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LIFE EVENTS OF EU CITIZENS

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EXECUTIVE SUMMARY

- **Hypothesis:** if the legislations of the Member States concerning life events increasingly differ, the EU citizenship and the civil rights are clearly prejudiced.
- **Purposes:** study of the lack of harmonisation of EU Law, the disparities of the national legislations and the effects and impact of them on EU citizenship and the free movement of persons.
- **Methodology:** case study. Each case is initiated with a short background explaining the subject and scope of the topic and the aims of the research. On the other hand, each case includes model cases in order to illustrate the standard practices, which are used as an example in order to explain the solutions of each Law and to include leading cases of each country. Starting from these assumptions, the staff of the different countries submitted a national report, whose paragraphs have been almost literally incorporated in order to enhance the transparency of the research project.
- **Topics:** regarding the lack of harmonisation of EU Law, the disparities of the national legislations and the effects and impact of them on EU citizenship and the free movement of persons, it is convenient to select the following life events: filiation, forenames and surnames and marriage, accompanied by a final and transversal topic relating to the circulation and recognition of documents on civil status.
- **Scope:** the selection of countries in order to inform on these topics is based on the following grounds: countries of Central Europe, such as Belgium and The Netherlands, with a very consolidated experience in EU citizenship as founders of the EEC; countries of the South of Europe, such as Spain, which has a Latin tradition in Family Law; countries of the East of Europe, namely Hungary, as more recent members of the EU; and countries of the North of Europe, such as Denmark, whose position is very interesting as this country is not a member of the EU space of freedom security and justice.
- **Conclusions:** adoption of Private International Law acts by the EU; mitigation of barriers to the free movement by the general principle of the effectiveness of life events (mutual recognition of life events and the principle of unique identity); progressive replacement of the national public policy by a public policy at an EU level; uniform and coordinated identification and persecution of fraud and abuses of the free movement of persons; and harmonisation of civil registries of Member States and the improvement of the cooperation between the Registries.

LIST OF ABBREVIATIONS

CC	Civil Code
CPIL	Belgian Code of Private International Law
CPR	Central Person Registry
CJEU	Court of Justice of the European Union
DCC	Dutch Civil Code
ECHR	European Court of Human Rights
EU	European Union
ICCS	International Commission on Civil Status

PRESENTATION

EU Citizenship and the free movement of persons are directly affected by life events. If the legislations of the Member States concerning life events increasingly differ, the EU citizenship is clearly prejudiced. For this reason, the **Project "Beucitizen: Barriers towards EU Citizenship"**, which has received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration under grant agreement no 320294, considers the importance of a case study about life events, particularly, in its **Work Package 7**, **about civil rights**, as the nucleus of rights of citizens, essential for understanding the obstacles and opportunities for achieving EU citizenship.

In this context, regarding the lack of harmonisation by EU Law, the disparities of the national legislations and the effects and impact of them on EU citizenship and the free movement of persons, it is convenient to select the following life events: filiation, forenames and surnames and marriage, accompanied by a final and transversal topic relating to circulation and recognition of documents on civil status. See, in this sense:

1. Parentage: The area of parentage and parent-child relationships is one of the areas of family law that lacks harmonisation between European States and where there are more differences between national laws. The European Union Member States have different solutions as regards the attribution of custody rights based on the existence (or absence) of a marital relationship between the parents. This has implications for the mobility of citizens and families between Member States. In this sense, the implications can be seen in a case of unmarried parents and child abduction in the Judgement of the European Court of Justice in the *McB* case (Judgement of 5 October 2010, Case 400/10). These differences affect their rights of inheritance or maintenance obligations. There are also some problems in the area of the effectiveness of surrogacy arrangements, whose international regulation has been proposed in The Hague Conference on Private International Law (*The Desirability and Feasibillity of further Work on the Parentage/Surrogacy Project,* April 2014). In these cases, the case law of the European Court of Human Rights, in *Mennesson* and *Labasse* cases (ECHR Judgements of 26 June 2014), has already revealed that it directly affected the right of the child to respect their private life, stated in the Article 8 of the European Convention of Human Rights.

2. Forenames and surnames: the Court of Justice of the EU has shown a special concern about the forenames and surnames of EU citizens. Firstly, the Judgement of the Court of 30 March 1993 (Case C-168/91, *Konstantinidis*) ruled that it was contrary to the freedom of establishment a national provision for a Greek national to be obliged to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons. Secondly, the Judgement of the Court of Justice of European Union of 2 October 2003 (Case-148/02, *García Avello*) ruled that nationals from two Member States could choose the identity in accordance with one of these Member States and this identity should be recognized in the other Member State in order to respect the EU citizen and the free movement of persons. Thirdly, and in a similar sense, Judgement of the Court of 14 October 2008 (Case C-353/06, *Grunkin Paul*) ruled that the surname acquired in the Member State of birth and residence shall be recognized in the Member State of which the applicant is national in order to protect the right to move and reside freely within the territory of the Member States. Fourthly, Judgement of the Court of 22 December 2010 (Case C-208/09, *Sayn Wittgenstein*) ruled that the non-recognition of the surnames from another Member State is only based on public policy grounds (in this case, the abolition of the

nobility), which are necessary for the protection of the interests which they are intended to protect and they are proportionate to the legitimate aim pursued.

This set of rulings, *inter alia*, shows that the forenames and surnames definitively affect EU citizenship. Nevertheless, the EU has not adopted any legal act in relation with the legal rules of forenames and surnames. This is particularly relevant, not only because this fact obliges to assess country-by-country the impact of the case law of the CJEU, but also because the national legislations contain many disparities. It is true that names and surnames are not exactly a "life event", but they are a very relevant consequence of some life events such as, for instance, filiation and marriage. But, instead of analysing the issues of the name in each "life event", an autonomous and independent analysis is more adequate, regarding the special attention that the Court of Justice of EU has paid to this right and the connection of the forenames and surnames with some civil rights in many legal systems.

3. Marriage: the EU has adopted acts in relation with divorce, legal separation and marriage annulment. Such are the cases of Council Regulation (EC) n. 2201/2003, of 27 November 2003, concerning jurisdiction and recognition and enforcement of judgements of matrimonial matters and the matters of parental responsibility, and Council Regulation (EC) n. 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).

Nevertheless, the EU has not adopted any general act in order to promote the free movement of marriages in the EU, although this life event has a great effect on the rights of EU Citizens and the freedom of movement of persons. In this context, many disparities among Member States are observed. In this sense, in many systems the marriage is a civil right linked to the right of a family life or even the freedom of religion. Furthermore, the marriage is an event that facilitates the legal residence in the EU in accordance with Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, or even the access to the nationality of the Member States and, accordingly, to EU citizenship. In order to fight marriage abuses, the EU has only adopted complementary texts, mainly: Resolution of the Council of 4 December 1997 (OJ C 382, 16 December 1997) on marriages of convenience; Communication of the Commission to the European Parliament and to the Council [COM(2014) 604 final] and a Commission Staff Working Document as a handbook on marriages of convenience [SWD(2014) 284 final].

4. Life events and Registries: In the European rules on the free movement of people the need for mutual recognition of civil status acts between States plays an essential role (such as names, marriages, parenthood). At present, this trend is an unfinished model in Europe and one of the reasons lies in the different registration systems in the European States. According to some European laws, the registrar has to control the legality of the act before recording it in the Registry. This control is made according to family law and international private law rules in force in each State. These rules differ significantly between the States. These differences create obstacles to an increased intra-EU mobility of Union citizens and an indirect discrimination of nationals of other Member States in comparison with nationals in cross-border relationships. The Conventions of the International Commission on Civil Status (ICCS) are insufficient and not all European States are members.

The non-harmonised system of Registries between European States also creates many obstacles to mobility of EU citizens in order to carry out life events (such as marriage) in the State they desire. This

has been highlighted in the Report for the European Commission "Facilitating Life Events" (von Freyhold, Vial & Partner Consultants), October 2008. At the same time, and closely related to this issue, the problem of free movement of documents arises. There is an urgent need to settle mutual recognition of documents issued in Member States. This mutual recognition is necessary to enable the registration of acts of civil status in the Registry Offices. This mutual recognition also serves to facilitate the proof of identity and family relationships to other effects. Such evidentiary value is required in the field of social security benefits (see Judgement of the European Court of Justice in the *Dafeki* case, C- 336/94). It is also required for the purpose to prove the family ties to exercise family reunification linked to citizen mobility. In this field, it is necessary to take into account the *Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012* [COM (2013) 228].

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In this context, the selection of countries in order to inform on these topics is based on the following grounds: countries of Central Europe, such as **Belgium and The Netherlands**, with a very consolidated experience in EU citizenship as founders of the EEC; countries of the South of Europe, such as **Spain**, which has a Latin tradition in Family Law; countries of the East of Europe, like **Hungary**, as more recent members of the EU; and countries of the North of Europe, such as **Denmark**, whose position is very interesting as this country is not a member of the EU space of freedom security and justice.

With this selection, perhaps it would be convenient to finish this presentation with some specificities of the research. On the one hand, each case is initiated with a short background explaining the subject and scope of the topic and the aims of the research. On the other hand, each case includes model cases in order to illustrate the standard practices, which are used as an example in order to explain the solutions of each Law and to include leading cases of each country. Starting from these assumptions, the staff of the different countries submitted a national report, whose paragraphs have been almost literally incorporated in order to enhance the transparency of the research project. Our last words are precisely of sincere gratitude to all the researchers who have participated in this case study.

Pilar Jiménez Blanco and Ángel Espiniella Menéndez

In Oviedo, May 15th 2016.

1. PARENTAGE

Case 1.1: Types of parentage

Background: One of the most important differences between Member States law is derived from the different conceptions about the parent-child relationships. The European Union Member States have different solutions as regards the attribution of custody rights based on the existence (or absence) of a marital relationship between the parents. There may be legal distinctions on the basis of the different criteria, depending on matrimonial or non-matrimonial parentage; natural or adoptive. The national laws could establish differences regarding the content of parental responsibility or on the children's rights concerning their parents as regards their rights of inheritance or maintenance. Other legal systems are based on the principle of equality between children and the prohibition of discrimination between the children based on the child's or his or her parents' birth or other status. In such cases, it is possible to refuse the application of foreign law on the ground of public policy.

1.1.1 WHAT TYPES OF PARENTAGE EXIST IN YOUR LAW?

-*Model Case*: A couple has a child born out of wedlock. After marriage, they have another child born in wedlock and they adopt a third child. Do these children deserve equal treatment?

Conclusion:

The European States recognizes different forms of parentage, including biological parents (born in or out of wedlock) and adopted children. The difference between matrimonial or non-matrimonial parentage is how the filiation is established (presumptions of paternity, the requirement of recognition by the father). Once the filiation is established, the children are equal before the law, irrespective of their parentage and the marital status of the parents.

In Belgium, according to Belgian Civil Code, whatever mode of filiation is established, children and their descendants have the same rights and the same obligations regarding parents and their parents and relatives. Under Belgian law the only difference, according to the model case proposed, will be how the filiation is established (e.g., the presumption of paternity of the husband in the case of heterosexual marriage)[1].

In Denmark, Danish legislation recognises filiation in and out of wedlock, and adopted children have the same legal rights as biological children[2].

Hungary guarantees the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of birth or any other status. This protection is also extended to adopted children: they are handled in the same way as biological children[3].

In the Netherlands, "different forms of parentage exist including legal parents, social parents, foster parents, biological parents (begetters) and genetic parents (donors). Legal parentage is established in the Netherlands when the law attaches legal filiation links to certain biological (e.g. birth), or legal (e.g. recognition) facts. The legal status of children is to a great extent determined by the status

[1] See H. De Waele et al., National Report-Belgium, § 1.1.1.
[2] See S. Adamo, National Report-Denmark, § 1.1.1.
[3] See T. D. Ziegler, National Report-Hungary, § 1.1.1.

of the relationship between the parents of the child. Children born in wedlock automatically stand in familial relationship with their parents. A child born out of wedlock automatically has family ties with his/her mother, i.e. the woman that has given birth to the child. The child born out of wedlock does not automatically have a familial relationship with his/her father. The familial relationship can arise if the child is recognised by the father (Article 1:199 under c DCC) or parentage has been established in court proceedings (Article 1:207 DCC). However, since 1998 the difference between children born in wedlock and out of wedlock has been reduced. At present, their legal status has been equalized as much as possible" [4].

In Spain, "according to Article 39.2 of the Spanish Constitution, the public authorities likewise shall ensure full protection of children, who are equal before the law, irrespective of their parentage and the marital status of the parents. The difference between matrimonial or non-matrimonial parentage only has consequences for proof of parentage. As Spanish law allows marriage between same sex couples, this marriage can also be attributed parentage" [5].

1.1.2 Does the type of parentage have consequences on its content?

-*Model Case*: After the death of the deceased, arises the distribution of the estate between his three sons, two of them are biological children and the third is an adopted child.

Conclusion:

No difference is made between biological and adopted children. This applies to parent-child relationships, maintenance obligations and inheritance rights. However, this equality occurs only in the case of full adoptions, not in the case of simple adoptions.

In Belgium, "there is no distinction in terms of rights and obligations between a biological and an adopted child. The only substantial difference that can be made is the fact that in the case of simple adoption, the inheritance rights from the grandparents are not transmitted, with the filiation, to the adopted child"[6].

In Denmark, "the type of parentage does not have consequences in the cases of succession where the deceased had both biological and adopted children: 'Children inherit in an equal manner'. Adoption creates a legal tie between the adopted child and the adopters, putting the adopted child on an equal footing to any other biological children"[7].

The **Hungary** law "handles all the children similarly, and no difference is made between them. This also applies to parent-child relationships, maintenance obligations and inheritance rights"[8].

In the Netherlands, "Book 1 on Dutch family law provides that adopted children are the legal children of their parents; consequently, there is no difference in other legal areas. The child will acquire

[4] See B. Safradin, National Report-The Netherlands, § 1.1.1.
[5] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.1.1.
[6] See H. De Waele et al., National Report-Belgium, § 1.1.2.
[7] See S. Adamo, National Report-Denmark, § 1.1.2.
[8] See T. D. Ziegler, National Report-Hungary, § 1.1.2.

within his/her adopted family the same active and passive position as the other legal children. The adopted child hence has the possibility to inherit from his new family"[9].

In Spain, "due to the fact that in Spanish law there is equal treatment for all children, there cannot be any difference related to the content of the parent-child relationship, maintenance obligations or inheritance rights"[10].

1.1.3 Is the equal treatment of children a principle of public policy in your country?

-Model Case: A deceased leaves two sons, one biological and one adopted. The law of the competent court for the succession states the equality between children. The law applicable to the succession only recognises inheritance rights of biological children.

Conclusion:

The principle of equality between the adopted (by full adoptions) and the biological child is considered a principle of public policy. Consequently, a foreign law or a foreign judgement which contains discriminative measure towards a child would not be applied, recognized or enforced.

In Belgium, "the principle of equality between the adopted and the biological child of the adopter is considered a principle of public policy. The Belgian Civil Code provides for an exception to this principle of equality, namely when the establishment of the filiation comes after an adoption order in respect of a person other than the adopter or adopters. In the context of simple adoption, the adopted do not have inheritance rights of the parents of the adopter, i.e. the grandparents"[11].

In Denmark, "the equal treatment of children is indeed a principle of public policy in Danish law"[12].

In Hungary, "the recognition of any foreign judgement which contains discriminative measures towards a child would not be recognised or enforced. The reason for this is that it would violate the Constitution, which contains the framework of public policy"[13].

In the Netherlands, "children that are adopted by means of full adoption are fully equalized with the biological children of the adopter"[14].

In Spain, "according to Article 39 of the Spanish Constitution, the principle of equality between children is a principle of public policy. Therefore, a Spanish judge would reject the application of a foreign law that discriminates parentage depending, for example, on the marital status of the parents"[15].

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[9] See B. Safradin, National Report-The Netherlands, § 1.1.2.
[10] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.1.2.
[11] See H. De Waele et al., National Report-Belgium, § 1.1.3.
[12] See S. Adamo, National Report-Denmark, § 1.1.3.
[13] See T. D. Ziegler, National Report-Hungary, § 1.1.3.
[14] See B. Safradin, National Report-The Netherlands, § 1.1.3.
[15] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.1.3.

Case 1.2: Ways to ascertain parenthood

Background: The differences between the laws of European States show contrasting ways to ascertain the biological parenthood. The rules concerning when the competent State authorities will have jurisdiction to accept a voluntary acknowledgement of legal parentage vary considerably between States. There were problems with the acknowledgement of natural children before different authorities of the State register. Some national laws could regard as a matter of public policy the practice of biological testing (DNA analysis) to prove paternity, allowed in many States. It should also be assessed when it is possible to register parentage established in a certificate obtained from a foreign Registry Office.

1.2.1 What effects has the acknowledgement of natural children before a foreign authority?

-Model Case: The birth record of a natural child only named one parent (the mother) in the Registry Office of State A. The child is acknowledged at a later date by the biological father. This acknowledgement is made before a notary of State B. The father provides this document to the Registry Office of A to register paternal parenthood.

Conclusion:

The acknowledgement of natural children made before a foreign authority is valid in the required State. As a norm, this document must be recognised according to the general rules of foreign public documents, such as the requirements of authenticity (legalisation), the equivalence of authorities of both States and the control of public policy.

In Belgium, "an act of paternity or maternity is valid if it complies with the required formalities contained in the law governing the filiation or in accordance with the rule of *locus regis actum* established by the law of the state in which it is established. In any case, Belgium applies the automatic recognition of a foreign notarised or legalised document. The prerequisite for automatic recognition is the compliance of the foreign act or judgement with the necessary conditions for its authenticity according to the law of the state in which it was granted. In any case and prior to the inscription or transcription of the foreign authentic act, the depositary of the act in the register must check that the prerequisites required by the article 27 of the Belgian Code of Private International Law (hereinafter: CPIL) are met and the officers are compelled to deny the effect of the act if its content is manifestly contrary to the Belgian public order"[16].

In Denmark, "registration of acknowledgement of a natural child abroad can be recognised in Denmark also. Depending on the State of origin of the document, a 'legalisation' or an Apostille Certificate has to be provided in order to admit the validity of a certificate from abroad"[17].

In Hungary, "regarding a Hungarian citizen, the father must make a statement (at the Hungarian Consulate or in Hungary before government authorities) on the recognition of fatherhood (this must be made personally, and both parents must be present). This statement must always be made if a Hungarian citizen is involved, and the simple fact that a foreign document was made on the recognition of fatherhood is not relevant for Hungarian law. Section 4:102 of the Civil Code states that

[16] See H. De Waele et al., National Report-Belgium, § 1.2.1.

[17] See S. Adamo, National Report-Denmark, § 1.2.1.

acknowledgement and consent shall be executed in a statement made before the registrar, the court, the guardian authority or a consulate officer. Once the statement or the document is signed, the acknowledgement of paternity may not be withdrawn. If no Hungarian citizen is involved, the foreign authority must issue an international certificate on the recognition of fatherhood, which must be recognized according to the general rules on recognition of foreign public documents"[18].

In the Netherlands, "foreign birth certificates are not always recognised. In order to be recognised, legalisation of a document is required that does not automatically lead to acceptance by Dutch authorities of that document as proof. An authority will sometimes first try to verify the content of the document or may also ask the applicant to produce other documents. Moreover, pursuant to Article 1:20b (1) DCC, a foreign certificate or foreign court order might not be recognised if it conflicts with Dutch public order"[19].

In Spain, "according to Spanish law, the acknowledgement of a Spanish child can be given before the registrar of the Registry Office, in a testament or in another public document. The recognition of parentage made before a foreign authority can access the Registry Office as long as the foreign authority is equivalent to the Spanish authority. This document must be recognised according to the general rules of foreign public documents. It might not be recognised if it is contrary to Spanish public policy"[20].

1.2.2 How is the biological test of fatherhood regulated in your law?

-*Model Case:* The alleged father refuses to undergo a DNA test to prove the paternity of a child. The State where the test shall be performed allows the coercive practice of the test. Nevertheless, the court where the fatherhood procedure was raised rejects this practice on the grounds of public policy.

Conclusion:

DNA testing is possible to ascertain the paternity of a child. Where there is a lack of regulation (Belgium), there is a test based on a blood examination on the basis of scientifically sound methods. The practice of a DNA test could not be enforced, without the consent of the father, except in Hungarian law. That said, recognition of a foreign decision would be refused on the grounds of enforcing the DNA test. However, if the alleged father refuses to undergo the test without justification, the court may consider the existence of a presumption that he is the biological father.

In Belgium, "there is a lack of regulation of the DNA paternity test. In the context of a judicial procedure, regarding an action of filiation, a court can order, upon a request or *ex officio*, a blood examination on the basis of scientifically sound methods. While there does not exist a coercive method for men to be involved in an action for filiation, it is stipulated that the refusal of a man to take a test entitles a court to presume that he is the biological father"[21].

In Denmark, "it is possible to carry out a DNA test in paternity cases. The Children Act gives the possibility to raise a paternity case within six months of the birth of a child, also in the cases where the

[18] See T. D. Ziegler, National Report-Hungary, § 1.2.1.
[19] See B. Safradin, National Report-The Netherlands, § 1.2.1.
[20] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.2.1.
[21] See H. De Waele et al., National Report-Belgium, § 1.2.2.

paternity has already been established. A man who has had sexual relations with a woman at the time of conception can also request a DNA test"[22].

In Hungary, "in the case of disputes, the cooperation during the DNA test can be mandatory for the father. Consequently, regarding domestic disputes, such tests are used even if the consent of the father was not given to use them. Section 4: 104 of the Civil Code says that the action for establishing paternity by way of judicial process may be brought by the mother, the child, the child's descendant or by the father"[23].

In the Netherlands, "only if the mother contests his fatherhood and if there are no facts making it likely that he is the father, a court may order – also at its own motion – a DNA test. In situations in which the alleged father refuses to undergo a DNA test, the court cannot enforce his cooperation. Therefore, Dutch civil law provides that in case of refusal of cooperation the judge may attach consequences to the situation at hand. That said, according to Dutch civil law, recognition of a foreign decision would be refused on the grounds of enforcing the DNA test"[24].

In Spain, "the proof of paternity is governed by the law of habitual residence of the child. If the habitual residence does not exist or the establishment of paternity is not possible, the proof of paternity is governed by the national law of the child. Subsidiarily, it is governed by the Spanish law (*lex fori*). The Spanish law allows the undergoing of a biological test (DNA testing) to ascertain paternity, but this cannot be carried out coercively. However, if the alleged father refuses to take the test without justification, the court may consider the existence of a presumption of paternity, which will help to determine the biological parenthood of the child together with other evidence"[25].

1.2.3 Is it possible to register the parenthood in your State on the basis of a certificate of civil status issued by a foreign Registry Office?

-Model Case: The record of birth of a child is in the Registry Office of the State where he is born (State A). Then, the recognition of the certificate of the Registry Office of A to record the child in the Registry Office of their nationality (State B) is applied.

Conclusion:

The foreign act concerning the civil status (birth certificate) could be registered in the required State but it requires different conditions, depending on the State, such as the the authenticity of the document, the validity of the act under the rules of private international law or the control of public policy.

In Belgium, "the foreign act concerning the civil status may be subject to a mention in the margin of the records in the register, be transcribed into a register of civil status or provide the basis for an entry in a population register, a register of foreigners or provisional register, until its verification by the depositary of the act in the registry. The conditions for the foreign act to be included in a Belgian register are laid down in article 27.1 CPIL. These conditions are: the validity of the act is established; the

[22] See S. Adamo, National Report-Denmark, § 1.2.2.
[23] See T. D. Ziegler, National Report-Hungary, § 1.2.2.
[24] See B. Safradin, National Report-The Netherlands, § 1.2.2.
[25] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.2.2.

act has to meet the necessary conditions for its authenticity under the law of the state in which it was held"[26].

In Denmark, "certificates of civil status issued by a foreign Registry Office are recognised in the same manner as acknowledgement of paternity before foreign authorities (refer to answer 1.2.1 above)"[27].

In the Netherlands, "a Dutch authority may require somebody to produce a 'legalised' official foreign document, such as a birth certificate, marriage certificate, or death certificate. One can usually have this type of document legalised by an authority in the State where it originates from – in most cases the authority that will legalise this is the state's foreign ministry. Once the applicant has done so, he/she must also get the document legalised by the Dutch mission in that country. If the document is written in a language other than English, French or German, a translation must be provided by a sworn translator. In that case, the applicant must have both the original document and the translation legalized"[28].

In Hungary, "there exists a process in Hungarian law for such cases: the foreign birth certificate of the child must be submitted to Hungarian authorities. If the child has Hungarian citizenship (one of the parents is a Hungarian citizen), Hungarian law shall apply on his/her status"[29].

In Spain, "the events are not automatically registered in the Spanish Judiciary Registry Office based on the foreign certificate. The register of a foreign certificate requires compliance with several controls, including checking the validity of the act under the rules of private international law and that the act does not violate Spanish public policy"[30].

Case 1.3: Surrogacy arrangements

Background: The different approaches between States in the field of surrogacy arrangements caused the phenomenon of reproductive tourism, related to third countries. In these cases, the prohibitions in the domestic law are trying to be avoided by going to more permissive States in which the intending parents obtain the legal parentage of the child. The problem arises when the receiving States do not recognise this parentage and, consequently, the situation of the child becomes uncertain. The impact of the case law of the European Court of Human Rights with the Mennesson and Labassee cases should also be assessed. These cases concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment. In both cases the Court held, unanimously, that there had been no violation of Article 8 (right to respect for private and family life) ECHR concerning the applicants' right to respect for their family life; A violation of Article 8 concerning the children's right to respect for their private life. The Court observed that the French authorities, despite being aware that the children had been identified in the United States as the children of Mr and

[26] See H. De Waele et al., National Report-Belgium, § 1.2.3.
[27] See S. Adamo, National Report-Denmark, § 1.2.3.
[28] See B. Safradin, National Report-The Netherlands, § 1.2.3.
[29] See T. D. Ziegler, National Report-Hungary, § 1.2.3.
[30] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.2.3.

Mrs Mennesson and Mr and Mrs Labassee, had nevertheless denied them that status under French law. It considered that this contradiction undermined the children's identity within French society. The Court further noted that the case law completely precluded the establishment of a legal relationship between children born as a result of – lawful – surrogacy treatment abroad and their biological father. This overstepped the wide margin of appreciation left to States in the sphere of decisions relating to surrogacy.

1.3.1 Are surrogacy arrangements allowed or prohibited in your country?

-Model Case: A couple signs a surrogacy arrangement in their home country. When they applied to register the birth of the child, the problem of the parenthood of the child arises: has the parenthood been established to the intending parents or to the gestational carrier (surrogate mother)?

Conclusion:

According to the laws analysed, commercial surrogacy agreements are illegal. These agreements are not punishable, except in the Netherlands. There is not a complete set of rules prohibiting surrogacy in Belgium, Denmark or the Netherlands and these States allow altruistic surrogacy agreements. Notwithstanding, if the intending parents want to become legal parents of the child, legal parentage has to be transferred to them. According to Hungarian and Spanish law a surrogacy agreement of the surrogate is void and cannot have any legal effect.

Belgium "only allows altruistic surrogacy agreements. Commercial surrogacy agreements are illegal. There is no legal framework regulating the surrogacy arrangement; in practice, there are certain Belgian hospitals that themselves establish the conditions to be met by the intended parents, in order to take part in the programme. As a result, the filiation established via surrogacy does not have specific legislation. A contractual commitment of the surrogate is void and cannot have any legal effect. Specifically, article 348.4, first paragraph, of the CC states that a woman can only consent to the adoption of her child two months after the birth"[31].

In Denmark, "the surrogacy agreement described in the model case is not punishable, but it is invalid according to Danish law. The gestational carrier will be considered the legal mother of the child, entailing that she will have the duty to look after the child and there will be a reciprocal right of inheritance between the mother and the child. The intended mother has only a possibility to apply to step-adopt the child. If the child is born in Denmark, and the father does not share custody/parental rights, the surrogate mother can transfer custody of the child to the couple as a whole. There is no complete set of rules prohibiting surrogacy in Denmark. However, scattered in several legal texts in Danish legislation one can find several provisions that concern the issue of surrogacy. The logic behind the rules points in two directions: on the one hand to limit the instances of surrogacy agreements between strangers, and on the other hand, to avoid children being rendered a commodity. Thus it is not unlawful to act as a surrogate mother, but no money must be exchanged as a result of the surrogacy"[32].

In Hungary, "the conclusion of surrogacy arrangements has not been allowed since 2002 (however, they are not criminalised either). In 2002, the section which earlier made them available was

[31] See H. De Waele et al., National Report-Belgium, § 1.3.1.
[32] See S. Adamo, National Report-Denmark, § 1.3.1.

erased by Act No CLIV of 1997 on health care. Consequently, such agreements are considered to be null and void, and such agreements concluded abroad cannot be recognised in Hungary"[33].

In the Netherlands, "the surrogate mother is automatically the legal mother of the child. If the intending parents want to become legal parents of the child, legal parentage has to be transferred to them. If the surrogate mother is married, her husband will automatically be the legal father of the child, which does not make the transfer of legal parentage to the intending parents easier. Article 151b was established in the Dutch Criminal Code which has made commercial surrogacy a criminal offence in the Netherlands. The interest of the child plays a significant role in this matter. On the other hand, altruistic gestational surrogacy is allowed in the Netherlands, but required by law to comply with professional guidelines"[34].

In Spain, "the 14/2006 Law, of 26 May, on Assisted Human Reproduction, states the nullity of the surrogacy arrangement: the early resignation of childbirth of the pregnant mother is void and the motherhood is always determined by birth. Consequently, the surrogate mother is automatically the legal mother of the child"[35].

1.3.2 Is the legal parenthood acquired abroad by a surrogacy arrangement recognised in your country?

-*Model Case:* The intending parents register in a USA Registry Office the legal parenthood of a child established by a USA judge. Then, they applied to register this parenthood in their home country (receiving State). Is that registration possible if the law of the receiving State prohibits the surrogacy arrangements?

Conclusion:

In States where surrogacy is allowed, like Belgium or the Netherlands, the recognition of filiation established in a foreign judgement or in a foreign birth certificate that recognises the intending parents is possible. However, in Denmark, when a Danish couple is involved, it is necessary a transfer of the custody from the surrogate mother to the Danish father which has to take place in the country of birth. In States where surrogacy is forbidden, like Hungary and Spain, there are different practices in order to give effect to the foreign judgement on surrogacy.

In Belgium, "when the Belgian filiation by surrogacy is established as a result of a judgement, the principle of direct recognition of a foreign judgement will apply. Even though there is a lack of surrogacy regulation, Belgium does not forbid it totally, as there are specific situations in which surrogacy is allowed. Under Belgian law, there are two main grounds for denying recognition and thus, registration of a foreign judgement. The first is that the judgement is against the Belgian public policy. Second, the exception of legal fraud can be invoked. Invocation of the exception of legal fraud is rarely used in a filiation context, but has made a timid appearance in the context of the recognition of filiation through surrogacy"[36].

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[33] See T. D. Ziegler, National Report-Hungary, § 1.3.1.
[34] See B. Safradin, National Report-The Netherlands, § 1.3.1.
[35] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.3.1.
[36] See H. De Waele et al., National Report-Belgium, § 1.3.2.

In Denmark, "the Danish Social Appeals Board informs that in cases of surrogacy abroad, Danish authorities will not recognise agreements which have taken place abroad even when the Danish couple is mentioned in the birth certificate as the parents of the child. The Danish authorities cannot provide declarations in order to facilitate the exit from the country where the surrogacy has taken place. When a child is born abroad, it is the legal system of the country where he or she is born that determines if the father can share custody over the child. A transfer of the custody from the surrogate mother to the Danish father has to take place in the country of birth. Denmark will recognise a transfer of custody unless money has been exchanged for a surrogacy agreement"[37].

In Hungary, "Hungarian courts would probably say such agreements are against public policy (even if no financial element was present). Some Hungarian citizens concluded surrogacy agreements in Ukraine, the mothers gave birth in Ukraine, their names (i.e. the biological parents' names) were signed in the registry in Ukraine. On the other hand, Hungary's consulate in Ukraine refused to register them as parents, and they turned to Hungarian courts to achieve the registration of their status. In cases of refusal, the courts could violate related Strasbourg case law"[38].

In the Netherlands, "in order to recognise a status of the child regarding parentage, it is important to firstly examine how the surrogacy agreement has been established in a foreign country. Three situations can be distinguished here: 1) a judicial decision has been established upon which the relationship of descent has been declared between the intending parents and the child (Article 10:100 DCC); 2) a foreign birth certificate has been issued that recognises the intending parents (legal fact or legal act ex article 10:101 DCC); 3) an adoption has taken place. Different recognition regimes are applicable to this matter (see Articles 10:105-10:109 DCC), with reference to the Hague Adoption Convention and the law on placement of foreign adoption children. To be recognised, the foreign legal fact or act must satisfy a number of conditions. Two situations can be distinguished here. Firstly, the child and his/her parents can return to the Netherlands with a birth certificate stating that they are the legal parents of the child. The question arises whether this "legal fact" which is recorded on the birth certificate in the Netherlands can be recognised under Art. 10:101 DCC. Secondly, Dutch case law has confirmed that improper use of recognition by the intending father can also be an opportunity to become a legal parent. The starting point which needs to be applied is that the Dutch registrar is confident that the registration of the legal fact or act that has taken place has been conducted correctly outside the Netherlands"[39].

In Spain, "nowadays, there is not a specific solution in Spanish Law in this field. The Instruction of General Directorate of the Registries and Notaries, of 5 October 2010, allows the registration of surrogacy whenever there is a judgement in the State of origin that guarantees the rights of children and pregnant mothers. On the other hand, the Sentence of the Supreme Court of 6 February 2014 stated that the surrogacy arrangement violates Spanish public policy. However, the Ministry of Justice has ordered to continue practicing the inscriptions on the basis of Instruction 2010"[40].

1.3.3 In the case of non-recognition of the legal parentage established abroad, what will the future status of minors be?

[37] See S. Adamo, National Report-Denmark, § 1.3.2.
[38] See T. D. Ziegler, National Report-Hungary, § 1.3.2.
[39] See B. Safradin, National Report-The Netherlands, § 1.3.2.
[40] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.3.2.

-*Model Case:* The record of birth of a child named the intending mother as the mother in the Registry Office of State A. Nevertheless, the receiving State B does not recognise and establishes the motherhood of the gestational carrier (surrogate mother). Then, who should take charge of this child?

Conclusion:

There is no single answer to this case. Some national courts try to accept the parenthood established abroad or find a way to maintain the status quo of the relationship already generated between the intending parents and the children, even if under the domestic law the surrogacy is not allowed (Spain). In other cases, it is necessary to make a step-adoption of the child upon returning to the State (Denmark). Finally, it is possible not to recognise the parentage established abroad and not give effects to it (Hungary).

In Belgium, "however, there does exist a constant jurisprudence and a wide range of judgements on the matter. Belgian courts follow the theory of the "best interest of the child". This theory indicates that a child cannot be punished for the illegality of the surrogacy contract/arrangement on which his/her filiation depends. Consequently, the courts just accept the parenthood"[41].

In Denmark, "in the model case in question, the gestational mother was determined to be the legal mother of the child. The Danish father who donated the sperm was recognised as the biological father of a child born abroad via surrogacy. The Danish mother was supposed to make a step-adoption upon return to Denmark. The Danish mother of a child born with a surrogate mother abroad can apply to step-adopt the child, having regard to the condition of domicile, cohabitation of mother and child for 2½ years, and declaration regarding the adoptability by the foreign surrogate mother. These conditions would normally not be met in cases of surrogacy abroad, where typically an application for step-adoption is filed when the child is still a new-born"[42].

In Hungary, "generally, the woman giving birth to the child is considered to be the mother. However, in countries where surrogacy is allowed, in certain cases the biological mother is signed as mother on the birth certificates (this causes serious problems and uncertainty e.g. in Ukrainian-Hungarian family relations). Since the Hungarian authorities normally do not know anything about the background of the birth, they must accept the biological mother as mother, whose name is registered on the birth certificate as mother. If they later learn that the mother did not give birth to the child, there is a high chance the parentage will not be recognised by the authorities"[43].

In the Netherlands, "it has to be stated from the outset that the answer to this question depends on the facts of each case. It is therefore impossible to give one answer which applies to all cases. If Dutch intending parents have appointed a surrogate mother from a foreign country who gives birth in the Netherlands, it is important to determine the applicable law in this matter. Under Dutch law the woman who gives birth to the child is the child's legal mother as enshrined in Article 1:198 DCC. This is a mandatory statutory provision from which it is not possible to deviate. This however does not apply to the legal status of the husband of the surrogate mother since in Dutch law a child does not always

[41] See H. De Waele et al., National Report-Belgium, § 1.3.3.
[42] See S. Adamo, National Report-Denmark, § 1.3.3.
[43] See T. D. Ziegler, National Report-Hungary, § 1.3.3.

need to have a father. This leaves possibilities for the intending father to recognise the child of the surrogate mother"[44].

In Spain, "the final solution would be to find a way to maintain the status quo of the relationship already generated between the intending parents and the children"[45].

1.3.4 What shall the impact be on your country of the case law of the European Court of Human Rights in the Mennesson and Labassee cases?

-Model Case: According to the *Mennesson* and *Labassee* cases, the non-recognition of a legal parenthood already registered in another State infringes the right of the child to respect for their private life according to article 8 of the European Convention of Human Rights.

Conclusion:

The *Mennesson* and *Labassee* cases have impact in those States where the child, whose legal parenthood is established abroad, has no ways to establish a relationship with the intending parents (such as recognition of the biological father or adoption). These cases could probably change the position of those States that reject all the effects of surrogacy.

In Belgium, "the bond of filiation with the biological father is always recognised, so that the *Mennesson and Labassee* cases have no direct impact for the Belgian legal system"[46].

In Denmark, "following the European Court of Human Rights Judgement in the case *Genovese v. Malta* this specific rule of automatic acquisition of citizenship at birth was changed as of 1 July 2014. In the future, children born abroad by Danish fathers or co-mothers will also be able to automatically acquire Danish citizenship at birth, thus no longer admitting limitations to the children's right to social identity"[47].

In Hungary, "there is no case law yet as regards how the Hungarian judicial system would react to these cases. We can presume that they break through the Hungarian resistance regarding the recognition of foreign surrogacy agreements, and they may also be in conflict with the relevant provisions of the Civil Code. There are ongoing cases on surrogacy agreement, but no judgements have yet been delivered"[48].

In the Netherlands, "as things stand, direct recognition of the intending parents as legal parents is in conflict with Dutch law, which provides that the surrogate mother is the legal mother of the child. This policy is problematic in the case that the intending mother requests a Dutch passport for the child at the Embassy, which will be denied under Dutch law. By application of the ECHR and in line with the *Mennesson* and *Labassee* decisions, which envisage the right to respect for private and family life

[44] See B. Safradin, National Report-The Netherlands, § 1.3.3.
[45] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.3.3.
[46] See H. De Waele et al., National Report-Belgium, § 1.3.4.
[47] See S. Adamo, National Report-Denmark, § 1.3.4.
[48] See T. D. Ziegler, National Report-Hungary, § 1.3.4.

(Article 8 ECHR), it would be most likely that the Netherlands will be required to allow a child that has been born via (commercial) surrogacy, to legally reside in the Netherlands"[49].

In Spain, "nowadays, the impact of ECHR case law is the "return" to the Instruction of General Directorate of the Registries and Notaries of 5 October 2010. This was laid down in the guidelines established by the Spanish Ministry of Justice in July 2014, that allowed the recognition of foreign judgements on surrogacy. However, the Sentence of the Supreme Court of 6 February 2014 stated that the surrogacy arrangement is against Spanish public policy. The Order of the same Court of 2 February of 2015 considers that *Mennesson* and *Labassee* do not change this decision because in Spain there are different ways for the child to remain with the intending parents"[50].

Case 1.4: Filiation and adoption

Background: There are differences in the rules governing adoption: simple or full adoptions, revocable or irrevocable adoptions, adoptions that create a permanent parent-child relationship and adoptions that do not create. In this context, a full adoption is that in which the child breaks, irrevocably, the link with their biological family and creates a new filiation with the adoptive family; on the contrary, adoption is simple when these requirements are not fulfilled. The adoption is irrevocable or irrevocable (?), as the constitution of the adoption may be deprived of effect or not. There are also different regulations on the requirements for the constitution of the adoption, depending on whether the adopting parents are single parent families or same sex couples. In addition, adoptions may have consequences on the acquisition of the nationality of the adopted child. The ECHR Wagner case (Judgement of 28 June 2007) has revealed the incidence of the right to family life of the article 8 European Convention of Human Rights related to the recognition of adoptions legally created in another State.

1.4.1 Are simple or revocable adoptions allowed in your country?

-*Model Case:* A child is adopted in country A by a simple or revocable adoption. Later, the adoptive parents seek the recognition of such adoption in State B.

Conclusion:

According to the States analysed, the simple adoption is only available in Belgium. In other cases, the adoption establishes a filiation with the adopting parents and the relationship with the family of origin of the adopted child elapses. Generally, the full adoption is irrevocable, but many States (Hungary and the Netherlands) establish ways to revoke the adoption under the fulfillment of certain guarantees and in some special circumstances. In Denmark, the annulment of the adoption is also possible in a series of circumstances.

In Belgium, "two types of adoption exist, simple adoption and full adoption. The simple adoption has consequences for the benefit of certain effects of the filiation law while maintaining ties with the family of origin in which the adoptee and his/her descendants retain all his/her inheritance rights. This adoption is revocable. The full adoption is irrevocable and confers to the adoptee's

[49] See B. Safradin, National Report-The Netherlands, § 1.3.4.
[50] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.3.4.

descendant's rights and obligations identical to those they would have had if the adoptee were a biological child of the adopter or adopters"[51].

In Denmark, "the Danish law on adoption creates an 'artificial' (*kunstig*) kinship between a child and the adopters. The current adoption system (in force since 1956) is based on a 'single-family principle' which determines that the relationship with the family of origin of the adopted child elapses, and that the child will be regarded as a natural child of the new family. However, the Danish rules also allow annulment of the adoption in a series of circumstances. By means of annulment the legal relationship between the adopted child and the adopters elapses, and in some cases the relationship with the child's family of origin can be re-established"[52].

In Hungary, "according to Section 4:119 of the Civil Code, adoption shall be considered to establish a family relationship between the adoptive parent, his/her relatives and the adopted child in the interest of allowing the child to grow up in a family. As regards the adoptive parent and his/her relatives, the adoptee receives the legal status as the adoptive parent's child (4:132). Adoption is revocable in a set framework (dissolution is possible). There are two distinct ways of dissolution of adoptions: dissolution of adoption upon mutual request (Section 4:138 Civil Code) and in some special circumstances, dissolution of adoption upon unilateral request (Section 4:139 Civil Code)"[53].

In the Netherlands, "the adoption law has been significantly modified during recent years. On 1 April 1998 the old limitation of adoption to married couples only was set aside, and adoption is now equally available for cohabiting and single persons. A key requirement for adoption in the Netherlands is that the child to be adopted must no longer be under the parental authority of his or her biological parents. The Netherlands does not provide for simple adoptions. Dutch law provides for the possibility for revocation of adoptions. This possibility is enshrined in articles 1:231 en 1:232 DCC. The revocation of an adoption is only possible on the basis of an application of the adopted child, pursuant to Article 1:231 DCC. Moreover, in accordance with article 1:231 Civil code, adoption can only be revoked by means of a court judgement. Two other conditions are required in order to revoke the adoption, as enshrined in Article 1:231(2) DCC. A revocation can only be filed if it is in the best interest of the child and if the District Court is convinced that a revocation is reasonable, and the request is filed *not* earlier than two years and not later than five years after the day on which the adoptive child has reached the age of 18"[54].

In Spain, "the law only allows the full and irrevocable adoption, in which the filiation to the adopting parents replaces the filiation to the biological family"[55].

1.4.2 Is adoption allowed in your country by single-parent families or by couples of the same sex?

-*Model Case:* A single person adopts a child in State A and applies for its recognition in his or her home State (receiving State B).

[51] See H. De Waele et al., National Report-Belgium, § 1.4.1.
[52] See S. Adamo, National Report-Denmark, § 1.4.1.
[53] See T. D. Ziegler, National Report-Hungary, § 1.4.1.
[54] See B. Safradin, National Report-The Netherlands, § 1.4.1.
[55] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.4.1.

Conclusion:

The States recognised the adoption by singles or legal cohabitants, but the joint adoption is usually granted to heterosexual married couples or registered partners. When the State recognises same-sex couples (the Netherlands and Spain) the joint adoption of a child is possible. Belgium also allows the adoption by cohabitants, heterosexual or of the same sex, in a permanent and affective way.

In Belgium, "the Belgian Civil Code establishes that adoption can be carried out by a single person, by a married couple or legal cohabitants, heterosexual or of the same sex. Even two persons living together (for more than 3 years at the moment of the adoption request) in a permanent and affective way can adopt a child"[56].

In Denmark, "spouses, registered partners and single parents can be approved as adopters according to the rules and procedures set up in the Adoption Act. Cohabitating partners can also adopt if their cohabitation is stable and they plan to get married before final approval of the adoption is granted. Joint adoption is only granted to married couples and registered partners"[57].

In Hungary, "same sex couples can live in registered partnership, according to Act XXIX of 2009 on registered partnership (registered partnerships are only available for them). However, same sex couples may only adopt children as single parents, since only married couples may adopt children together (Section 4:132. § of the Civil Code). Consequently, joint adoption is also excluded for heterosexual couples living in civil (unregistered) partnership"[58].

In the Netherlands, "since 1 April 2001 same-sex couples can also adopt a child. The legislator has chosen to institutionalise the social parentage between a child, born within same-sex relationships with the aid of artificial procreation techniques, and the same-sex partner of the parent, not by amending the paternity law, but via the adoption law. The legislator has welcomed both adoption by couples, whether married or not, and adoption by the opposite-sex partner of a parent, by providing that these adoptions can be granted after those persons have cared for the child for a period of one year, whereas for a single person this period should be at least three years, pursuant to Article 1:228(1)(f) DCC. For two women the requirements are less stringent. The newest Act of 1 April 2014 has made it possible for a lesbian co-parent to recognise the child before the birth as a consequence that both female partners will become the legal parents of the child. Due to this Act, the mothers have the possibility to register their joint custody in the authority registry of the court *without* a prior judicial decision"[59].

In Spain, "according to Spanish law, it is possible to be adopted by singles. The 13/2005 Act allows marriage between same sex couples and adoption by same-sex couples. This adoption is allowed when the adoption takes place before a Spanish authority. The problem may arise related to the

[56] See H. De Waele et al., National Report-Belgium, § 1.4.2.
[57] See S. Adamo, National Report-Denmark, § 1.4.2.
[58] See T. D. Ziegler, National Report-Hungary, § 1.4.2.
[59] See B. Safradin, National Report-The Netherlands, § 1.4.2.

adoptions established by foreign authorities, whose laws usually do not allow the adoption by same sex couples"[60].

1.4.3 Is the recognition of foreign adoptions which do not create a permanent parent-child relationship allowed in your country?

-*Model Case:* A couple adopts a child in State A, which does not create a permanent parent-child relationship. How is that adoption recognised in the receiving State B?

Conclusion:

All States analysed are party to the Hague Convention of 1993 on protection of children and Cooperation in respect of international adoption. Consequently, if an adoption order comes from a State party to the Hague Convention, this adoption shall have the effect of the establishment of legal family ties between the child and his/her adoptive parents. It is possible the recognition of adoption orders that do not terminate the child's legal relationship between his/her biological parents. In this case, an additional order is required according to the private international law rules of the host State.

In Belgium, "both the simple adoption and the full adoption – in national and international situations – create a permanent parent-child relationship link under Belgian Law. The conditions for the adoption contained in the CC are that they will be recognised in Belgium in application of the Belgian private international law rules. Belgium is party to the Hague Convention of 1993 on the protection of children and Cooperation regarding international adoption"[61].

In Denmark, "by means of adoption it is sought to create a permanent kinship between the adopted child and the adopters. However, the Danish rules also allow annulment of the adoption in a series of circumstances. By means of annulment the legal relationship between the adopted child and the adopters elapses, and in some cases the relationship with the child's family of origin can be re-established"[62].

In Hungary, "adoptions which do not create a parent-child relationship are not allowed. The above-mentioned rules mean that recognition of such relationships would be problematic: there is a high chance they would be refused. Hungary also joined the 1993 Hague Convention of adoptions, which regulates the framework of permanent adoptions"[63].

In the Netherlands, "an adoption order in a State that is party to the Hague Convention is legally recognised in the Netherlands. Provided that the adoption order has the effect of not only the establishment of legal family ties between the child and his/her adoptive parents, but also of terminating the child's legal relationship between his/her biological parents, no additional adoption order is required under Dutch law. Article 26 of The Hague Adoption Convention does not specify anything on (the termination of) family ties between the child and his/her biological parents. The Netherlands applies Article 10:110 (1) (c) and paragraph 2 DCC to this situation. This leads to the situation that by recognition of a foreign convention adoption in the Netherlands, the family ties

[60] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.4.2.
[61] See H. De Waele et al., National Report-Belgium, § 1.4.3.
[62] See S. Adamo, National Report-Denmark, § 1.4.3.
[63] See T. D. Ziegler, National Report-Hungary, § 1.4.3.

between the adopted child and the blood relatives of his/her biological parents will only be terminated if the adoption has this effect in the Contracting state where it was made. A foreign adoption order that is issued in a country that is not party to the Hague Convention, is only eligible for automatic recognition in the Netherlands under certain circumstances, which since 1 January 2012 are codified in book 10.6 under Articles 10:107-109 DCC. Title 6 of book 10 DCC applies two different recognition regimes: 1) Article 10:08 DCC is applicable to a situation in which both the child as well as the adoptive parents had their habitual residence outside the Netherlands at the moment of the adoption order. If this is the case and if all the recognition requirements are fulfilled, an adoption order granted outside the Netherlands shall be recognised by operation of law in the Netherlands (Article 10:108(1)). 2) Article 10:109 DCC on the other hand envisages the situation in which the adoptive parents had their habitual residence in the Netherlands at the time of the adoption order. This provision hence regulates intercountry adoptions in which the Netherlands is the host country. Such adoptions shall only be recognised if a court has established that the conditions for recognition under Article 10:109 a, b and c have been met. Exceptions to the recognition of foreign adoption orders are enshrined in Articles 10:108(2) DCC, and stipulate that in the following situations a foreign adoption order is not recognised: where the order was not preceded by an appropriate investigation or procedure; where the adoption order issued was not recognised in the foreign country in which either the parents or the child resided; or in situations in which recognition would be contrary to the public order"[64].

In Spain, according to Spanish law, "only full adoptions are considered as adoptions; consequently, it is required that adoptions create a permanent parent-child relationship between the adoptive parents and the adoptee. The "simple" adoptions established by a foreign authority have the effects given by the law established by the art. 9.4 Civil Code. Spain is a member of the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. The Convention covers only adoptions which create a permanent parent-child relationship"[65].

1.4.4 Is the acquisition of nationality a consequence of the adoption?

-*Model Case:* A Spanish citizen adopts a child of 10 years of age and another of 18. It raises the question if the children acquire Spanish nationality as a result of the adoption.

Conclusion:

The States provide for the acquisition of nationality in case of adoption of a minor, although different age requirements and conditions are established.

In Belgium, "according to article 9 of the Belgian Nationality Code, a simple adoption or a full adoption of a foreign child under the age of 18 confers the Belgian nationality onto the child from the day the adoption has effect. The Belgian nationality is granted under the conditions of article 9. In case of revocation of the adoption, regardless whether it concerns the simple or full adoption, the child will retain the Belgian nationality"[66].

[64] See B. Safradin, National Report-The Netherlands, § 1.4.3.
[65] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 1.4.3.
[66] See H. De Waele et al., National Report-Belgium, §

In Denmark, "the Danish Citizenship Consolidation Act states that a foreign child under the age of 12 who is adopted by means of a Danish adoption order becomes a Danish citizen at the time of the adoption, if the child is adopted by a married couple or a cohabitating couple, where at least one of the spouses or partners is a Danish citizen, or if the child is adopted by a single Danish citizen. The same effect is given to a foreign adoption order that has been recognised after the rules in the Adoption Act"[67].

In Hungary, "the child will not receive the Hungarian nationality automatically if adopted by a Hungarian citizen. However, in such cases, the habitual residence of the child is unimportant. This means that children may receive citizenship easier than adults, who generally must reside in the country for a longer term"[68].

In the Netherlands, "if a child is adopted in another state other than the Netherlands Dutch citizenship is automatically acquired if at least one of the adoptive parents is a Dutch national and if the adoption followed the Dutch adoption proceedings, provided that the child was a minor on the date of the adoption order. This rule is applicable to adoption orders issued in the Netherlands, the Netherlands Antilles or Aruba, in States that are party to the Hague Convention and in other States, provided that the adoption order is in line with the criteria for recognition in the Netherlands, as enshrined in Articles 10:107-109 DCC"[69].

In Spain, "according to Article 19 of Spanish Civil Code, the foreign child under eighteen adopted by a Spanish citizen acquires Spanish nationality of origin since the adoption. If the adoptee is over the age of eighteen he may opt for Spanish nationality of origin within two years of the constitution of adoption"[70].

[67] See S. Adamo, National Report-Denmark, §
[68] See T. D. Ziegler, National Report-Hungary, §
[69] See B. Safradin, National Report-The Netherlands, §
[70] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, §

2. FORENAMES AND SURNAMES

Case 2.1: Disparities between legal systems

Background: due to the several differences between legal systems and their impact on the free movement of persons and the principle of unique identity, please provide explanation and indication of leading/model cases about your national legislation concerning forenames and surnames.

2.1.1 EXPLAIN YOUR CONFLICTS OF LAW RULES, HIGHLIGHTING THE CASES IN WHICH YOUR NATIONAL LEGISLATION IS APPLICABLE.

-*Model Case 1*: a child was born in a third country, where his parents (nationals of your Member State) reside.
-*Model Case 2*: a child was born in your Member State, where his foreign parents reside.

Conclusions:

1. Frequently, the law of the nationality of the applicant governs the name and surnames. The nationality of the parents is generally transferred to the children with a more restricted extension in certain cases.

2. The law of the State of which he is a national was applied except for certain countries in which the law of the residence is applied. However, relevant differences are observed in relation to the acquisition of nationality of a Member State by the children regarding the residence of the foreign parents.

Model Answer 1:

In Belgium, "if a child is born in a third country and the parents, Belgian nationals, reside there, the juridical situation is as follows. If the child was born after 01.01.1985, the child would have the Belgian nationality if the parents were born in Belgium or in Belgian Congo before the 30.06.1960, or in Rwanda or Burundi before 01.07.1962. Or, if the Belgian parents were born abroad and make a declaration requesting that the child is granted Belgian nationality. Or, when the Belgian parents were born abroad and did not submit the "award declaration" (déclaration d'attribution/toekenningsverklaring) within a period of five years following the child's birth, and the baby is not provided with another nationality before he/she turned 18. Once the establishment of the Belgian nationality is clear, and in the model case the child has assumed the Belgian nationality since birth, Belgian law will apply to the determination of the child's surname. Article 37 CPIL indicates that a person's name and surname are governed by the law of the country of which that person is a national"[71].

In Denmark, "if a child is born abroad by Danish nationals, the Danish legislation is applicable if the stay abroad is temporary. This is the case, for example, if the parents of the child are posted abroad by their employer or during a stay abroad due to studies. The elements to consider are: the objective of the stay abroad; the working and tax-relationship to the country; the length of the stay; the extension of

[71] See H. De Waele et al., National Report-Belgium, § 2.1.1.

the work or study permit; and whether the applicant owns property in the country. In the cases of temporary stay abroad, the application for registering the name of the child can be given at the registrar office in the parish where the parents had residence before moving (section 1 in the Names Executive Order)" [72].

In Hungary, "in accordance with Act IX of 2009 amended the Private international law code (Law decree 13 off 1979), adding special rules to the code. The newly inserted Section 10 (2) states that to a person's name, the personal law of the person (in most cases: his/her citizenship) shall apply"[73].

In the Netherlands, "a child of a Dutch mother automatically acquires the Dutch nationality and hence her surname pursuant to Article 1(5)(1) DCC. If, for example, a child is recognised by an Australian man, and if according to Dutch law this recognition is valid, the child will keep the name of the mother according to Dutch applicable law, unless the parents have chosen the name of the Australian man for the child. Article 10:20 DCC, regulating the applicable law for the determination of the names of a person of Dutch nationality, states the following on this matter: the surname and the forename of a person of Dutch nationality shall be determined, regardless whether he/she has another nationality, by Dutch internal (national) law"[74].

In Spain, "due to the fact that the child is a Spaniard, the forenames and surnames are governed by Spanish Law, irrespective of the place of birth or residence. In Spain, the law of the nationality of the applicant governs the name and surnames, in accordance with the Convention n. 19 of the law applicable to surnames and forenames, concluded in Munich, on 5 September 1980, signed and ratified by Spain. Spain has not made any reservation in favour of the application of the Spanish Law when the applicant resides in Spain (Article 6 of the Munich Convention). In consequence, Spanish Law is applicable to Spaniards, irrespective of the place of birth or place of residence. In contrast, Spanish law is not applicable to foreigners, irrespective if they were born in Spain or have habitual residence in Spain (…)"[75].

Model Answer 2:

In Belgium, "assuming that the newborn holds a foreign nationality, the applicable law will be his/her national law. In this particular case, when the Officer of the civil status registers this newborn, he/she will verify if the rules contained in the national law are complied with. However, Belgian law will be applicable in the case of a child born in Belgium to parents who hold another nationality, but were born in Belgium and have lived in Belgium for at least five years during the 10 years preceding the birth" [76].

In Hungary, the nationality law governs the name and forenames[77]. It is the same case in the **Netherlands,** in situations in which foreign parents are residing in the Netherlands, the law of the child's nationality is applicable[78]**.**

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[72] See S. Adamo, National Report-Denmark, § 2.1.1.
[73] See T. D. Ziegler, National Report-Hungary, § 2.1.1.
[74] See B. Safradin, National Report-The Netherlands, § 2.1.1.
[75] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.1.1.
[76] See H. De Waele et al., National Report-Belgium, § 2.1.1.
[77] See T. D. Ziegler, National Report-Hungary, § 2.1.1.
[78] See B. Safradin, National Report-The Netherlands, § 2.1.1.

In the same sense, **in Spain**, "where the Judge of the Registry will apply the law of the State of which he/she is a national. If at least one the foreign parents transfers their proper nationality to the child, the child is not a Spaniard, irrespective of the place of birth or residence. But the birth shall be recorded in the Spanish Civil Registry because it has occurred in Spain"[79].

On the other hand, **in Denmark, "**if a child is born in Denmark, where his/her foreign parents reside, the Danish legislation is applicable if Denmark is their permanent state of domicile/residence. The authorities use the aforementioned same elements of evaluation to determine whether the parents are established on a temporary or permanent basis in Denmark. It is therefore not enough to determine that a permanent residence has been established by the parents only by ascertaining that they are in possession of a Danish national identification number (CPR-number) and a Danish address" [80].

2.1.2 Explain briefly the main rules concerning forenames and surnames, especially focusing on number, limits, civil acts which affect forenames and surnames, admission of foreign forenames and surnames, and translations of them.

-*Model Case*: a child born in your Sate whose parents are nationals and resident in your State.

Conclusion:

Two models are observed: the model of one surname and the model of two surnames (father and mother). In the first case, the main issue is the choice of the surname (desirably by agreement of the parents but it is possible in some countries the combination of the two surnames or the using of non-protected last names). In the second model, the main issue is the order of the surnames (desirably by agreement of the parents).

In Belgium, "the Law of 8 May 2014 amending the CC to establish equality between men and women in the transmission of the name to the child or the adopted child, is the current law governing the attribution of name and surname. Therefore, establishing the filiation will be the cornerstone for obtaining the surname of the father or of the mother. Hereby, it is necessary to distinguish between situations arising before the Law of 8 of May 2014 entered into force, and after. Before 1 June 2014, the system established by the law of 3 March 1987 and the Law of 1 July 2006 was that the child takes the father's name. With the new Law, from 1 June 2014, as incorporated in its article 2 providing for a new reading of article 335 CC, the parents have different options; either the surname of one of the parents, or a combination of both names. At present, the trend in Belgium remains a traditional one, whereby the child is conferred the father's surname. Other essential elements to be taken into consideration with regard to the name and the surname are the following. The name is formed by three elements, two essential and one optional. The essential one is the surname. Graphically, it is composed by a group of letters that will be formed by one or more words. If the surname is originally composed of characters related to a different alphabet, the Officer of the civil status will "translate" the surname to the applicable alphabet based upon the phonetic expression of the surname in its original alphabet. The second element is the name. The name allows to distinguish the different members of the same family. Currently, parents can freely choose the name of their child, but the Officer of the civil status may refuse to register any ridiculous name. Under the reservation of "asexual" names, the name is linked to the

[79] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.1.1.
[80] See S. Adamo, National Report-Denmark, § 2.1.1.

gender of the child. Thus, an entry can be refused – due to the reason that it is ridiculous – of a name of a boy given to a girl, and vice versa" [81].

In Denmark, "in the legislation we find three different notions concerning names, i.e.: last name (or surname), first name, and middle name. The parents or person with custody over the child must choose a first name and a last name for a new-born within six months of birth. If that does not happen, the child will automatically take on the last name of the mother (whether the child is born in or out of wedlock). Normally the child will carry the last name of the father or the mother when the child is born, or, if one of the parents carries the last name of a former spouse, the parents may choose the last name the parent had before the marriage. Moreover, last names which are carried by more than 2,000 individuals are 'free' to be adopted as last names by anyone, as they are not considered protected surnames. The Danish Social Appeal Board publishes the list of non-protected surnames on its website" [82].

In Hungary, "as an exception in Europe, Hungarians place the surname before the given name. The basic rules on names can be found in the Civil Code, especially in Section 4:27 (which contains the rules on names of the parties in a marriage) and in Section 4:150 (the rules on children). Some questions on names have even been dealt with by the Constitutional Court. In Decision 58 of 2001 the Constitutional Court stressed that every man has got the inalienable right to have and bear his own name representing his (self)- identity, and this right may not be restricted by the state. Thus, the right to a name is interpreted as a fundamental right of the person. In the same decision, the Court found several provisions of the former constitution unconstitutional (eg. the solution that husbands could not bear the wife's name after marriage). A family name may consist of one or two parts. If it is made up by two parts, a hyphen (-) must be used between them. This rule changed as of 1 August 2015. From that time, the usage of a hyphen will not be necessary. A person may have a maximum of two forenames. Only forenames published in the forename registry can be given freely in Hungary, otherwise permission from the Research Institute for Linguistics of the Hungarian Academy of Sciences (or, in case of minority names, of the nationality self-government) must be attached to the application. If the person belongs to a minority (nationality), his/her names may be registered even if they cannot be found in the registry of the Hungarian Academy of Sciences. However, the name (except the signature) must be written with the usage of the Latin alphabet (i.e. in fact a translation is registered), which may be in conflict with the findings of the Konstantinidis case. According to Section 68 of the law on registries, if the Hungarian citizen gives birth to a child abroad, the name registered abroad must also be registered in Hungary. On the other hand, he/she may only have two first names registered (two must be selected if he/she was registered with more first names)"[83].

In Hungary, according to Section 68 of Act I of 2010 on registries, regarding the birth of a child of a Hungarian citizen, the name registered abroad must also be registered by the Hungarian authorities (only two first names are allowed, if there are more, he/she must choose which should be registered). Otherwise the name should be the same as in the foreign document. A Hungarian citizen may ask for a translation of the name.

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[81] See H. De Waele et al., National Report-Belgium, § 2.1.2.

[82] See S. Adamo, National Report-Denmark, § 2.1.2.

[83] See T. D. Ziegler, National Report-Hungary, § 2.1.2.

In the Netherlands, "the main starting point of the law is that the parents can choose the family name of the child, pursuant to Article 1:5 DCC. The choice that the parents make for their first child – that is the first child to whom they fall in family law relations – is applicable to all the following children. In the interest of the child, Dutch law has pursued unity of the name in the family (article 1:5 (8) DCC)"[84].

In Spain, "filiation is the only civil act which affects forenames and surnames, due to the fact that marriage does not alter the surnames of the spouses. Habitually, the acquisition of Spanish Nationality is a very relevant event which can imply the change of surnames. On the other hand, Spanish Law permits up to two simple forenames or one integrated forename. The forename can be expressed in a foreign language. In relation with the surnames, Spanish Law requires two surnames, the first one of the father and the first one of the mother. The order of the surnames is agreed by the parents and, in the absence of agreement, the interest of the child governs the final decision"[85].

Case 2.2: Gender equality

Background: some legislations establish gender equality between the surnames of men and women as a matter of public policy and marriage does not alter the surnames of the spouses and the children receive surnames from both parents. In this context, please provide explanation and indication of leading/model cases concerning gender equality at the moment of attribution of the forenames and surnames, particularly:

2.2.1 WHAT ARE THE MAIN ISSUES WITH THE SURNAMES OF THE WIFE?

-*Model Case*: a wife with maiden surname Ms. Smith and married name Ms. Fernández. How is she referred to in your Civil Register?

Conclusion:

Gender equality is being incorporated and the maiden surname of the wife is conserved. The tradition of some countries concerning the acquisition of the husband's surname remains a free option (not a duty) or by incorporation of a hyphen or a mere reference in the Registry or the indication of the marital status.

In Belgium, "the law applicable to the name does not depend on the relationship status, such as, for example, a filiation or marriage. It is the national law of the wife, not the law of marriage effects, which decides whether she takes or may choose to adopt the name of her husband. Thus, under Belgian law, marriage does not have any effect on the surname of the spouse(s). Consequently, a wife will keep her maiden surname. In her daily life, she might be referred to by the surname of her husband. The tradition remains that the marriage required a woman to precede her maiden name with her husband's name, and add a hyphen between the two. But this surname does not become her legal name, as the legal name of the woman does not change at all. Passports and all official documents will continue to be issued with her maiden name, even though the words "spouse of ……" may be added.

[84] See B. Safradin, National Report-The Netherlands, § 2.1.2.

[85] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.1.2.

However, the last paragraph of article 38 CPIL entails that when the law of the state that one spouse is a citizen of allows him/her to choose a name after his/her wedding, the officer of the civil status will mention that name on the marriage certificate"[86].

In Denmark, "the Names Act was amended in 1961 in order to create equality of treatment between men and women and children born within and outside of wedlock as regards name-giving. There is no automatic change of the last name of the wife to the husband's surname after marriage in Danish legislation. According to the Names Act, if a married couple wants to bear the same last name, the wife or the husband may adopt the other's last name with his/her consent. Otherwise, after the marriage the spouses will continue to carry the last names that they held before they got married. Individuals who are not married but who declare that they live together as a married couple, and have done so for at least two years, or have children together under the age of 18, may also adopt the same last name. It is also possible to combine two last names into a single last name by joining the two into one last name with a hyphen between them (e.g.: Smith-Fernández). The rules concerning change of last name after marriage are also applicable to registered partnerships"[87].

In Hungary, "the Hungarian rules are relatively liberal: it is up to the wife to decide. She may adopt the surname of her husband (Maria Fernandez), keep her own name (Smith) or completely use her husband's name (Hugo Fernandez). Thus, upon marriage, the wife has the option to keep her birth name (Maria Smith), or her name immediately before the time of marriage; to bear her husband's full name with an indication of marital status ("-né" in Hungarian, like Fernandez Hugoné), possibly with her name immediately before the time of marriage attached (Fernandezné Smith Maria); to bear her husband's surname with an indication of marital status and with her name immediately before the time of marriage attached (Fernandezné Mária; or to bear her husband's surname with her own forename (Fernandez Mária)"[88].

In the Netherlands, "Article 1:9 DCC states that men and women preserve within the marriage and registered partnership their own family name. Article 1:9 DCC also grants them the right (not the duty) to apply the name of the other partner instead of their own family name, prior to their own family name or following their own family name"[89].

In Spain, "in the Spanish Register, any reference to the wife will be made as Ms. Fernández, in accordance with her national law, but will also include the reference to her surname Smith. Spanish Law provides some special provisions for foreign wives. When a foreign wife has to be mentioned in the Civil Register and, in accordance with her national law, she has the husband's surname, the Civil Register mentions this surname because it is the legal surname of the wife. But, for reasons of public policy and in order to respect the gender equality, the maiden surname will also be included (Article 137 Regulation of the Civil Register)"[90].

2.2.2. WHAT ARE THE MAIN ISSUES WITH THE SURNAMES OF MOTHERS?

[86] See H. De Waele et al., National Report-Belgium, § 2.2.1.
[87] See S. Adamo, National Report-Denmark, § 2.2.1.
[88] See T. D. Ziegler, National Report-Hungary, § 2.2.1.
[89] See B. Safradin, National Report-The Netherlands, § 2.2.1.
[90] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.2.1.

-*Model Case*: a husband and a wife (maiden name: Ms. Smith; married name: Ms. Fernández) have a child. What are his/her surnames?

Conclusion:

Gender equality is being incorporated and the transmission of the maiden surname of the mother is possible as an option, even if the child has only one surname. However, it is true that, in the absence of choice, some countries automatically use the father's surname.

In Belgium, "the surname given to the child will therefore be governed by the Law of 8 May 2014. This means that depending on the filiation, different options are granted. She may transmit her maiden name onto the child, unless her national law allows the change of the surname based on marriage reasons. As mentioned previously, marriage in Belgium does not have any effect on the spouse's surname"[91].

In **Denmark, "**in the case presented, the child's surname could be Smith, or Fernández, or Smith-Fernández, or Fernandéz-Smith, or another last name included in the 'free last names' list, or a last name determined following the conditions listed below. According to the Danish regulation as presented above, and following the principle of freedom to choose one's name, it is up to the parents of the child to decide, which name the child will bear. As stated in the Names Act, a name may be adopted as a last name if certain conditions are met. The applicant knows and has obtained the consent of the individuals who bear the name as their last name"[92].

In Hungary, "in the case of children with Hungarian citizenship, the parents must give the birth name or the married surname of his/her mother or father (it is their decision which name they choose)"[93].

In the Netherlands, "prior to the birth or adoption of a first child, married parents may choose which surname the child will acquire (mother's or father's name, both is however not possible under Dutch law). If the parents make no choice, the child automatically obtains the father's surname. Any further children will also acquire this surname. If the parents of the child are not married, the children will automatically obtain his/her mother's surname unless otherwise indicated (Article 1:5(5) DCC)"[94].

In Spain, "the Spanish surnames of the child are Fernández Smith and not Fernández Fernández, because the mother transfers her personal surname. Spaniards have two surnames and one of them is the first one of the mother. But Spanish Law contains specific rules for mothers who have lost their surname in favour of the surname of the husband. In this case the mother transfers her maiden name, in order to respect the aims of the Spanish Law and its public policy, which does not admit gender discrimination"[95].

[91] See H. De Waele et al., National Report-Belgium, § 2.2.2.
[92] See S. Adamo, National Report-Denmark, § 2.2.2.
[93] See T. D. Ziegler, National Report-Hungary, § 2.2.2.
[94] See B. Safradin, National Report-The Netherlands, § 2.2.2.
[95] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.2.2.

Case 2.3: Public policy

Background: Judgement of the Court of 22 December 2010 (Case C-208/09, Sayn Wittgenstein) ruled that the non-recognition of surnames by another Member State is only based on public policy grounds. Please, provide for cases of public policy which prevent the application of a foreign law concerning forenames and surnames by the authorities of your Member State (dignity of persons, superior interests of minor, gender grounds, rules abolishing the nobility). In this context, please highlight if the public policy clause can play in a total or attenuated form.

2.3.1 EXPLAIN CASES OF ABSOLUTE APPLICATION OF PUBLIC POLICY, IN WHICH FOREIGN LAW IS NOT APPLIED IN ANY SITUATION WITHOUT EXCEPTIONS.

-*Model Case:* A foreign law of a child permits names which affect the dignity of the persons.

Conclusion:

The countries refuse some names against human dignity under the principle of violation of public policy. Some countries use a database in order to check the admission of names. The issues concerning nobility are not dealt with in the same way.

In Belgium, "it is necessary to distinguish between Belgians and foreigners. Article 39.2 and 3 CPIL reads: "[…] 2° ou la détermination du nom ou des prénoms n'est pas conforme au droit belge lorsque cette personne était belge lors de cette détermination; ou 3° dans les autres cas, cette détermination ou ce changement n'est pas reconnu dans l'Etat dont cette personne a la nationalité [...]". On the one hand, the name of a Belgian determined abroad, in violation of Belgian law, is not recognised in Belgium. On the other hand, the name of a foreigner is recognised in Belgium if the name is also recognised in the state the person is a citizen of; this requires an examination not only of the foreign substantive law, but also of the (possibly conflicting) rules of foreign private international law. Name and surname are neither ridiculous nor whimsical, are pronounceable in the national language, and therefore not likely to harm the child. The name is given by the person who declares the child with the Officer of the Civil Status, and he/she can give it one or more names. The final aspect concerns the title of nobility recognised in Belgium. This title is also a part of the name, and has to be indicated in all the acts relating to the civil status of the noble"[96].

In Denmark, "the Danish Social Appeal Board publishes online a list of approved first names for boys and girls, and every child has to bear a name taken from this list. It is not possible to give a girl a boy's name and vice versa. It is possible though to apply for admittance of a new name to the list of approved first names. Following the authorities' consideration, authorisation will be provided if the name: 1) is a proper first name; 2) is not unsuitable to be used as a name in Denmark; and 3) if it is not improper (*upassende*) or likely to cause offence/shock. Nobility titles (countess, baron etc.) and numbers (I, II, III) are not admitted as first names. Some pet names which are first names outside Denmark have been approved (e.g. *Mulle* – mullet), while others have not been admitted (e.g. *Potte* – pot). As regards the condition of not being improper or likely to cause offence, the evaluation will revolve around the sentiment that the name will provoke in others rather than for the person that wishes to take up the name. For example racist names, names relating to lavatories or other vulgar

[96] See H. De Waele et al., National Report-Belgium, § 2.3.1.

associations will be considered as improper first names. To evaluate whether a name is proper or not the authorities will also consider whether the name can be used in other settings than as a first name. This would entail that they are not suitable to be used as a first name. As examples the Names Circular mentions: interjection words (*øj! puh! ha!*); certain nouns (*dulle*, *pølse* – bimbo, sausage – and similar); verbs (*forsvind* - disappear); adjectives (*dum*, *lyseblå*, *skæv* – stupid, light blue, wry); certain fictive characters (e.g. Batman or Superwoman), and known trademarks"[97].

In Hungary, "in such cases, if registered abroad, the foreign name will be registered in Hungary as well. The same is true of foreign nationals. However, if not registered abroad, the name of a Hungarian citizen must conform to Hungarian rules, and parents must select a name from the Database of Registered Forenames of the Hungarian Academy of Sciences. On the other hand, in its Decision 988/B/2009 (X. 25.), the Constitutional Court dismissed claims on noble titles. It stressed that such titles can be used in private life, but not in official documents"[98].

In the Netherlands, "when a court determines that a foreign rule is incompatible with public order it has to be examined what other law should be applied to the case in hand. The foreign law is only set aside to the extent that it is incompatible with public policy. Nevertheless, no general rule is given in the event that the public policy exception does apply. The decision is hereby left to the courts. One possibility is to turn to the application of the *lex fori*"[99].

In Spain, "in relation with Spanish Law, the forename cannot be objectively prejudicial for the applicant and his/her dignity, nor confusing or misleading in relation with the gender. Furthermore, the forenames and surnames cannot prejudice the superior interest of the minor"[100].

2.3.2. Explain cases of attenuated public policy, in which foreign law is applied in a "soft" way (material attenuation) or in which public policy is only applied when the case is connected with the territory or nationals of your Member State (spatial attenuation):

-*Model Case:* "foreign wife" who is a mother with the legal surname of the husband.

Conclusion:

Some examples of attenuated public policy are observed such as the recognition of the gender-determined ending of last names, designation by the legal surname but also by maiden surname, the possibility to adopt patronym and matronym names, and the possibility to take up as a last name a first name of a parent, grandparent or spouse's first name.

In Belgium "marriage has no effect on the surname of the wife. Nevertheless, it is possible that this rule is different in the country she is a national of. In this case, there is still a considerable freedom for the parents to choose the surname of their child. Notwithstanding the wide margin of appreciation granted to Member States, the refusal of the authorities to register the first name of a child chosen by her parents is considered a violation of article 8 of the European Convention of Human Rights (the right

[97] See S. Adamo, National Report-Denmark, § 2.3.1.
[98] See T. D. Ziegler, National Report-Hungary, § 2.3.1.
[99] See B. Safradin, National Report-The Netherlands, § 2.3.1.
[100] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.3.1.

to respect the private and family life) so long as that surname is neither ridiculous nor whimsical, is pronounceable in the national language, and therefore not likely to harm the child. Consequently, under Belgian law, in her everyday life she can use her married surname, even in the case of a divorce if the ex-husband consents. This is a case of material attenuation, because the foreign law is not absolutely excluded. As a general rule, the surname that will be transferred from the mother onto the child is her maiden surname in order to respect the Belgian public policy (a case of special attenuation). Nevertheless, if that were to lead to a violation of article 8 ECHR in the abovementioned sense, it is possible that the mother will transfer the married surname to the child (a case of special attenuation)"[101].

In Denmark, "some examples of attenuated public policy could be the recognition of the gender-determined ending of last names, if the name is rooted in a culture that permits it (as mentioned above, Greece, Lithuania, Poland, and the Czech Republic); the possibility to adopt patronym and matronym names, which allows to create a last name by adding either '–søn' or '–datter' to the first name of one of the parents (a reintroduction of a Danish tradition that is also allowed for citizens of the Faroe Islands and Iceland); and the possibility to take up as a last name a first name of a parent, grandparent or spouse's first name, if the name has a tradition in a culture, that does not differentiate between first name and last name (namely, the Muslim and Tamil traditions)"[102].

In Hungary, "there exists a serious problem in Hungarian law: names, which do not conform with Hungarian law (like –ová names from Slovakia, in which case –ová serves as a sign that she is the wife) are registered as a birth name, even if they are not. Moreover, in a number of cases the parties do not know about this change, which may cause problems in the international recognition of a person's name, because this process is not logical. Moreover, this practice is contrary to Constitutional Court decision 58 of 2001, which stressed that a person's name cannot be changed without his/her consent. In a number of cases, the parties do not know that their birth name has been changed, instead of the names they use. The same was true of family names (Smith-Fernandez) registered abroad before 2004, if the parties opted to use both of their family names after marriage (before 2004 the usage of such names was not allowed in Hungary)"[103].

In the Netherlands, "Article 10:24 DCC nowadays regulates the recognition of foreign names and changes of names established outside the Netherlands. It stipulates that when the surname or forename of a person have been recorded on the occasion of a birth outside the Netherlands or have been changed as a result of a change made in the civil status outside the Netherlands, and the surname or forenames have been laid down in a certificate issued for this purpose by a competent authority in accordance with local regulations, then such recorded or changed surname or forenames shall be recognised in the Netherlands. The provision moreover states that such recognition cannot be refused as being in conflict with public order on the sole ground that another law has been applied than the law that would have been applicable pursuant to the provisions of the Dutch Civil Code"[104].

In Spain, "Spanish Law requires that she is nominated with this legal surname but even the maiden surname will be included. This is a case of material attenuation because foreign law is not

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[101] See H. De Waele et al., National Report-Belgium, § 2.3.2.
[102] See S. Adamo, National Report-Denmark, § 2.3.2.
[103] See T. D. Ziegler, National Report-Hungary, § 2.3.2.
[104] See B. Safradin, National Report-The Netherlands, § 2.3.2.

absolutely excluded. Furthermore, from the point of view of Spanish Law, in those cases she transfers her maiden name to the child, in order to respect public policy. This is a case of spatial attenuation, because it only comes into play in relation to Spanish children"[105].

Case 2.4: Diversity of surnamens by nationality and place of birth

Background: the record of a birth in several Registries, in the Registry of the nationality and in the Registry of the place of birth, can provoke diversity of surnames and affect the free movement of persons and the principle of unique identity. Thus, Judgement of the Court of 14 October 2008 (Case C-353/06, Grunkin Paul) ruled that the surname acquired in the Member State of birth and residence shall be recognised in the Member State of which the applicant is national in order to protect the right to move and reside freely within the territory of the Member States.

2.4.1. EXPLANATION AND INDICATION OF LEADING/MODEL CASES CONCERNING "DIVERSITY OF SURNAMES", IN RELATION WITH NATIONALS OF YOUR MEMBER STATE BORN OR RESIDENT IN A THIRD COUNTRY:

-*Model Case:* nationals from your Member State born and resident in third countries.

Conclusion:

Countries which apply the law of nationality do not recognise other surnames, but countries which apply the law of residence recognise other surnames.

In Belgium, "this is detailed in the Circular of 30 May 2014 on the Law of 8 May 2014 amending the CC. The name mentioned on the foreign birth certificate that conforms to the choices offered by the new law must be recognised in accordance with article 27 CPIL. Article 27 states that these basic rules are applicable to the recognition of a foreign authentic act. In contrast, if the name mentioned in the foreign birth certificate does not comply with the choices offered by the new law, it cannot be recognised by the officer of the civil status"[106].

In Denmark, "as a starting point Danish legislation recognises that a child shall be named according to the legislation of the country where the parents are permanently residing. An exception to this rule is when the parents (Danish nationals) are only temporarily living abroad, and are therefore to be considered as still having their domicile in the country. In order to evaluate whether a Danish national has in fact established a permanent residence abroad, the authorities will carry out an overall evaluation of the specific circumstances in the case. The Names Executive Order provides the fictional example of a Danish national who has been posted to China by a Danish company for ten years: notwithstanding the length of the stay abroad, the applicable law would be the Danish law. Please refer also to answer to question 2.1.1 above. The authorities will register a Danish child born abroad according to the birth certificate issued by the authorities in the country where the child is born and the parents are temporarily living (e.g. according to a German birth certificate). A possible problem may arise if the said authorities, in order to issue a birth certificate, require the registration of name and surname. In these cases, if the parents want to register the name of the child according to Danish rules (for example if they want to give the child a middle name, or two surnames connected by a hyphen),

[105] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.3.2.

[106] See H. De Waele et al., National Report-Belgium, § 2.4.1.

they will first have to register the name of the child as stated on the foreign birth certificate, and later apply for a name change upon returning to Denmark"[107].

In Hungary, "there are no special rules: the foreign registration is accepted, apart from aforementioned problems (translation, two first name selection, registration as birth name). In a problematic way, registered names in same-sex marriages are also registered as birth names (they must ask the Hungarian registry to do so, it is not automatic). This rule can cause issues if the persons want to conclude contracts, for example, and their birth name is not the same as it was"[108].

In the Netherlands, "Article 10:20 DCC is applicable to Dutch nationals resident in third countries, which stipulates that: "the surname and the forename of a person of Dutch nationality shall be determined, regardless whether he has another nationality, by Dutch internal (national) law." That same provision also states that this provision even applies when foreign law is applicable to the familial (parent-child) relationship and the existence of that relationship may have effect on the surname"[109].

In Spain, "Spanish Law does not contain any solution. Thus, Spanish Law requires the application of the Spanish rules and the surnames provided by other Civil Registries are not recognised in Spain"[110].

2.4.2. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in another Member State.

-*Model Case:* nationals from your Member State born and resident in a Member State of the EU.

Conclusion:

The requirements of the Judgement of the Court of EU of 14 October 2008 (Case C-353/06, *Grunkin Paul*) are absolutely applied. Although some countries originally found issues in the application of this case law, nowadays relevant issues are not observed.

In Belgium, "the rules of the CPIL may conflict with those applicable in another country. Nevertheless, the rules of the CPIL are called upon to resolve a conflict of laws with the laws of other Member States, as occurred in Case C-353/06, *Grunkin and Paul*. The approach currently adhered to conforms with the gist of that judgement. Article 18 of the EC Treaty was held to preclude the authorities of a Member State, in applying national law, refusing to recognise the surname of a child as determined and registered in another Member State where the child was born and he/she has been resident since his/her birth – even if he/she has only the nationality of the first Member State. On 27 September 2012, the European Commission decided to refer Belgium to the Court of Justice of the European Union in the context of an infringement of proceedings, due to the local authorities still refusing to register children with two Member States nationalities under a different name than their father, even if the child was already registered under a double surname allowed in another Member State. The entry into force of the new law of 8 May 2014 amending the CC to establish equality between

[107] See S. Adamo, National Report-Denmark, § 2.4.1.
[108] See T. D. Ziegler, National Report-Hungary, § 2.4.1.
[109] See B. Safradin, National Report-The Netherlands, § 2.4.1.
[110] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.4.1.

men and women in the transmission of the name to the child or the adopted child has put an end to these practices"[111].

In Denmark, "due to the application of the law of residence, there is no difference in the legislation concerning "diversity of surnames" in relation to Danish nationals living in third countries or a Member State of the EU, respectively. Therefore, the answer to question 2.4.1 above will also be applicable in this latter case"[112].

In Hungary and **the Netherlands,** no domestic leading case is available. The main cases are referred to diversity of surnames by dual nationality.

In Spain, "from the point of view of the Spanish Law, the requirements of the Judgement of the Court of EU of 14 October 2008 (Case C-353/06, *Grunkin Paul*) are absolutely applicable. As leading case, see Instruction of General Directorate of the Registries and Notaries of 24 February 2010 (BOE n. 60, 10-March-2010), which provide several requirements"[113].

Case 2.5: Diversity of surnamens by dual nationality

Background: the dual nationality of the applicant can also provoke "diversity of surnames" and this affects free movement of persons and the principle of unique identity. Judgement of the Court of Justice of European Union of 2 October 2003 (Case-148/02, García Avello) ruled that nationals from two Member States could choose the identity in accordance with one of these Member States and this identity should be recognised in the other Member State in order to respect the EU citizen and the free movement of persons.

2.5.1. EXPLANATION AND INDICATION OF LEADING/MODEL CASES CONCERNING "DIVERSITY OF SURNAMES", IN RELATION WITH NATIONALS FROM YOUR MEMBER STATE WHO ARE ALSO NATIONALS FROM THIRD COUNTRIES:

-*Model Case:* nationals from your Member State who are also nationals from third countries.

Conclusion:

Some countries prefer the application of their own law, due to fact that the persons are nationals of that State. Thus dual nationality is dealt with in a different manner depending if the dual nationality refers to two Member States or to a third country. In contrast, some countries provide the same rules for dual nationals, irrespective of whether the other nationality is a Member State or not.

In Belgium, "according to article 38 CPIL, the change of name or surname of a person by voluntary act or by operation of law is governed by the law of the state the person belongs to at the time of the change. The voluntary change of name or surname as part of the acquisition of Belgian nationality referred to in articles 15 and 21 of the Code of Belgian Nationality is governed by Belgian law. Belgian law remains very much attached to the principle of immutability of the name. This conception of immutability of the name in a domestic law is reflected in Belgian private international

[111] See H. De Waele et al., National Report-Belgium, § 2.4.2.
[112] See S. Adamo, National Report-Denmark, § 2.4.2.
[113] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.4.2.

law. Under article 39 CPIL, a change of name or names by judicial or administrative decisions which occurred abroad will not be recognised in Belgium. If the act or judgement concerns a foreigner, the change in name will be recognised in Belgium if it is recognised in the state of which the foreigner is national. The legal control of such a judgement will be carried out by applying, exceptionally, the foreign law under which the judgement was rendered. This connection to national law may form an 'obstacle' when people hold several nationalities, as the surname may vary from one state to the other. Thus, in conformity with the *Garcia Avello* judgement of the CJEU, in Belgium there now apply two different regimes to the change of surname when the person has dual nationality, i.e. Belgian – another Member State or Belgian – third country. This is further elaborated upon below"[114].

In Denmark, "according to the Names Act (section 24), a foreign national can apply to have a name changed in accordance with a name giving or name change which has been carried out according to the rules in their country of citizenship. This is a modification of the principle of domicile as explained above. This rule is also applied to Danish nationals who are also nationals of another country.

It is a condition that the name giving or name changing has been carried out in the country of nationality, for example an Italian citizen can have a name giving or name change recognised in accordance with Danish rules only if the name change has been carried out in Italy. Moreover, it is a condition that the right to the name giving or name change has been granted. The Danish Authorities will therefore require that the applicant provide documentation for a name giving or name change in the form of e.g. name certificate, birth certificate, a transcript/print-out of the country's official person register, or similar.

As regards surnames, according to the Danish Names Act, a person can only have one surname. If a couple wishes that their child bears both parents` surnames, the Names Act provides the option to combine the two surnames with a hyphen, making the two surnames into one surname (see above under question 2.2.1). However, if a person has two last names in accordance with another country's legislation, for example as is the case with Spanish surnames, the two surnames will be considered as one surname even though they are not connected with a hyphen. Therefore, parents carrying a double surname with no hyphen can pass it on to their child"[115].

In Hungary, "in this case the rules of the third country can also be applied, see Section 10 (2) of Law Decree 1979 on private international law. In practice this means the law of the foreign country may be applied if the applicant requests it"[116].

In the Netherlands, "Article 10:20 DCC regulates the applicable law in cases of dual nationality of Dutch persons and provides that when a person has along with his/her Dutch nationality another nationality, Dutch law applies. This provision moreover states that Dutch law even applies in the situation when foreign law is applicable to the familial relationship and the existence or ending of that relationship may have effect on the surname. If a person has – along with his/her Dutch nationality – another nationality, the Dutch nationality is decisive concerning the question of which law is applicable to decide the name of the person with dual citizenship as stipulated in Article 10:20 DCC. In situations in which a person has two or more nationalities, the law of the State of which he/she has the nationality and with which, taking all circumstances into account, he/she is most closely connected, shall be

[114] See H. De Waele et al., National Report-Belgium, § 2.5.1.
[115] See S. Adamo, National Report-Denmark, § 2.5.1.
[116] See T. D. Ziegler, National Report-Hungary, § 2.5.1.

applicable (Article 10:21 DCC). However, it is not always easy to prevent situations in which a person – as a consequence of disparities in different legal systems in a country – has another name in another country. To this person, a declaration of differences in family names can be issued from which it can be deducted that the different names are applicable to one person" [117].

In Spain, "the rules of Article 9.9 of the Spanish Civil Code are applicable. In this sense, the Spanish law governs the forenames and surnames except in relation with dual nationality expressly established (Latin American countries, Portugal, Philippines, Andorra, Equatorial Guinea). In these cases, rules established by Treaties shall be applied and, in the absence thereof, the nationality of the last place of residence and, failing that, the last nationality acquired (Resolutions 15 February 1988, 19 November 2002 and 27-1.ª February 2003). Nevertheless, the application of the Spanish Law can provoke some negative effects if the Spanish nationality is the last one acquired and the applicant has a previous and stable identity. For these reasons, the Regulation of the Civil Registry provides that the applicant retain the surnames in a way other than the legal way if the applicant makes a statement in the act itself or within the two months posterior to the acquisition or the full age Instruction of General [Directorate of the Registries and Notaries of 23 May 2007 **(***BOE* n. 159, 4-July-2007)]"[118].

2.5.2. Explanation and indication of leading/model cases concerning "diversity of surnames", particularly, in relation with nationals of your Member State who are also nationals of other Member States.

-*Model Case*: nationals of your Member State who are nationals of other Member States.

Conclusions:

***García Avello* jurisprudence applied in full, but under certain conditions in some countries.**

In Belgium "the *García Avello* jurisprudence applied in full, but under certain conditions. The legal framework with regard to this particular situation is settled by the Circular of 23 September 2004 on aspects of the law of 16 July 2004 on the CPIL of personal status (Circulaire du 23 Septembre 2004 relative aux aspects de la loi du 16 juillet 2004 portant le Code de droit international privé concernant le statut personnel / Circulaire betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht die betrekking hebben op het personeelstatuut, *Moniteur Belge / Belgisch Staatsblad* 28 September 2004). The CPIL has integrated the lessons of the judgment, which concerns only changes in the administrative name. Consequently, the principles applicable to name and first names are now as follows:

1. The judgment had no impact on the question of the law applicable to the determination of names and surnames, which remains governed, as is currently the case, by the law of the state of which that person is national.

2. The change of name or surname of a person by voluntary act or by operation of law, is governed by the law of the state whose nationality is subject to change.

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[117] See B. Safradin, National Report-The Netherlands, § 2.5.1.

[118] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.5.1.

As is indicated in the Circular, the effect on the name of a state change is governed by the law applicable to the determination of the name and not by the law applicable to the relevant state relationship. For example, the effect of marriage on the name will be governed by the law applicable to the name, and not by the law applicable to the effects of marriage. The circular is however a bit more restrictive, in stating that: "the *García Avello* rule will be applicable in case of voluntary change of name of a person who has both Belgian nationality and the nationality of another Member State, this person being granted the right to obtain, by changing his/her administrative name, the name which would be incumbent under the law and tradition of the second Member State. This should not, however, affect the work of registrars because the change of name or surname on a voluntary basis is granted by royal decree"[119].

In Denmark, "there is no difference in the legislation concerning "diversity of surnames by dual nationality" in relation to Danish nationals who are also third country nationals or a Member State's nationals, respectively. Therefore, the answer to question 2.5.1 above will also be applicable in this latter case"[120].

In Hungary, "there are no problems in this regard: such names are registered just like abroad. Public policy arguments are set aside and are not used, not even for the purpose of defending the child's interests. The spelling and translation of such names could cause problems, but such problems have not occurred until now. Registering unknown names as birth names is also problematic, as mentioned before"[121].

In the Netherlands, "in a Dutch case concerning a Polish couple, the Dutch court ruled in favour of having Polish law applied to the last name of their children, who had both Dutch and Polish nationalities, even though the initially applicable law was the *lex fori,* Dutch law. In this judgement, the Polish couple invoked Article 8 ECHR (right to family life), but in the end the Dutch court decided to rule in favour based upon the analogy of the CJEU's judgement in *Garcia Avello.* Another interesting Dutch case in this regard concerned a Spanish couple born, married and resident in the Netherlands. They had a child that acquired both the Dutch and Spanish nationality. The couple requested that the child acquire a surname as regulated in Spanish law in the Dutch birth certificate. The civil registrar applied Article 2 of the Act conflict of Law Rules for Names (since 1 January 2012 codified in Article 10:20 DCC) on the basis of which Dutch law is applicable. The applicants challenged this decision and started court proceedings on the basis of article 1:27 DCC to – other than in *Garcia Avello* – challenge the decision of the civil registrar to apply Dutch law in this case. The court allocated their request to approve the birth certificate of their child according to Spanish law on the basis of Article 8 of the Convention of children's right and stipulated that it would be an impairment of the identity of the child, if the application of Spanish law were not be allowed. The civil registrar appealed, but the Court of Hertogenbosch did not rule in favour of the registrar and cited the CJEU's *Garcia Avello* ruling whereby it stipulated that in line with that reasoning the birth certificate should be changed according to Spanish law"[122].

In Spain "the requirements of the Judgement of the Court of 2 October 2003, Case-148/02, *García Avello* are absolutely applicable. In fact, the General Directorate of the Registries and Notaries

[119] See H. De Waele et al., National Report-Belgium, § 2.5.2.
[120] See S. Adamo, National Report-Denmark, § 2.5.2.
[121] See T. D. Ziegler, National Report-Hungary, § 2.5.2.
[122] See B. Safradin, National Report-The Netherlands, § 2.5.2.

has adopted an Instruction in order to clarify the scope of this ruling. In consequence, see, as leading case, Instruction of General Directorate of the Registries and Notaries of 23 May 2007 (BOE n. 159, 4-July-2007): The applicant has freedom of choice of the national law which he/she wishes to govern his/her forenames and surnames. It is not relevant that a nationality is more connected with the applicant, for instance, because his/her residence is located within the territory of this State. The rules of the Spanish Civil Code concerning the determination of the personal law of a person with dual nationality are not applicable in cases of two nationalities of the EU"[123].

[123] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 2.5.2.

3. MARRIAGE

Case 3.1: Disparities between legal systems

Background: The disparities between legal systems affect the right to marry of EU Citizens, concerning questions such as age, consent, religious or civil form. These disparities can block the civil right to marry and, on the other hand, have increased "matrimonial tourism" with the aim of conclusion of the marriage which is not admitted in the country of origin of the spouses.

Short explanation and indication of leading/model cases about the main requirements of the national legislation, concerning matrimonial capacity, legal impediments, gender requirements and issues of the marriage of the same sex, matrimonial consent and religious and civil forms.

-Model Case: spouses nationals and residents of your Member State.

Conclusion:

There are a lot of disparities between legal systems affecting the right to marry of EU Citizens, concerning questions such as gender, age, consent and form (religious or civil form).

In Belgium, "as regards the age of the future spouses, Belgian legislation in the article 144 CC requires them to have attained the age of civil majority, i.e. be 18 years old. The provision specially indicates the prohibition to marry under that legal age, without distinction of gender. However, article 145 CC provides an exception to this general rule. It indicates that the judge (of the family court) may lift the prohibition if there is a "serious reason". In this vein, article 146 CC indicates that in a case of marriage of a minor, the parents always have to express their consent. As regards the exemption, the problem in granting it is to determine when the court is facing a "serious reason". This problem was solved by the Youth Court of Charleroi in the judgement of 5 July 2006, in which it concluded that this notion should be understood in a broad sense "without allowing marriage for any young person under 18 who expresses the wish to found a homestead". The trend in Belgian case law in this kind of situations is not to grant the exception. Nevertheless, in very specific cases it has been awarded. This is the case of the judgement rendered by the Youth Court of Ghent on 5 November 2007, in which a girl of 17, with a stable relationship of two years with her fiancé, requested the permission or exemption of the judge to marry. After a period of investigation and interviews with her social circle and family, it seemed clear that the couple lived independently, not reliant on their parents. In this particular case, the marriage was authorised because the young girl seemed to possess the necessary maturity to marry. Concerning, *gender requirements*, since the entry into force of the Law of 13 February 2003 regarding the opening of marriage to same sex persons and amending certain provisions of the CC, marriage can be celebrated both between people of different genders and between people of the same gender, in accordance with the provision of article 143 CC. Originally, gay marriage was reserved to nationals of states whose national law permitted such a wedding. Article 46 CPIL opened the possibility of gay marriage to all persons having the nationality of one state and the permanent residency of another state in which gay marriage is allowed. Regarding, *legal impediments*, as already indicated, the marriage of a minor is not allowed in Belgium, as established in article 144 CC. There is a legal impediment to contracting a second or subsequent marriage before the dissolution of the previous one, as stated in article 147 CC. Article 161, specifically, forbids marriage in direct line between ascendants and descendants in the same line. In the collateral line, marriage between brothers, sisters or brothers and

sisters is forbidden (article 162 CC). Article 163 CC still forbids a marriage between uncle and niece/nephew, or between aunt and niece/nephew. Nevertheless, article 164 CC leaves room for the King to lift the prohibitions stipulated in the previous articles.

The abovementioned provisions apply to both the natural family of origin and the adoptive family, and to the child adopted by a full adoption. These prohibitions also apply to both the natural or adoptive family of the adopted children through a simple adoption. Furthermore, marriage is prohibited between the adopter and the adoptee or his/her descendants, between the adoptee and the former spouse of the adopter, between the adopter and the adoptee's former spouse, including adopted children, and even between the adopted son of a same adopter and between the adopted child and the adoptive parent. Concerning r*eligious and civil form*, in Belgium, the only form of marriage which produces legal effects is civil marriage. In addition, it is required that the civil marriage takes place before the religious marriage, as indicated in article 21 of the Belgian Constitution and article 267 of the Belgian Penal Code. There is only one exception to this general rule, and that is of a marriage celebrated *in extremis*"[124].

Marriage **in Denmark** "is defined as being a legal relationship between a man and a woman or two persons of the same sex. Before 2012, persons of the same sex could not be married, they could only register as a partnership. The conditions of validity for a marriage are various and stated in the first chapter of the Formation and Dissolution of Marriage Act. Among the conditions, a marriage has to be voluntary (i.e. prohibition of forced marriages) and between two persons of over 18 years of age. Nonetheless persons under the legal age can marry if the regional state administration allows it and the parents of the youngsters consent to the marriage. Also, two persons that are closely related cannot be married, that is to say persons in the direct ascending or descending family line, and brothers and sisters. Marriage between persons of which one has been married to the other person's relatives in the ascending or descending line has to be approved by the Ministry of Social Affairs, while an adopted child cannot be married to an adoptive parent, as long as the adoption subsists. Bigamy is not allowed according to Danish law, so a person cannot marry until an existing marriage or registered partnership is dissolved. Moreover, if a marriage or registered partnership has elapsed on grounds of death of one of the partners, a new marriage cannot be celebrated until the family assets and property have been divided"[125].

In Hungary, "men and women are entitled to marry in the same conditions and effects, irrespective of their gender. Two witnesses are needed, and if one of the spouses is under the age of 18, he/she needs permission from the Guardianship Authority. According to Article L of the Fundamental Law, "Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation." This means that the marriage can only take place between spouses of the opposite sex, and this rule is also expressed in the constitution. Moreover, strangely, the Fundamental Law also stresses that "family ties shall be based on marriage and/or the relationship between parents and children". Commentators criticized this rule, because it unnecessarily narrows down the concept of family, and excludes several forms of family relations like same-sex partnership, but also some more traditional forms like uncle-nephew relationships. Moreover, it mainly focuses on family as a "tool" for having children. The Constitutional Court struck down some related, lower level laws earlier which had

[124] See H. De Waele et al., National Report-Belgium, § 3.1.

[125] See S. Adamo, National Report-Denmark, § 3.1.

similar content, but were re-codified - this is the reason why the rule can be found in the Constitution itself [see Constitutional Court decision 43 of 2012. (XII. 20.]. Thus, an amendment of the Fundamental Law (the fourth amendment) narrowed down the earlier, general concept of family. Religious forms of marriage are not recognised by the state. Thus, marriage is concluded if a man and a woman together appear before the registrar in person and declare their intention to marry. Such a declaration cannot be made subject to a condition or time limit. If the spouses want to marry, the marriage cannot take place before 30 days have passed after filing the notification of their intent to the authority. Marriage shall be invalid if it takes place between relatives in direct lineage or siblings, a person and the descendant of his/her sibling, or between the adoptive parent and the adopted person during the existence of the adoption. The marriage of any person under guardianship invoking fully limited legal competency at the time of marriage is invalid. The marriage of a person under guardianship (not fully limited legal competency) is valid after six months following the termination or guardianship, with retroactive effect, if the spouse or any another person does not challenge the existence of marriage"[126].

In the Netherlands, "Book 1 Title 1.5 DCC regulates marriage rules. Article 1:30 DCC stipulates that a marriage can be concluded by two persons of a different or same gender. In order for a marriage - concluded by two Dutch nationals - to be valid, both prospective spouses need to explicitly give their consent to the marriage before the Registrar of Civil Status, pursuant to Article 1:67 DCC. With regard to religious ceremonies, Article 1:68 stipulates that no religious ceremonies may be concluded before the parties have shown to the foreman of the religious service that the marriage has been contracted before a Registrar of Civil Status. In addition, Article 1:49 (a) DCC regulates the certificate of legal capacity to marry for persons with Dutch nationality who intend to enter into a marriage outside the Netherlands. Paragraph 2 of that same provision states that this certificate will be issued to Dutch nationals who have their domicile in the Netherlands, by the Registrar of Civil Status of the municipality where that domicile is located"[127].

In Spain, "men and women are entitled to marry in the same conditions and effects, irrespective if the spouses are of the same or of different genders (Article 44 Civil Code). Non-emancipated minors and persons who are already joined in marriage are not able to marry (Art. 46). Particularly, direct line relatives by consanguinity or adoption, collateral relatives consanguinity up to third degree and persons sentenced as authors or accomplices in the spouse of either of them may not marry each other (unless exempted by court) (Art. 47). Any citizen may marry inside Spain before the Judge, Mayor or public officer, Judicial Secretary or Notary provided by the Spanish Civil Code or in accordance with the following religious forms (Article 49): Canonical, Evangelical, Islamic or Hebrew form but also other forms of religion with notorious consolidation. As leading case: see Judgement 198/2012 of the Spanish Constitutional Court, 6 November: From the point of view of marriage as an institutional guarantee, the option chosen by the legislator in this case cannot be reproached as being unconstitutional, within the margin of appreciation acknowledged in its favour by the Constitution. The option was not excluded by the constitutional founder and it may fall within the scope of Article 32 CE"[128].

[126] See T. D. Ziegler, National Report-Hungary, § 3.1.

[127] See B. Safradin, National Report-The Netherlands, § 3.1.

[128] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.1.

Case 3.2: Cross-border conclusion of marriage

Background: as previously mentioned, due to the differences between the many legal systems, a hypothetical cross-border civil right to marry may be difficult. But on the other hand, this cross-border civil right can produce the practice of matrimonial tourism in order to elude the requirements of the Law of a Member State applicable to its nationals or residents. This fact is particularly visible in the cases of marriage of persons of the same sex. In this context, it is very important to know the conflict of law rules concerning the conclusion of marriage by the authorities of your Member State.

3.2.1. Explanation and indication of leading/model cases concerning the conclusion of marriage to foreigners in your Member State.

-*Model Case 1:* Marriage between a national of your Member State and national of another Member State.
-*Model Case 2:* Marriage between spouses of a Member State other than your Member State.

Conclusion:

Many countries require that at least one of the spouses is either a national or a foreigner with legal residence in the country, although some countries consider marriage a fundamental right irrespective of the illegal residence of both spouses.

In Belgium, "under Belgian legislation, it is possible to conclude mixed marriages, i.e. marriage between future spouses of different nationality whereby (only) one of the spouses is Belgian and even a marriage between foreigners. In Belgium there is no international convention that applies to this matter, so the applicable rules to a mixed marriage will be settled by the CPIL. Article 46 CPIL designates that it is the national law of each of the spouses at the time of the marriage which determines the validity of the marriage, i.e. the qualities and conditions required. The connection with the respective laws of the spouses will operate in a distributive form, i.e. each spouse must comply with the requirements of his/her national law. Article 47 CPIL settles the formalities that govern the law of the marriage. In principle, it is the law of the state in whose territory the marriage is celebrated. In the same vein, article 48 specifies the effects of the marriage. These effects will be governed by a complex rule of connection with the situation of the couple. In any case, in practice Belgian law will be the law applicable to most of the spouses established in Belgium. The objective of the legislator was the integration of the couple in their current social environment, and their subjection to Belgian immigration laws. However, in the model cases proposed some prerequisites have to be met. The main and most important one is that at least one of the future spouses has a Belgian residence or Belgian nationality. It is required that one of the future spouses is a Belgian citizen at the time of the ceremony of the celebration of the marriage, or, that one of them has had his or her place of residence in Belgium for more than three months. However, the only form of marriage recognised in Belgium is civil marriage. A marriage celebrated in another form has no legal effects. In any case, the Officer of the civil status may not refuse to celebrate a marriage between foreigners on grounds of the mere fact that a foreigner is illegally present in the country. In this vein, as indicated above, the foreigner must satisfy the marriage conditions of his/her home country"[129].

[129] See H. De Waele et al., National Report-Belgium, § 3.2.1.

In Denmark, "in 2002, two additional requirements were added to the existing marriage conditions. Following these requirements, marriage in Denmark can only be contracted when each of the parts is either a Danish national or a foreigner with legal residence in the country. The regional state administration can grant an exemption in special circumstances, among these taking into consideration the foreigners' length of stay in the country"[130].

In Hungary, "concluding marriage for the Hungarian spouse is simple: the Hungarian party must prove his/her citizenship and the marriage can take place. If one or both parties have a citizenship different than Hungarian, he/she must bring a certificate from the foreign authority issued by the authorities in the country of his/her citizenship that he/she may conclude a marriage (has the capacity to marry) and must also prove his/her family status. On the other hand, in a highly problematic way, Hungarian authorities do not provide Hungarians with such status certificates, since they cannot prove the Hungarian person did not marry abroad. Consequently, they only issue a statement that the person is not married in Hungary"[131].

In the Netherlands, "since 1 January 2012, Book 10 Chapter 3 of the Dutch Civil Code regulates the international private law rules regarding (foreign) marriages. In the *model case 1:* a marriage between a national of the Netherlands and a national of another State can be concluded in the Netherlands. For the non-Dutch partner, a declaration is necessary. The Municipality in question can emit this declaration. The immigration and naturalisation service (IND) checks the residency status of the non-Dutch national and the Alien police (*Vreemdelingenpolitie*) checks whether the marriage is a marriage of convenience, i.e. a marriage for the sole reason to obtain a permanent residency for the non-Dutch national. In the *model case 2:* Article 10:28 DCC regulates the recognition of the concluding of a marriage in the Netherlands. Article 10:28(a) stipulates that a marriage is contracted if each of the prospective spouses meets the requirements for entering into a marriage set by Dutch law and one of them is exclusively or also of Dutch nationality or has his/her habitual residence in the Netherlands. Subparagraph b states that a marriage can also be contracted in the Netherlands if each of the prospective spouses meets the requirements for entering into a marriage of the State of his/her nationality"[132].

In Spain, "Spanish Civil Code provides the same rules in favour of EU citizens as in favour of third country nationals. Firstly, the law of the nationality of the spouses governs the matrimonial capacity (Art. 9.1), although the foreign law must respect the Spanish public policy and the fundamental rights provided by the Spanish Constitution. Secondly, the Spanish law governs the requirements of the consent of the spouses, due to the fact that a Spanish authority concludes the marriage. Concerning the form of the conclusion, two situations shall be distinguished: A) If at least one of the spouses is a Spaniard, the Spanish religious or civil forms shall be applied. B) If both spouses are foreigners, the marriage may be concluded in Spain according to the civil or religious form provided for Spaniards, or in compliance with the form set forth in the personal law applicable to either of them (Art. 50)"[133].

3.2.2. Can the Consular Officers from your Member State conclude marriage? If so, what are the requirements?

[130] See S. Adamo, National Report-Denmark, § 3.2.1.
[131] See T. D. Ziegler, National Report-Hungary, § 3.2.1.
[132] See B. Safradin, National Report-The Netherlands, § 3.2.1.
[133] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.2.1.

-*Model Case*: the Consular Officer of your Member State concludes a marriage in another Member State.

Conclusion:

In countries which admit consular marriage, the Consular Officers may conclude marriage provided that, at least, one spouse is from the State of the Officer, neither spouse is a national of the receiving State, and there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular office. However, some countries do not admit this kind of marriage or admit it in exceptional cases.

In Belgium, "the only person who can celebrate marriages in a Belgian consulate abroad is the head of the consular post. The head of the consular post is able to celebrate a marriage if one of the future spouses has the Belgian nationality, as stipulated in article 18 of the Consular Code of 21 December 2013. The head has this competence if he/she has been authorised to this purpose by the Minister, as indicated in article 20 of the Consular Code. The main requirement for a marriage celebrated by the head of a consular post is laid down in article 21 of the abovementioned Code. For the head of a consular post to be able to celebrate a marriage, three conditions apply: i) to be placed in the consular district of the consular post where the Belgians and non-Belgians have their habitual residence; ii) compliance with the legislation in force in Belgium in the field of notaries; and iii) respect for the international rules concerned binding on Belgium. Nevertheless, acts which do not fulfil all the formal requirements prescribed by Belgian laws, only because of their being established abroad, are still valid"[134].

In Denmark, "the Ministry of Foreign Affairs informs that there is not a general access to conclude a marriage in a Danish diplomatic or consular representation abroad. This follows from the fact that concluding marriages is not one of the typical tasks of Danish Foreign services. Danes living or travelling abroad are directed to make contact with the competent authorities in the State where they intend to get married in order to clear all the administrative formalities. The few instances where a marriage is concluded in a Danish consular office have been in the case of foreign trade sailors, who are prevented from getting married in Denmark because of lasting absence from the country, and only in those countries where it is not possible to conclude a marriage in the local marriage authorities, whether a church or a civil marriage office"[135].

In Hungary, "officers of consulates do not have such rights, they may not (cannot) conclude marriages. Only the process of recognition of foreign marriage can be started at the consulate"[136].

In the Netherlands, "Article 10:30 DCC, regulating Dutch International Private Law on marriages, stipulates that a marriage concluded in the Netherlands is only valid if it has been celebrated by the Registrar of Civil Status (*Ambtenaar van de Burgerlijke Stand*) and with due observance of Dutch law. That same provision stipulates that foreign diplomatic and consular civil servants may participate in

[134] See H. De Waele et al., National Report-Belgium, § 3.2.2.
[135] See S. Adamo, National Report-Denmark, § 3.2.2.
[136] See T. D. Ziegler, National Report-Hungary, § 3.2.2.

the contracting of a marriage in accordance with the requirements of the law of the State they represent, provided that neither of the involved spouses is of Dutch nationality"[137].

In Spain, "concerning marriage concluded by Spanish Consular Officers located in other Member States, the Consular Officers may conclude marriage provided that, at least, one spouse is a Spaniard, neither spouse is a national of the receiving State, and there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular office"[138].

3.2.3. Has your Member State adopted any legal measures to prevent the conclusion of marriage by its authorities when this can be considered matrimonial tourism? If so, are they also applied by Consular Officers?

-Model Case: marriage of spouses of the same sex and the origin country of one of them does not admit marriage of the same sex.

Conclusion:

The prevention of matrimonial tourism is reached by requiring at least one of the partners (or both in some cases) entering into a marriage must be a permanent resident or domiciled or a national of the State. Exceptionally, non-prevention of matrimonial tourism has been considered as a way of tacit protest against the prohibition of gay marriage in some countries.

In Belgium, "as indicated in previous answers, Belgian law allows for the marriage between two foreigners, and this includes gay marriages. Under article 46.2 CPIL the application of a law pursuant to the nationality of the spouses will be discarded in the event this provision prohibits same-sex marriage. This is done when one of them is a national of or has his/her habitual residence in the territory of a state in which same-sex marriages are allowed. Consequently, Belgian law recognises same-sex marriage of two foreigners as a result of the application of articles 44 and 46 CPIL. In this regard, article 44 provides that the marriage can take place when one of the spouses is Belgian, is domiciled in Belgium, or after three months of habitual residence in Belgium when the marriage is planned to be celebrated. In this sense, article 46 states that a same-sex marriage may be entered into in Belgium when one of the spouses is Belgian or has had his/her regular residency in Belgium for three or more months. Diplomatic and consular agents to whom the functions of the registrar of civil status have been transferred are competent to celebrate marriages, as long as one (at least) of the future spouses has Belgian nationality. On the other hand, there are no conditions attached with regard to the nationality of the other (future) spouse"[139].

Denmark "has not adopted legal measures to prevent the conclusion of marriage by its authorities in cases of so-called matrimonial tourism. On the contrary, the country has promoted its culture of openness towards gay marriages by allowing three Russian couples to marry in Denmark, as a form of tacit protest against the Russian policy of discrimination of homosexuals"[140].

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[137] See B. Safradin, National Report-The Netherlands, § 3.2.2.

[138] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.2.2.

[139] See H. De Waele et al., National Report-Belgium, § 3.2.3.

[140] See S. Adamo, National Report-Denmark, § 3.2.3.

In Hungary, "the Criminal Code states in Section 355 on abuse of family ties that "any person over the age of eighteen who enters into a family relationship for financial gain for the sole purpose of obtaining a document verifying the right of residence, or consents to a statement of paternity of full effect is guilty of a misdemeanour punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offence". However, no specific obligation exists which would force authorities to check the background of marriages, and they may not check the motivation of parties. In case of a suspicious marriage, the Office of Nationality and Immigration checks the background of marriage by asking the persons involved"[141].

In the Netherlands, "both opposite and same-sex couples can get married, conclude a registered partnership, create a legally binding *de facto* partnership, or cohabit without any legal status. In 2001, the Netherlands was the first country in the world to legalise same-sex marriage. In most cases, the procedures and ceremonies are identical for both heterosexual and same-sex couples. However, pursuant to Article 1:43 DCC, at least one of the partners entering into a marriage must be a permanent resident or a national of the Netherlands. It is not possible for two non-permanent residents, i.e. non-Dutch citizens, to get married in the Netherlands. In other words, two Italians on holiday in the Netherlands cannot get married in the Netherlands. Hence, the Dutch legislative model prevents access to marriage in order to avoid matrimonial tourism. In addition, Article 10:31 DCC regulates the recognition of the contracting of a marriage of foreigners and states that a marriage that is contracted outside the Netherlands and that is valid under the law of the State where it took place or that has become valid afterwards according to the law of that State, is recognised in the Netherlands as a valid marriage (*lex loci celebrationis* principle). Hence, if same-sex marriage is not recognised in the home State, the Dutch rules on private international law hinder matrimonial tourism by preventing non-Dutch same-sex couples who merely come to the Netherlands to circumvent their home State rules from concluding a marriage under Dutch law"[142].

In Spain, "from the point of view of the Spanish Law, Resolución-Circular of the General Directorate of the Registries and Notaries of 29 July 2005 (*BOE* n. 188, 8 August 2005) is the leading case. The admission of marriage between persons of the same sex since 2005 has increased the cases in which foreign citizens wish to marry in Spain, due to the fact that their countries of origin do not admit this marriage. In order to prevent "matrimonial tourism", the Resolution requires that the Spanish authority only concludes the marriage between two foreign persons of the same sex when both of them reside in Spain. It is not enough that only one of them resides in Spain. On the other hand, this Resolution lays down that Spanish Consular Officers cannot conclude marriage between persons of the same sex, if this marriage is contrary to the rules of the State where the officer is established [Art. 5.f) Vienna Convention on Consular Relations]. However, the Consular Officer could admit the consent of the spouses before a Spanish authority in Spain, acting by delegation (Art. 57 Civil Code)"[143].

Case 3.3: Recognition of marriages concluded abroad

Background: in the previous case, we analysed the balance between a cross-border civil right to marry and prevention of matrimonial tourism (abuse of this right) from the point of view of the authorities of

[141] See T. D. Ziegler, National Report-Hungary, § 3.2.3.
[142] See B. Safradin, National Report-The Netherlands, § 3.2.3.
[143] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.2.3.

marriage conclusion. But, obviously, if the marriage is finally concluded, other States can refuse the recognition of that marriage balancing this civil right to marry and the prevention of matrimonial tourism or even its public policy.

3.3.1. Conditions of the recognition in your Member State of marriages concluded by authorities of other Member States or by religious form:

-*Model Case*: marriage between a national of your Member State and a foreign spouse, concluded by the authorities of another Member State or by religious form within the territory of another Member State.

Conclusion:

The general rules are that the marriage is recognised if it was concluded in accordance with the law of the State where the marriage was celebrated, unless the marriage violates fundamental principles of *ordre public.* No distinctions are established between civil and religious forms except in the case of Spain regarding canonical marriage (this marriage is valid although it is not permitted in the State of conclusion).

Belgium "has not ratified the Hague Convention of 14 March 1978 on Celebration and Recognition of Marriages. The CPIL, however, contains specific provisions aimed at the recognition of foreign authentic instruments concerning civil status. Belgian law does not make a distinction between civil and religious forms. Since marriage is not a judicial decision but a legal act, its recognition is conditioned on its validity, which must be assessed in the light of the applicable law according to the Belgian rules of conflict of laws. Recognition of marriages celebrated abroad is automatically granted, i.e., without the necessity to introduce a particular procedure to have this effect. Article 48 CC allows any Belgian to demand, upon his/her return, the transcription of an act of civil status carried out abroad. In any case, the officer of civil status will verify if the decision or act satisfies the conditions imposed by the law to be recognised, in accordance with article 31 CPIL. This verification is carried out with the possibility of judicial review. Like any foreign authentic instrument, the recognition of a marriage presupposes that the act meets all necessary conditions for its authenticity flowing from the law of the state in which it has been established. However, article 24 CPIL allows a judge to accept equivalent documents if the parties cannot produce the original foreign documents"[144].

In Denmark, "recognition of a marriage between a Danish national and a foreign spouse concluded abroad will normally take place if the following conditions are verified. The marriage ceremony has been celebrated by an authority or person authorised to conduct a marriage in the country where the marriage took place. The marriage ceremony fulfils the formal requirements in the country where the marriage took place. The marriage ceremony does not contradict fundamental Danish legal principles (*ordre public*). This entails, that especially two requirements must be met: both parts must be present at the marriage ceremony and both parts must be over 15 years of age at the time of the marriage. The marriage ceremony must be valid in the country where the marriage took

[144] See H. De Waele et al., National Report-Belgium, § 3.3.1.

place. Furthermore, the Ministry of Children and Social Affairs has issued a set of guidelines for the recognition of the validity of foreign marriage documents"[145].

In Hungary, "the recognition (or, to be more precise, registration) of such marriages can either take place at the Hungarian consulate in a foreign country or in Hungary. In both cases, several documents must be submitted (birth certificate with approved translation, the foreign documents certifying the marriage (must include the mother's maiden name), a document certifying that the spouse has the right to marry the person concerned, copy of personal ID or passport, certification of the residence of the person concerned (official translations needed). Family status must also be certified by a public document. Regarding all the public documents issued by the foreign authority, the general rules of public documents must be applied"[146].

In the Netherlands, "on 1 January 2012, Book 10 of the Dutch Civil code entered into force, which regulates Dutch Private international Law rules. Pursuant to Article 10:31 DCC regulating the recognition of foreign marriages, a marriage concluded outside the Netherlands will be recognised under Dutch private international law when this marriage is valid under the law of the land where the marriage has been celebrated (principle of *lex loci celebrationis*) (Article 10:31(1) DCC). A marriage that is contracted outside the Netherlands before a diplomatic or consular civil servant in accordance with the requirements of the law of the State that is represented by this civil servant, is recognised in the Netherlands as a valid marriage, unless it was illegal to contract such a marriage in the State where the marriage took place (Article 10:31(2) DCC). In both situations the international private law rules should be taken into account"[147].

In Spain, "in relation with the marriage concluded by authorities of Member States other than Spain, the Spanish Law distinguishes between civil form and religious form. Concerning civil form, Spanish Law recognises the marriage concluded by Consular Officers, provided that at least one of the parties is a national of the sending State, that neither of them is a national of the receiving State and that there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular officer (Art. 13 European Convention on Consular Functions of 1967). On the other hand, the religious form receives a different treatment. In principle, the religious marriage concluded abroad will be recognised in Spain if the marriage is admitted in the State of conclusion. Nevertheless, and due to the Agreement between the Holy See and Spain of 1979, the canonical marriage will be recognised in Spain, irrespective of its consideration in the State of conclusion"[148].

3.3.2. CASES OF PUBLIC POLICY WHICH IMPLY THE REFUSAL OF RECOGNITION OF MARRIAGES.

-*Model Case:* a polygamous marriage concluded abroad between a third country national and an EU citizen.

Conclusion:

Polygamous marriage under personal law is not admitted due to reasons of public policy. But some countries admit the attenuation of the public policy in order to protect the family or to obtain

[145] See S. Adamo, National Report-Denmark, § 3.3.1.
[146] See T. D. Ziegler, National Report-Hungary, § 3.3.1.
[147] See B. Safradin, National Report-The Netherlands, § 3.3.1.
[148] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.3.1.

maintenance or inheritance or even widowhood pensions for successive spouses. Forced marriages are not recognised unlike "arranged marriages" in which both parties fully and freely consent to the marriage proposed by the family leader.

In Belgium, "the public policy exception is applied under Belgian law either to prevent the application of foreign law in Belgium in order to recognise a marriage or to prohibit a celebration in Belgium of a marriage that would (only) be admissible under the national law of the spouses or the law of the place of celebration. In this vein, for example, a foreign polygamous person cannot invoke his national law to conclude on Belgian territory a second union before the dissolution of the first one. The public policy exception also applies in respect of a polygamous union celebrated by a foreign consular or diplomatic agent in Belgium. However, the application of the exception should be based on a double criterion. First of all, the nature of the effects postulated, and second, the connection with the intensity of the situation with Belgian law. There is an exception for cases where the application of the foreign law contradicts a principle of international law. Consequently, a polygamous union validly concluded abroad may still produce certain effects in Belgium, even when the parties do not rely on their personal status to contract a second marriage, without the dissolution of the first one. It is has to be pointed out that monogamy is a fundamental value of the Belgian legal system. Thus, it is unthinkable to celebrate a marriage of a person who is still in the bonds of a previous marriage, whatever his/her nationality. Any divergence pursuant to foreign law is ruled out by the international public policy exception. Yet, this exception is not as severe, as has already been mentioned, when it comes to appreciating the validity of a marriage celebrated abroad. Polygamous marriages have given rise to the theory of "the attenuated effects of the international public order". According to this theory, the reaction to provision of foreign law contrary to public order is different if it impedes the acquisition of a right in Belgium, or if it does not allow the effects of a law validly acquired abroad in Belgian territory. On the basis of this theory, case law has allowed for an action for reparation of harm suffered by a wife after the accidental death of her polygamous husband, or a demand filed against a polygamous spouse for a contribution in the marriage expenses. Judges have also recognised the effects of polygamous marriage filiation"[149].

In Denmark, "polygamous marriages are not recognised in Danish law. Bigamous or polygamous marriages go against fundamental Danish legal principles or *ordre public*, as stated by the Formation and Dissolution of Marriage Act, section 9: 'The person who has previously been married or in a registered partnership cannot conclude another marriage as long as the previous marriage or registered partnership exists'. Bigamy/polygamy is punishable according to the Danish Criminal Code with a sentence of up to three years in prison, or six years if the other part had not known about the previous marriage or registered partnership. In 2008 there was a notorious case of an Iraqi interpreter who wanted his bigamous marriage recognised in Denmark. He had been acting as an interpreter for four years for the Danish troops in Basra, Iraq and was given asylum in Denmark, along with his two wives and three children, because his work had endangered their lives in his home country. However, he did not accept to be divorced from one of his two wives, as the Department of Family Affairs (*Familiestyrelsen*) had requested after their arrival in the country. The translator risked a court case for infringement of Danish family law and eventually chose to move back to Iraq with his family"[150].

[149] See H. De Waele et al., National Report-Belgium, § 3.3.2.

[150] See S. Adamo, National Report-Denmark, § 3.3.2.

In Hungary, "polygamy would possibly hurt Hungarian public order and as such, the recognition of such marriages would be refused. Regarding Hungarian citizens and those residing in Hungary, polygamy is even penalized by the Criminal code. Section 214 says that ''any person who enters into a new marriage while engaged in a previous marriage, or who enters into marriage with a married person is guilty of a felony punishable by imprisonment not exceeding three years". Consequently, avoiding polygamy is a notion of public policy in Hungarian law. A very similar situation would occur regarding forced marriages. Even though we do not have case law yet, we could presume recognition of such marriages would also hurt public policy"[151].

In the Netherlands, "according to Article 1:33 DCC, Dutch law requires that a person may only be united in a marriage with *one* other person at the same time. As of 5 December 2015 a new Act entered into force by which the conditions to contract a foreign marriage in the Netherlands have become more stringent. The Dutch Ministry of Security and Justice aims to increase marriage freedom by means of limiting forced marriages and wants to limit the recognition of some types of foreign marriages. It will hereby be easier to annul forced marriages and there will be a ban on marriages concluded by children under the age of 18. Polygamy is forbidden in the Netherlands. In its judgement of July 1, 1993, the Dutch Supreme Court confirmed this and stated that the substantive prohibition of polygamy in the Netherlands is a principle of public policy. In some situations, foreign polygamous marriages can be recognised in the Netherlands. Recognition of a foreign polygamous marriage does not involve the consequence that someone can receive a residence permit for his multiple wives in the Netherlands. Only one spouse can obtain a residence permit. The possibility of recognition of polygamous marriages contracted abroad is further reduced by this new Act of 5 December. If a non-national concludes a polygamous marriage abroad - after his application for a residence permit - this marriage will not be recognised on moving to the Netherlands. Moreover, that marriage does not justify admission of the spouse. Once the non-national has settled in the Netherlands, he must abide to the Dutch laws and regulations. If he later travels abroad to enter into a polygamous marriage there, then this does not lead to recognition in the Netherlands"[152].

In Spain, "although matrimonial capacity is governed by the national law of the spouses (art. 9.1 Civil Code), polygamous marriage under personal law is not admitted for reasons of public policy, in particular violation of the full legal equality between men and women. But it is also true that the attenuation of the public policy is possible in order to protect the family (Article 39) or to obtain maintenance or inheritance or even widowhood pensions for successive spouses [Ress . DGRN of March 8, 1995 and (2nd) of 14 May 2001; Social Court of La Coruña of 13 July 1998, Social Court of Barcelona of 10 of October of 2001, dissenting opinion in Superior Court of Justice of Catalunya of 30 July of 2003]. It is also admitted "potential polygamy", in other words, the first marriage of both spouses (Res. DGRN of April 23, 1998). Finally, forced marriages, in which one or both parties are married without his or her consent or against his or her will, are not recognized unlike "arranged marriages", where both parties fully and freely consent to the marriage proposed by the family leader"[153].

Case 3.4: Acquisition of nationality of the spouse

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[151] See T. D. Ziegler, National Report-Hungary, § 3.3.2.

[152] See B. Safradin, National Report-The Netherlands, § 3.3.2.

[153] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.3.2.

Background: Marriage is one of the life events that has legal consequences in relation with the acquisition of the nationality of a Member State and, therefore, the acquisition of EU Citizenship. Explanation and indication of leading/model cases concerning the acquisition of the nationality of a Member State by marriage.

3.4.1. WHAT ARE THE GENERAL REQUIREMENTS FOR ACQUISITION OF NATIONALITY OF THE SPOUSE?

-*Model Case*: a foreigner is married to a national of your Member State.

Conclusion:

The requirements for acquisition of nationality of the spouse are very different (from 1 year to 8 years of residence, 3 years being the main rule). Exceptionally, the previous common residence can count as marriage.

In Belgium, "the marriage of a foreigner with a Belgian national does not grant the foreigner Belgian nationality. There is a possibility that the foreigner acquires Belgian nationality, but this is not an obligation. The transcription of the marriage in the Belgian registries does not grant the foreigner Belgian nationality either, as established in article 48 CC. In order to acquire Belgian nationality, the foreigner must submit a request to the local register of births, marriages and deaths. In order to make the request to obtain Belgian nationality, it is required that the spouses are living together. Moreover, the time of residence in Belgium determines the residence rights of the foreigner. Cohabitation and residence in Belgium is thus required to obtain Belgian nationality"[154].

In Denmark, "the Naturalisation Circular is the framework providing the general requirements for acquisition of Danish nationality, in accordance with the Citizenship Consolidation Act. As regards applicants living in a marriage with a Danish national, they can apply for naturalisation after 6 years of continued stay in the country, when the marriage is still valid and the spouse has been a Danish national for at least 3 years. If the marriage's duration is 2 years, the requirement will be 7 years of residence, and for a 1 year marriage the residence requirement will be 8 years of residence. If the couple has lived together without being married up to one year, the period can count as marriage. If the married couple has different addresses, or if in any other way it is doubtful whether the couple lives together, the Parliamentary Naturalisation Committee (*Indfødsretsudvalg*) will have to consider the application after the administrative procedure in the Ministry of Justice"[155].

In Hungary, "marriage in itself does not result in the spouse receiving citizenship automatically. However, according to Section 4 (2) a) of Act LV of 1993 on citizenship, after three years of marriage the non-Hungarian citizen spouse may ask for citizenship under preferential terms. The conditions to reach this situation are the following: (i) the person has been lawfully married to a Hungarian citizen for at least three years (must also be married at the time of application), or such a marriage was terminated by the death of his or spouse, (ii) the person had been residing continuously for at least three years prior to the submission of the application in Hungary or the person's minor child is a Hungarian citizen, (iii) the applicant does not have a criminal record according to Hungarian law and no criminal proceedings are in progress against him or her before a Hungarian court, (iv) the applicant's livelihood

[154] See H. De Waele et al., National Report-Belgium, § 3.4.1.

[155] See S. Adamo, National Report-Denmark, § 3.4.1.

and residence are assured in Hungary, (v) receiving the citizenship does not harm the interests of Hungary, (vi) the applicant provides proof that he/she passed the examination regarding basic constitutional issues (in Hungarian) or provides proof that he/she is exempted from the examination. There is another option, if (i) the spouse has been married to a Hungarian citizen for over ten years (the Hungarian spouse must be a citizen at the time of application), or married for 5 years and have common child/children (the necessity of Hungarian residence is not mentioned in the law) (ii) can prove his/her language knowledge (iii) has no criminal record (same as above) (iv) receiving of the citizenship does not hurt the interests of Hungary"[156].

In the Netherlands, "if you are married to a Dutch national, you can apply for naturalisation after three years of marriage. The same applies to registered partnerships after three years of uninterrupted cohabitation. The municipality in question will check the information you have given and will forward your application to the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst,* IND) with a favourable or unfavourable recommendation by the mayor. The IND will afterwards determine whether or not you are eligible for Dutch nationality"[157].

In Spain, "Spanish Civil Code lays down that a foreigner may obtain Spanish Nationality after one year of residence in Spain and one year of marriage to a Spaniard. Notice that the requirement of one year is double: one year of residence and one year of marriage"[158].

3.4.2. IF YOUR NATIONAL LEGISLATION REQUIRES A PERIOD OF RESIDENCE OF THE SPOUSE, MUST THE RESIDENCE MEET SOME SPECIFIC REQUIREMENTS?

-*Model Case 1:* a third national country person who is not a legal resident has been married to a national of your Member State for the required period and has illegally resided in your Member State for one year.

-*Model Case 2:* a foreigner has been married to a national of your Member State for the legal period and has resided in your Member State for the legal period, but, at the moment of the application, is residing in another State.

Conclusion:

The residence must be legal, in general terms, at the moment of application. Some exceptions are observed concerning a Danish spouse posted abroad to work for Danish interests, the application can be admitted if the residence requirement of 6 years has been met.

In Belgium, "as mentioned in the previous answer, a residence period is required in order to obtain the nationality. However, in Belgium there exists a naturalisation procedure in order to acquire the Belgian nationality when a foreigner does not have the legal right to it. This procedure is regulated in articles 18 to 21 of the Belgian Code of Nationality. The naturalisation procedure is a genuine way to acquire nationality. The particularity of a naturalisation procedure is that the foreigner applying does not have the right to obtain Belgian nationality, but the House of the Representatives may grant him/her Belgian nationality by way of 'concession'. This concession can be made on various grounds, the

[156] See T. D. Ziegler, National Report-Hungary, § 3.4.1.
[157] See B. Safradin, National Report-The Netherlands, § 3.4.1.
[158] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.4.1.

most common being: marriage to a Belgian, legal residence or filiation with a child born in Belgium. To be able to apply for this concession, the foreigner must have had his/her main place of residence in the Belgian territory for at least 3 years. In the case of the main place of residence being abroad, the application for the naturalisation procedure must be submitted to the Belgian Embassy or Consulate of the place of living and these institutions will forward the application to the House of Representatives. In order to have the application approved if living in another country, a genuine link with Belgium during a required period must be demonstrated"[159].

In Denmark, "concerning case 1: the requirements for naturalisation in Danish law do not admit periods of illegal residence as counting towards fulfilling the residence requirement. Regarding case 2: the general requirements for naturalisation state that the applicant must reside in Denmark at the time of the application in order to be naturalised. However, if an applicant is residing abroad because their Danish spouse is posted abroad to work for Danish interests, the application can be admitted if the residence requirement of 6 years has been met"[160].

In Hungary, residence must be legal, otherwise no special rule exists[161].

In the Netherlands, "the received information refers to residence and not nationality. Several requirements should be fulfilled in the Netherlands with regard to the period of residence of the foreign spouse"[162].

In Spain, "the residence must be ongoing and immediately prior to the application. Furthermore, in relation with third country nationals, the residence must be legal"[163].

3.4.3. DOES THE NATIONAL LEGISLATION CONTAIN PROVISIONS IN CASES OF SEPARATION OR DIVORCE OF THE SPOUSES?

-*Model Case*: a foreigner has habitual residence in your Member State for the legal required period, which is ongoing and immediately prior to the application. He has been married to a national for longer than the required period, but at the moment of the application, they are legally separated.

Conclusion:

At the time of the application, the applicant cannot be divorced or *de facto* or legally separated for cases of preferential acquisition of nationality. They will have to satisfy the main rule regarding the residence requirement.

In Belgium, "divorce, like marriage, has no effect on the acquisition of the nationality by a foreigner. If the foreigner meets the necessary prerequisites to acquire the Belgian nationality, either by

[159] See H. De Waele et al., National Report-Belgium, § 3.4.2.
[160] See S. Adamo, National Report-Denmark, § 3.4.2.
[161] See T. D. Ziegler, National Report-Hungary, § 3.4.2.
[162] See B. Safradin, National Report-The Netherlands, § 3.4.2.
[163] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.4.2.

a declaration procedure or by a naturalisation procedure at the moment of the application, he/she will be granted Belgian nationality"[164].

In Denmark, "the national legislation does not provide explicit provisions in cases of separation or divorce of the spouses. However, it is possible to conclude by the letter of the law of the other provisions, that if an applicant for naturalisation does not live in a married relationship with a Danish national, they will have to satisfy the main rule regarding the residence requirement, i.e. 9 years of continued residence in the country, without significant periods of absence (i.e. periods of absence longer than one year, or two years on grounds of study or work for a Danish company abroad)"[165].

In Hungary, "the law does not mention expressis verbis separation or divorce. Divorce itself does not have an effect on citizenship received earlier. If they are separated at the time of application, the person cannot apply for citizenship in the preferential procedures as explained above"[166].

In the Netherlands, "the received information refers to residence and not nationality. In the case that someone has a residence permit resulting from a marriage or relationship with a Dutch citizen and the marriage or the relationship ends after a certain period, it has to be assessed whether they are eligible for another residence. For example for residence on the grounds of "humanitarian not temporarily" (*humanitair niet tijdelijk*). In order to be eligible for a continued residence, the applicant must have been in a relationship or marriage with his/her Dutch spouse for at least five years and in those five years the partners need to have lived together. The date which is determinative is that on which both partners have decided to live separately. Since 2010, the requirements have been modified and a civic integration exam is a necessary requirement. However, different rules are applicable to different categories of people, e.g. for Turkish people and EU citizens and their family members different rules are applicable"[167].

In Spain, at the time of application, the applicant cannot be divorced or *de facto* or legally separated[168].

Case 3.5: Spouse reunification

Background: despite Council Directive 2003/86/EC of 22 September 2003, in relation with third countries national-sponsors and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, in relation with EU citizens sponsors, some aspects of family reunification have not harmonised or can be regulated by the Member States in different ways [for more details see Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification (COM/2008/0610 final) and Communication from the Commission to the

[164] See H. De Waele et al., National Report-Belgium, § 3.4.3.
[165] See S. Adamo, National Report-Denmark, § 3.4.3.
[166] See T. D. Ziegler, National Report-Hungary, § 3.4.3.
[167] See B. Safradin, National Report-The Netherlands, § 3.4.3.
[168] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.4.3.

European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members (COM/2009/0313 final)].*

3.5.1. CAN THE SPOUSE BE REUNIFIED UNDER COUNCIL DIRECTIVE 2003/86/EC AND DIRECTIVE 2004/38/EC ALTHOUGH THE MARRIAGE IS NOT RECOGNISED IN YOUR MEMBER STATE? IF NECESSARY, DISTINGUISH BETWEEN THE PARTICULAR CASE OF A POLYGAMOUS MARRIAGE (WHICH IS HARMONISED IN RELATION WITH DIRECTIVE 2003/86 BUT NOT IN RELATION WITH DIRECTIVE 2004/38/EC) AND OTHER CASES WITHOUT ANY HARMONISATION (FOR INSTANCE, PERSONS OF THE SAME SEX, "FORCED MARRIAGE"…).

-*Model Case*: application for reunification of spouse, although the marriage cannot be recognised in your Member State.

Conclusion:

In general terms, the application for reunification requires the previous recognition of the marriage. Forced marriages and polygamous marriages are not considered valid marriages under public policy grounds. Thus, the possibility of family reunification is refused. Some theoretical exceptions can be observed in Belgium where it would be possible to reunify the family of a polygamous person. The treatment of forced marriages is not equal. In any case, Denmark does not apply the EU Directive.

In Belgium, "according to article 147 of CC a person cannot contract marriage if the previous marriage has not been annulled or dissolved through a divorce or a death of one of the wedded partners. However, bigamy or polygamy situations are frequently found in foreigners' marriages. Belgian international public order resists the marriage of a foreigner in Belgium if the previous marriage is not annulled, even in the case that the national law of the foreigner would tolerate or allow the marriage. In any case, a second marriage duly concluded abroad in a state that admits polygamy or bigamy will be recognised in Belgium and will give a status to all the wives, especially in terms of social security and inheritance law. Thus, the Belgian international order is not opposed to the recognition in Belgium of (all) effects of a marriage duly celebrated abroad (by a person already engaged in a prior marriage/s at the moment of the celebration), in accordance with the national law of the spouses. With this in mind, in theory it will be possible to reunify in Belgium the family of a polygamous person. Assuming that the polygamous person has the right to establish himself/herself in the Belgian territory for an unlimited period of time and he/she complies with the legal conditions required to the reunification of his/her family, the members of the family wishing to use the right to reunification have to meet the conditions established in article 10.4 of the Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners. This law was amended by the law of 15 September 2006. This article indicates that there is a right to reunification of the family members of the foreigner admitted or authorised for at least 12 months or indefinitely, to stay in Belgian territory, for at least 12 months to settle. This period of 12 months will not be applicable if the marital relationship or the registered partnership existed before the arrival in Belgium, or if the family member and the foreigner have a common minor child, or in the case of family members of a foreigner recognised as a refugee or granted the right of subsidiary protection. In any event, article 10.5 of the abovementioned Law, indicating the

* Take into account that this question is formulated in a different style and short answers are appropriate due to the wide harmonisation of the EU Law.

conditions that the spouses need to meet in order to be reunified in Belgium, specifies that the person may not have a lasting and stable relationship with another person"[169].

In Denmark, "following its opt-out on Justice and Home Affairs, Denmark is not bound by Directive 2003/86/EC on the right to family reunification. As stated in the Preamble to the Directive, point 18: 'In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive, and is not bound by it or subject to its application.' Not taking into consideration the Directive, the Danish legislation on family reunification is very strict and the procedures are often long-lasting and convoluted. Forced marriages and polygamous marriages are not considered valid marriages according to the Danish legal system, thus also impacting the possibility of family reunification"[170].

In Hungary, "a Hungarian person cannot conclude polygamous marriage legally (it is a crime, even if committed abroad). This means that in this case, the second wife may not unite with her Hungarian spouse. Otherwise, Section 19 (6) of Act II. of 2007 on the entry and right of residence of third-country nationals says that the spouse in a polygamous marriage may not ask for reunification if another spouse has already received permission to stay in the country. Same sex marriages are not recognised as marriages in Hungary. However, it is possible that such a relationship would be recognised as a registered partnership and family unification would be available for them. The recognition of forced marriages depends on the general rules: in the case of a Hungarian citizen and a foreign citizen, as a general rule, a marriage is deemed to be valid if it is valid according to the (personal) laws (in most cases, the law of citizenship) of both parties (i.e. according to both the Hungarian and foreign law). According to Hungarian law, a forced marriage is not valid, since the parties' consent is missing. Even though it is not expressis verbis mentioned in the text, there is a high chance in the case of forced marriages that the court would use the same approach if both spouses were third country nationals as well. There were a few cases in which refugees asked for refugee status partly because they were fleeing a forced marriage"[171].

In the Netherlands, "even though there is no harmonisation of same-sex marriage recognition in the EU, the Netherlands has recognised same-sex marriages since 2001, and hence recognition of validly concluded foreign same-sex marriages would not be problematic. The rules under article 10:31 DCC of Dutch International Private Law are applicable in this situation and generally resemble the *lex loci celebrationis* principle, i.e. a marriage that is concluded outside the Netherlands and that is valid under the law of the State where it took place or that has later become valid according to the law of that State, is recognised as a valid marriage in the Netherlands. On the other hand, the conclusion of a polygamous marriage is prohibited under the Dutch legal framework. According to article 1:30 (1) DCC, a marriage can only be concluded by two persons of different or of the same-sex, while art. 1:33 DCC stipulates that a person may only be joined simultaneously in marriage with one other person. Consequently, these two provisions contain the prohibition of polygamy in the Netherlands. Moreover, criminal law also punishes entering into a polygamous marriage under article 23 (7) of the Dutch Criminal Code, persons that in the Netherlands deliberately enter into a marriage of more than two persons are punishable and can face imprisonment or a fine. Regarding the recognition of foreign

[169] See H. De Waele et al., National Report-Belgium, § 3.5.1.
[170] See S. Adamo, National Report-Denmark, § 3.5.1.
[171] See T. D. Ziegler, National Report-Hungary, § 3.5.1.

polygamous marriages, the rules of Dutch international private law need to be consulted. Foreign marriages can be eligible for recognition in the Netherlands if such marriages are valid under the law of the State where they took place or if that marriage has later become valid according to the law of that State (specified in Article 10:31 DCC). In the context of polygamy, which is prohibited in the Netherlands, the new Act of 5 December 2015 has made the conditions to recognise foreign polygamous marriages more stringent. Recognition of a foreign polygamous marriage does not involve the consequence that someone can receive a residence permit for his multiple wives in the Netherlands. Only one spouse can obtain a residence permit. That possibility of the recognition of polygamous marriages contracted abroad is further reduced by the new Act of 5 December 2015. If a non-national concludes a polygamous marriage abroad - after applying for a residence permit - this marriage will not be recognised on moving back to the Netherlands. Moreover, that marriage does not justify admission of the spouse. Once the non-national has settled in the Netherlands, he/she must abide to the Dutch laws and regulations. If he/she later travels abroad to enter into a polygamous marriage there, then this does not involve recognition in the Netherlands"[172].

In Spain, "the law permits the reunification of one of the four spouses of the third country husband. In contrast, and in accordance with Article 4.4 Council Directive 2003/86/EC, where the husband already has a spouse living with him in the territory of Spain, Spain shall not authorise the family reunification of a further spouse. On the other hand, Royal Decree 240/2007, concerning reunification by EU citizens, does not provide any solution for polygamous marriage, because Spanish Law presumes that no national law of EU citizens admits polygamous marriage and precisely it is the law of the nationality which governs this aspect. Finally, in relation with cases other than polygamous marriage, Spanish Law does not provide any explicit solution. Nevertheless, the best practice follows the Guidelines of the Commission (COM/2009/0313 final). In this sense, forced marriages are not recognised unlike "arranged marriages" with full and free consent by the parties"[173].

3.5.2. In accordance with Article 16 Council Directive 2003/86/EC about family reunification, has your Member State adopted any provision for refusal of entry and residence of the spouse regarding the fact that the couple do not live in a real marital relationship?

-*Model case*: a third country national legally resides in your Member State and applies for the reunification of his foreign spouse, but authorities observe that they do not live in a real marital relationship.

Conclusion:

Most countries require a real marital relationship, but the proof of that is different (proof that the spouses are not separated or proof of common residence for 1 year before the application or acknowledgement for 2 years before the application). Denmark does not apply the EU Directive.

In Belgium, "Article 10.5 of the Law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners requires a real marital relationship between the foreigners in order to establish the family reunification. It indicates that the partners need to meet the following conditions: they have to prove that they maintain a sustainable partner relationship, that this

[172] See B. Safradin, National Report-The Netherlands, § 3.5.1.

[173] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.5.1.

relationship is stable, and that it has been duly established. The lasting and stable nature of the relationship is established if the partners can prove that they have lived legally, in Belgium or in another country, uninterrupted for at least one year before the application. It will also be considered proof if the partners can demonstrate that they have known each other for at least two years before the application and can proffer evidence that they have maintained regular contact by telephone/electronic mail, that they have met three or more times during two years prior to the application, and that these meetings in total amount to 45 days or more"[174].

Denmark, "as stated above in answer 3.5.1, is not obliged to implement and observe Directive 2003/86/EC. According to Danish law, a third country national does not have the right to family reunification if they do not live in a real marital relationship. The evaluation will be carried out on concrete elements, but in general a cohabitation of 1½-2 years will suffice, otherwise the authorities will evaluate the contact between the two, if there are children in the relationships, etc."[175].

In Hungary, "even though marriage usually leads to the formation of a new household, this is not a founding element. Post-marital residence is common, but the marriage is valid without it. Regarding the spouse of an EEA citizen, no special rules exist (neither for the entry, nor for a longer stay). Regarding the spouse of a Hungarian citizen, the law (on Act I of 2007 on the entry and residence of persons with the right of free movement and residence) does not contain any provisions which would prohibit the married spouse from entering the country. Regarding the spouse of a third country national, (Act II of 2007 on the Entry and Stay of Third-Country Nationals) no special rule exists"[176].

In the Netherlands, "rules on entry and residence of third country nationals are enshrined in the Alien's Act (*Vreemdelingenwet*) and the Alien's Decree (*Vreemdelingenbesluit*). The implementing measure for EU Directive 2003/86 was a Royal Decree adopted on 29 September 2004, amending the Dutch Alien's Decree. Dutch law requires the existence of a 'real family relationship' as enshrined in 3.14(1) sub c of the Aliens Decree. In the Alien's Circular it was stipulated that a real family relationship was deemed no longer to exist if the parent and child had been separated for more than a period of five years, the so-called 'period of reference'. The Dutch government regarded the requirement of a real family relationship in compliance with the ground for refusal of an application for entry and residence in Article 16(1)(b) of the Directive, which provides for a ground of refusal for family reunification in case the sponsor and the family member no longer live in a real family relationship. In various cases, Dutch courts nevertheless stipulated that the Dutch policy regarding the real family relationship went much further than the discretion given by Article 16(1)(b) of Directive 2003/86. By letter of 25 September 2006, the Minister of Alien Affairs and Integration annulled the policy advocating that a real family relationship was deemed no longer to exist in case of separation of parent and child of more than five years. The minister stipulated that for the interpretation of the requirement of a 'real family relationship', Article 8 ECHR, which protects the right to a family life, should be taken into account and consequently, the period of reference will no longer be applicable"[177].

In Spain, "according to Article 17 Organic Act 4/2000 on rights and freedoms of foreigners and their social integration and Article 53 Royal Decree 557/2011 of development, the spouse cannot be

[174] See H. De Waele et al., National Report-Belgium, § 3.5.2.
[175] See S. Adamo, National Report-Denmark, § 3.5.2.
[176] See T. D. Ziegler, National Report-Hungary, § 3.5.2.
[177] See B. Safradin, National Report-The Netherlands, § 3.5.2.

separated *de facto*. Really, this provision refers to the absence of a real marital relationship, in the sense of the Directive"[178].

3.5.3. In accordance with Article 15 Council Directive 2003/86/EC about family reunification, has your Member State limited the granting of autonomous residence permits to spouses in cases of breakdown of the family relationship (widowhood, divorce or separation)?

-*Model Case:* a third country national legally resides in your Member State and, after two years of residence with his foreign spouse, dies.

Conclusion:

In cases of divorce the requirements are different (2, 3 or 5 years). In cases of widowhood, the widow can automatically obtain this permit, without any temporal requirement. Denmark does not apply the EU Directive.

In Belgium, "in application of article 11 of the Law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners, the Belgian Minister or his delegate may decide that the foreigner who declares to find himself in one of the situations provided for in article 10 does not have the right to enter or to stay in Belgian territory if the foreigners and his/her foreign spouse do not maintain an effective marital or family life"[179].

Denmark, "as stated above in answer 3.5.1, is not obliged to implement and observe Directive 2003/86/EC. According to Danish law, a residence permit issued on grounds of family reunification cannot be extended if the spouses no longer live together. Nevertheless, in cases of death, or if the cohabitation ends on grounds of violence in the relationship, the authorities can decide to extend the residence permit if the foreigner has shown a willingness to integrate in Danish society, if there are children in the marriage going to school, if the foreigner is enrolled in a study program or is working in a Danish company, etc."[180].

In Hungary, "according to Section 19 (7) of Act II of 2007, if the family member did not receive permission to stay, he/she may continue to reside in two cases. Firstly, he/she may stay in the country if five years have passed after he/she first received permission to family unification (this rule is line with Section 25 of Directive 2003/86/EC). In the second case, he/she may stay after the death of the husband or wife, if the conditions of residence are complied with. According to Section 33, to be eligible for a permanent stay, the person must prove that he/she has enough financial capacity to stay, has social insurance and is able to pay it, and no special cause exists which would make him/her otherwise prohibited to stay. In sum, this means that in this second case there are no special rules for such persons" [181].

In the Netherlands, "the Dutch rules are more favourable in this matter than the minimum standard provided for in Directive 2003/86. Pursuant to Article 3.51 Aliens Decree, spouses and

[178] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.5.2.
[179] See H. De Waele et al., National Report-Belgium, § 3.5.3.
[180] See S. Adamo, National Report-Denmark, § 3.5.3.
[181] See T. D. Ziegler, National Report-Hungary, § 3.5.3.

unmarried partners are eligible for an autonomous residence permit after they have held a residence permit on the basis of family reunification for three years"[182].

In Spain, "according to Article 59 Royal Decree 557/2011 of development of Organic Act 4/2000 of rights and freedoms of foreigners and their social integration, in cases of divorce or separation, the spouse can obtain an autonomous residence permit if he/she lived in Spain with the sponsor for at least two years. However, the widow can automatically obtain this permit, without any temporal requirement"[183].

3.5.4. In accordance with Article 4.5 Council Directive 2003/86/EC about family reunification of third countries nationals, has your Member State required the sponsor and his/her spouse to be of a minimum age, and at least 21, before the spouse is able to join him/her, in order to ensure better integration and to prevent forced marriages?

-*Model Case:* a third country national legally residing in your Member State applies for the reunification of his foreign spouse. Both of them are 18 years old.

Conclusion:

Some differences are observed between rules that do not require minimum ages to rules that do require the spouse to be the age of 21. Anyway the marriage cannot violate public policy under grounds of minors. Denmark does not apply the EU Directive and it requires the spouse to be 24 years of age.

In Belgium, "the law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners requires that both members of the partnership have reached the age of 21. In the case that (one of) the applicants are 18, reunification will be allowed if upon the arrival in Belgium they can prove a marital relationship or a registered relationship"[184].

Denmark, "as stated above in answer 3.5.1, is not obliged to implement and observe Directive 2003/86/EC. In Denmark, third country nationals who want to be reunited with a foreign spouse must be over 24 years of age (both spouses). The age limit was introduced in 2002 in a double effort to promote the integration of foreigners already living in the country and to avoid pro-forma, forced and arranged marriages. The age limit is supposed to give especially girls a possibility to say no to these illiberal types of marriages. In the preparatory works to the act, the age requirement has been motivated in the effort to discourage especially forced marriages, as it is expected that the youngster will be better equipped with age to resist the pressures from parents and family members. It has not been ascertained once and for all whether the age-limit rule has worked as intended and eradicated the practice of pro-forma, forced and arranged marriages, and opinions on the matter are split. Only anecdotal evidence has indicated that the rule has in few cases prevented single individuals from entering into a marriage they did not independently agree to"[185].

[182] See B. Safradin, National Report-The Netherlands, § 3.5.3.
[183] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.5.3.
[184] See H. De Waele et al., National Report-Belgium, § 3.5.4.
[185] See S. Adamo, National Report-Denmark, § 3.5.4.

In Hungary, "expressis verbis no such rule exists. We can ascertain that the marriage of a minor would not be recognised in the country, since it seriously violates public policy"[186].

In the Netherlands, "the Dutch Aliens Decree requires a minimum age of 21 for family formation of both spouses or partners. Both provisions have been included in the Royal Decree implementing the directive. The regulations provide that admission should always be refused to spouses or partners under the age of 21"[187].

In Spain, this provision is not included in Spanish Law[188].

3.5.5. In accordance with Article 4.3 Council Directive 2003/86/EC, has your Member State decided that registered partners are to be treated equally as spouses with respect to family reunification?

-*Model Case*: a third country national resident in your Member State applies for the reunification of his/her registered partner.

Conclusion:

In general terms, and although some countries do not include rules, registered partners can be reunified, not so unregistered partners. Denmark does not apply the EU Directive.

In Belgium, "Article 10 of the Law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners also opens the door to reunification of registered partners if they meet the conditions required. These conditions are that the legal partnership is duly established and stable. They also have to be in a genuine relationship in the way described in the reply to question 3.5.2"[189].

As stated above in answer 3.5.1, **Denmark** "is not obliged to implement and observe Directive 2003/86/EC. According to the Danish Aliens Act, a permanent resident can apply for family reunification with their spouses but also registered partners. It is thus a condition that the marriage or the registered partnership can be recognised in Danish law"[190].

In Hungary, "the regulations on registered partners are slightly problematic. Registered partners are not mentioned among members of the family, and as such, in theory, cannot receive the same status as spouses in a marriage in the law on immigration. Section 2d of Act II of 2007 only mentions the following family members: (i) wife/husband (heterosexual marriage, due to public policy reasons), (ii) their joint child or children (including adopted children) (iii) supported minor child or children (including adopted children or children who were placed under their custody by the guardianship authority) in cases where parental responsibility exists, (iv) the minor child or children of his/her spouse maintained by the spouse. However, registered partners receive the same protection as if they were living in wedlock. The reason for this is that the law on registered partnerships (Section 3 of

[186] See T. D. Ziegler, National Report-Hungary, § 3.5.4.
[187] See B. Safradin, National Report-The Netherlands, § 3.5.4.
[188] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.5.4.
[189] See H. De Waele et al., National Report-Belgium, § 3.5.5.
[190] See S. Adamo, National Report-Denmark, § 3.5.5.

Act XXIX of 2009 on registered partnerships) states that the rules of marriage can be used for registered partnerships unless the law makes a difference between these two forms. The commentary of the law especially mentions the rules on immigration as one of those areas in which they receive the same treatment as marriages. This means that persons living in registered partnerships may unite their families. However, the fact that registered partnerships of third-country nationals are not mentioned in the text of the law on immigration itself is problematic, especially because registered partners are expressis verbis mentioned as family members by another law if they belong to Hungarian/EEA citizens (Act I of 2007). Finally, unregistered partnerships are not recognised as family relationships in the law on the residence of third country nationals (Act II of 2007), but regarding Hungarian/EEA citizens they could be interpreted as "quasi family members"[191].

In the Netherlands, "Dutch law has not been amended as a consequence of the implementation of Directive 2003/86 on family reunification. The right to family reunification already included the non-married partner of 18 years of age or older having a permanent and exclusive relationship with the sponsor, as enshrined in article 3.14 paragraph 1 sub b of the Dutch Aliens Decree. In the Netherlands, registered partners have an equal status as regards to married couples. Dutch law recognises 2 possibilities to form a family: 1) family reunification, i.e. a marriage or other relationships (e.g. children) between family members who have already lived together for a certain period in the host State. Family reunification may be applicable to spouses, unmarried partners, couples of the same-sex, children under the age of 18 who wish to join their parents in the Netherlands, 2) being with another partner: an in-coming partner is dependent on the residing partner. The Dutch residence permit will be terminated in the case of living apart or divorce. After 3 years of living together, a foreign partner can receive an independent Dutch residence permit. The partner residing in the Netherlands has to satisfy minimum salary criteria. For both categories the conditions as described earlier in question 3.5.4 have to be satisfied"[192].

In Spain, "according to Article 53 Royal Decree 557/2011 of development of Organic Act 4/2000 on the rights and freedoms of foreigners and their social integration, Spanish Law recognises the right to registered partners"[193].

3.5.6. In accordance with Article 26 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members, does your Member State carry out checks on compliance with carrying their registration certificate or residence card?

-*Model Case*: the residence card of a spouse of the EU citizens is required by the police.

Conclusion:

With some exceptions, the spouse can prove the condition of family of an EU Citizen by any means admitted by Law. Denmark does not apply the EU Directive.

[191] See T. D. Ziegler, National Report-Hungary, § 3.5.5.

[192] See B. Safradin, National Report-The Netherlands, § 3.5.5.

[193] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.5.5.

In Belgium, "according to the Law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners, any documents are accepted that can prove the link of the foreigner with an EU citizen willing to be reunited in Belgium. Normally, when the spouse is a third country national, a visa will be required upon arrival in Belgium. In any case, upon filing the request for reunification the foreigner has to demonstrate his/her identity. The documents that prove his/her identity allowed for in Belgium must meet the following conditions. It must contain the full name, place and date of birth and nationality of the person concerned. It must be issued by a competent authority. It allows for the identification of a physical link between the holder and the person concerned"[194].

As stated above in answer 3.5.1, **Denmark** "is not obliged to implement and observe Directive 2003/86/EC. According to the Danish Administration of Justice Act, a person is obliged to inform of their name, address, and date of birth when requested by the Police. The obligation does not extend to the CPR-number (Danish national identification number)" [195].

In Hungary, "the authorities (including police) may ask for the documents serving as basis of residence, such as visas, passports, residence permits, residence cards in order to check the identity of the person. Moreover, the immigration office may check the habitual residence of the persons to prove whether they are in a family relationship, and may also ask the parties to attend interviews about their relationship. The existence of a family relationship can be proved in various ways by the applicant (there is no obligatory form for such actions). Showing a birth or marriage certificate is preferred, documents on adoption are also accepted. The question whether a DNA test conducted outside Hungary can be accepted or the test must be taken again in Hungary are delegated to the Hungarian Institute for Forensic Sciences (if conducted again in Hungary, all related costs must be paid for by the applicant)"[196].

In the Netherlands, "certain officials may require proof of identity on the street, including police officers; ticket inspectors on public transport and special enforcement officers (BOAs). These officials may not ask for proof of identity without giving any specific reasons for it. Situations in which they may do so include the following: traffic management (for instance, if a cyclist rides without lights); the maintenance of public order (cases in which people's safety is at stake) or the investigation of criminal offences. If a person is unable or unwilling to identify himself/herself in such situations, applicants will be liable to prosecution. If a person is not able to establish his/her identity, the risk is that he/she will be taken to the police station and will have to pay a fine. For persons aged 16 or over who fail to comply with the requirement to identify themselves, the fine is set at €60. For persons aged 14 and 15, the fine is set at €30. This law does not make a distinction between nationals and non-nationals in this matter"[197].

In Spain, according to Article 14.4 of Royal Decree 240/2007, the spouse can prove his/her condition of family of an EU Citizen by any means admitted by Law[198].

Case 3.6: Marriage of convenience

[194] See H. De Waele et al., National Report-Belgium, § 3.5.6.
[195] See S. Adamo, National Report-Denmark, § 3.5.6.
[196] See T. D. Ziegler, National Report-Hungary, § 3.5.6.
[197] See B. Safradin, National Report-The Netherlands, § 3.5.6.
[198] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.5.6.

Background: the EU has adopted complementary texts in relation with marriages of convenience. See, mainly: Resolution of the Council of 4 December 1997 (OJ C 382, 16 December 1997) on marriage of convenience; Communication of the Commission to the European Parliament and to the Council [COM(2014) 604 final] and a Commission Staff Working Document as handbook about marriage of convenience [SWD(2014) 284 final]. The EU is concerned about preventing "marriages of convenience" for the acquisition of nationality or for family reunification.

3.6.1. Does the law of your Member State forbid "marriages of convenience"? If so, what are the concepts and effects of this kind of marriage?

-Model Case: a third country national marries a national from your Member State in order to obtain a residence permit or even nationality.

Conclusion

When the spouses, both or one of them, do not truly consent to the marriage, the simulated marriage is null so they do not have effects and cannot be authorised or recognised. In consequence, this marriage is invalid for acquisition of nationality or family reunification. These marriages can be punished by criminal law on the grounds of forgery or fraud.

In Belgium, "the law of 12 January 2006 amending the Law of 15 December 1982 on access to the territory, residence, establishment and removal of foreigners explicitly prohibits marriages of convenience. This text introduces a specific provision regarding such marriages, which announces that they are penalised, and even allows for the nullity of marriages celebrated with the aim of an abuse of law. It also allows for a prison sentence to be imposed on those who marry with no intention of creating a sustainable family life. Even the simple attempt to enter into a marriage of convenience can be punished. The law of 4 May 1999 amending certain provisions regarding marriage, inserted in the CC by article 146bis, had as its objective the characterisation of the marriage of convenience. It indicates that no marriage will be concluded in a situation in which the following two conditions are met, or presumed to be met. The first is that the intention of at least one of the future spouses or both of them is not the creation of a common and sustainable life together. The second concerns the intention of the future spouses with regard to the marriage, that is, if they mean to seek particular legal advantages, such as the legalisation of their situation, or of those linked to marital status. The direct effects of the detection of a marriage of convenience is the nullity of that marriage due to a defect in the consent. It will therefore not be recognised and will not have any effect. An ex ante effect is the refusal of the Register Officer to celebrate the marriage if there is any suspicion that it would be a sham. If the marriage has already been celebrated, it is susceptible to annulment, as indicated in article 184 CC. This annulment can be pursued by anyone who has an interest, either spouses, or the Public Prosecutor. In the latter cases, it will be a control a posteriori"[199].

In Denmark, "marriages of convenience, or pro-forma marriages, are defined as marriages that are concluded in order to obtain a residence permit in Denmark. As such, they are not allowed under Danish law, as stated in the requirement in the Aliens Act for family reunification in section 9 (9). In

[199] See H. De Waele et al., National Report-Belgium, § 3.6.1.

cases where the authorities have various elements to assume that the marriage is a marriage of convenience, the residence permit on the basis of family reunification will be denied"[200].

In Hungary, "a marriage of convenience as such is not defined by the civil law of Hungary. This means that such marriages are deemed to be valid. Authorities may not check the background notions of the parties involved. On the other hand, according to Section 14 2) of Act I of 2007, the permission of the third country national to stay in the country expires in case the family relationship was created for the acquisition of a residence permit. Furthermore, concluding such marriages is even criminalised in Hungary, but only on the part of Hungarian citizens. Section 355 of the Criminal code (Act C. of 2012) says that any person over the age of eighteen who enters into a family relationship for financial gain (this is the case in most of the cases if the Hungarian spouse enters into such a marriage) for the sole purpose of obtaining a document verifying the right of residence is guilty of a misdemeanour punishable by imprisonment not exceeding two years. The acquisition of citizenship (eg. after three years of marriage) is also excluded. Even though it is not mentioned separately in the criminal code, such a stay would be considered illegal based on the rules on residence if it was based on a marriage of convenience. Since acquiring citizenship presupposes legal residence in the country, citizenship could be revoked (up to ten years after its acquisition)"[201].

In the Netherlands, "the concept of "marriage of convenience" is defined in the civil law of the Netherlands under Article 1:50 DCC. The provisions concerning marriages of convenience are laid down in the Marriages of Convenience (Prevention) Act, which entered into force on 1 November 1994. The law was introduced to reduce the number of such marriages. It now contains provisions that have the function of preventing and stopping the conclusion of marriages of convenience in the Netherlands. The first evaluation of the Act in 1998 led to an amendment of the regulations in Book 1 of the Dutch Civil Code and the Municipalities Database (Personal Records) Act. As enshrined in Article 1:44 (1)(k) DCC, the municipal official of the Registry of birth, marriage and deaths can only register marriages of non-Dutch citizens in cases when the Superintendent of the Police has issued a declaration in which advice is given on the relationship of the applicants involved. Once it has been concluded that the marriage at stake is a marriage of convenience, this marriage can be punished by Dutch criminal law on the grounds of forgery or fraud"[202].

In Spain, "the Directorate General of the Registries and Notaries considers "marriage of convenience" all marriages in which a simulation is observed. The spouses, both or one of them, do not truly consent to the marriage as a community of life and a set of legal rights and duties, but they intend to create a mere appearance in order to obtain legal advantages (Instruction of 31 January 2006, BOE n. 41, 17 February 2006). This simulated marriage is null so they do not have effects and cannot be authorised or recognised. In consequence, this marriage is invalid for the acquisition of nationality or reunification family (…). Furthermore, the fraudulent marriage is considered a serious administrative infringement with a sanction from 501 euros to 10,000 euros"[203].

3.6.2. How do the authorities of your Member State control if the marriage in question is one of convenience? (See also question 4.3.2.)

[200] See S. Adamo, National Report-Denmark, § 3.6.1.
[201] See T. D. Ziegler, National Report-Hungary, § 3.6.1.
[202] See B. Safradin, National Report-The Netherlands, § 3.6.1.
[203] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.6.1.

-*Model Case:* see previous case and assess if, for instance, the authorities of your State can/shall interview the spouses.

Conclusion:

The control of the marriage of convenience is basically made at the moment of conclusion of the marriage or at the moment of registration of the marriage in the Civil Register. Despite some differences, interviews and questionnaires are the main tools for investigating a fraudulent marriage.

In Belgium, "article 167 CC, instated by the law of 1999, gives a wide discretion and control to the officer of the civil status. He/she may refuse, or defer for a period of two months, the celebration of a marriage if there exists a "strong presumption" that a marriage does not meet the conditions required. The delay of two months enables to carry out of an additional investigation in order to check whether the future spouses meet all the conditions to marry under Belgian law. This investigation will also ensure that the intended marriage is not a marriage of convenience.

The final amendment to article 167 CC was made by the Circular of 6 September 2013 regarding the Law of 2 June 2013 amending the CC, the Law of 31 December 1851 on consulates and consular jurisdictions, the Criminal Code, the Judicial Code and the Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners, to fight against marriages of convenience and legal cohabitations of convenience. It is indicated in section C.2. of the Circular that article 167 CC provides for an express right for the officer of the civil status to defer or refuse the marriage if there exists a "strong presumption". On this basis, the officer must ensure that all the formal and substantive requirements for a legal marriage are met. With this right granted to the Officer, the active and preventive role of the officer is emphasised. Thus, the role of the officer will not only be a passive one; some preliminary investigations are conducted in order to ensure that the future spouses meet all the legal conditions of substance and form. These investigations are carried out by the registrars, normally in the form of an interview, and the intended spouses must fill out certain forms. The investigations cover both the satisfying of the positive conditions on the one hand, and the absence of any impediments for the marriage on the other. The civil registrar must therefore also check whether the requirements of article 146*bis* CC are satisfied. Belgian case law has been fairly generous in judgements regarding marriages of convenience. One of the most recent judgements in this regard is that rendered by the Civil Chamber of the Appeal Court of Brussels on 10 April 2014"[204].

In Denmark, "after a written application, the authorities will interview the spouses and/or request further documentation in order to ascertain if the marriage is a marriage of convenience. This will happen if the information provided in the application gives rise to concerns on the 'reality' of the marriage. For elements that can alert the authorities, see answer 3.6.4 below"[205].

In Hungary, "no specific tool (apart from a standard questionnaire) is mentioned by the law to control marriages, and no concrete legal framework exists to prove whether a marriage is of convenience or not. Moreover, there is no previous special process (apart from general actions as specified below) of obligatory use by the authorities who conduct marriages, and no statistics are kept on marriages of convenience. The reason for this could be that the usage of fake documents is more

[204] See H. De Waele et al., National Report-Belgium, § 3.6.2.
[205] See S. Adamo, National Report-Denmark, § 3.6.2.

common regarding the relationships of third country nationals and seems to be a bigger problem in Hungary. Some registrars concluding marriages signal problems to the Office of Immigration and Nationality. As mentioned before, immigration authorities have the right to visit the habitual residence of the parties as well as to ask them questions on their relationship (this is also done if they apply for visas). During interviews in several cases the spouses seem not to know each other and full proof can be gained on the lack of their relationship. In practice this means that the authorities ask the same questions of the parties separately and check their convergence. Their family members may also be asked"[206].

In the Netherlands, "provisions on marriages of convenience are enshrined in the 1994 Act on the Prevention of Marriages of Convenience. This Act contains articles to both stop and suppress marriages of convenience. As discussed earlier, according to Article 1:44 (1)(k), the municipal official of the Registry of Births, Deaths and Marriages can in case one or both spouses or registered partners hold a non-Dutch nationality only cooperate with registering a marriage if a declaration of the Superintendent of the police has been issued. In this declaration, information concerning the residence of the alien is given as well as advice by the Superintendent for the municipal official on whether he/she should or should not cooperate in the marriage. This advice is based upon indications whether the marriage may or may not constitute a marriage of convenience. Negative advice by the Superintendent requires justification and needs to be followed by a completed questionnaire with possible observations that can indicate a marriage/partnership of convenience. Only a justified negative advice by the Superintendent will allow the municipal official to decide not to conclude the marriage or registered partnership. This national practice is in line with Article 16(4) of Directive 2003/86 on family reunification"[207].

In Spain, "from the point of view of Spanish Law, prior to the conclusion of a civil, Hebrew or Evangelical marriage or a marriage in another deeply consolidated religious form, the Spanish Authority controls the convenience in a previous report. This previous report is also necessary for the inscription of an Islamic marriage. However, the canonical marriage is not submitted to a previous report and, in these circumstances, some scholars criticize that the marriage of convenience is difficult to control in this form. As leading case: see Instruction of 31 January 2006, BOE n. 41, 17 February 2006"[208].

3.6.3. What happens with the control of the marriage of convenience when the marriage is concluded before a foreign authority but it provokes effects in your Member State?

-*Model Case:* a national from your Member State and a third country national marry abroad in order to obtain a residence permit in your Member State or even nationality. The couple seeks the recognition of this foreign act by the authorities of your Member State.

Conclusion:

The different countries provide control mechanisms for marriages of convenience at the moment of recognition by their authorities. However, the procedural rules for the control are very different.

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[206] See T. D. Ziegler, National Report-Hungary, § 3.6.2.

[207] See B. Safradin, National Report-The Netherlands, § 3.6.2.

[208] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.6.2.

In Belgium, "the starting point is that Belgium has not signed the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Foreign Marriages. This, in combination with the fact that marriage is not a judicial decision, means that the applicable rules for the recognition and the validity of a foreign marriage will be the same as for the recognition and validity of a legal act. Article 27.1 CPIL subjects the recognition and validity in Belgium of a foreign non-jurisdictional public act to the condition that its validity is established under the applicable law. The recognition and validity will also be subjected to the non-existence of a fraud on the law or a manifest violation of the public order. Nevertheless, as stated in articles 46 and 47 CPIL, a marriage celebrated abroad will be recognised in Belgium if two conditions are met. The first is that the substantive or basic conditions imposed by the national law of the spouses are met; secondly, the formal requirements stated by the national law of the place of celebration of the marriage need to be respected. In any case, the recognition will always be granted subject to the reservation of the exception of the Belgian international public order and/or the exception of legal fraud.

In the context of the fight against marriages of convenience, many jurisdictions have invoked non-recognition based on the exception of the legal fraud. The main basis for this is that the marriage had been celebrated in a foreign country with which the spouses have no link. In this vein, article 46 CPIL states that the national substantive conditions under which the foreign marriage has been celebrated are to be checked. The absence of a real consent of at least one of the partners to the marriage is indicative of an invalid marriage in most foreign legislations. In any case, it must be demonstrated that the aim of the foreign marriage is none other than to acquire legal privileges in Belgium. In view of the abundant case law of Belgian courts, as a single example the recent judgement of the Court of First Instance of Brussels of 13 March 2013 may be mentioned, in which recognition of a foreign marriage was refused"[209].

In Denmark, "the Danish Immigration Service will check that the marriage concluded abroad can be recognised in Danish law, and in order to be able to obtain family reunification with a third country national in Denmark, the Danish national will have to meet the strict requirements in the Aliens Act. Among these, the requirements of a 'definite' common life could have a decisive character, limiting the scope of the rule against marriages of convenience in section 9 (9)" [210].

In Hungary, no special proof exists for such cases, apart from that mentioned above[211].

In the Netherlands, "as discussed earlier, a foreign marriage will be recognised if the law of the land where the marriage has been celebrated recognises this marriage as a valid marriage, according to the principle of lex loci celebrationis as enshrined in Article 10:31(1) DCC. A marriage needs to be entered into the Persons Database (Basisregistratie Personen, BRP) before a residence permit can be granted to the couples in the Netherlands. Prior to the entering in the Municipal Administration, the so-called M46 procedure has to be concluded. Based on this procedure, the Municipality in question can check whether the marriage concerned is a marriage of convenience. The role of the Dutch Immigration Service (IND) in the M46 procedure is limited to providing data concerning the legal aspects of residence. The chief of the Aliens police has the competence to formulate the advice that is used by the municipal official to decide whether or not to enter the marriage into the Municipal Administration.

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[209] See H. De Waele et al., National Report-Belgium, § 3.6.3.
[210] See S. Adamo, National Report-Denmark, § 3.6.3.
[211] See T. D. Ziegler, National Report-Hungary, § 3.6.3.

When judging an application (e.g. for naturalisation) and the presumption of a marriage of convenience persists, more detailed investigation is possible. As is often the case, only after the residence permit has been granted is it possible to determine whether the persons involved are actually living together and form a domestic unit. The law on the Prevention of Marriages of Convenience enables the municipality to deny registration of the marriage in the Municipal Administration. Once it has been concluded that the marriage at stake is a marriage of convenience, the spouses can be punished under Dutch criminal law on the grounds of forgery or fraud"[212].

In Spain, "on the one hand, the Spanish Judge of the Registry shall make a report prior to the access of the marriage to the Spanish Civil Registry. On the other hand, if a certificate of a foreign Registry is presented, the Spanish Registry controls this certificate and complementary statements obtained by separated and confidential interviews (art. 246 Regulation of Civil Registry). Particularly, when a Spaniard wishes to marry abroad and apply for a certificate of matrimonial capacity of the Spanish Registry, the Spanish Judge will make a previous report (Instruction 9 January 1995). As *leading Case:* Instruction of 31 January 2006, BOE n. 41, 17 February 2006"[213].

3.6.4. WHICH ARE THE MAIN PRESUMPTIONS AND PROOF CONCERNING MARRIAGES OF CONVENIENCE AND ARE THEY IN ACCORDANCE WITH EU RECOMMENDATIONS?

-Model Case: the authorities of your Member State observe that a marriage formed by a national of your Member State and a foreigner do not know basic personal and family details about each other, although previous relations in presence or by mail, email, telephone or internet have been proved.

Conclusion:

The main presumptions and proof concerning marriages of convenience are in accordance with EU recommendations in relation with a lack of cohabitation; lack of the partners' capability to communicate in the same language; a wide age gap/difference between the partners; a lack or limited knowledge of the partners before marriage was concluded; and any previous marriage entered into by the spouses.

In Belgium, "according to the Circular of 6 September 2013 regarding the Law of 2 June 2013 amending the CC, the Law of 31 December 1851 on consulates and consular jurisdictions, the Criminal Code, the Judicial Code and the Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners, to fight against marriages of convenience and legal cohabitations of convenience, there is a combination of different factors that may constitute a serious indication of a marriage of convenience: the parties do not understand each other or even have difficulties in interacting or they need an interpreter; the parties have never encountered before the declaration of marriage; one of the parties cohabited with someone else in a sustainable manner; the parties do not know the name or even the nationality of the other; one party does not know where the other works; there is a clear divergence between the statements relating to the circumstances of how they met; a sum of money is promised as a reward for the celebration of marriage; one of the two is engaged in prostitution; a party has already the right to a family reunification through a marriage or a legal cohabitation with one or more persons; one of the parties has already made one or more attempts

[212] See B. Safradin, National Report-The Netherlands, § 3.6.3.

[213] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.6.3.

of a marriage of convenience or a legal cohabitation of convenience; one of the parties has failed in all legal attempts to settle in Belgium; the intervention of an intermediary; a large age difference. Concerning the proof and presumptions of marriage of convenience, we may highlight for example the judgement n.º 2013/AR/631 of 15 October 2014, rendered by the Civil Court of Antwerp (Family Chamber), indicating that the civil status is not a matter of trade"[214].

In Denmark, "from the travaux préparatoires to the act that introduced the rule against marriages of convenience (in 1998), we can evince that the elements that the authorities will consider are: lack of cohabitation; lack of the partners' capability to communicate in the same language; a wide age gap/difference between the partners; a lack or limited knowledge of the partners before marriage was concluded; and any previous marriage entered into by the spouses"[215].

In Hungary, "the most important proof is that the parties do not know each other at all. The most typical solution for such marriages in Hungary is to meet and chat with a foreign person through the Internet, typically on a website such as Badoo. In other cases, the Hungarian party travels to the foreign country for a holiday and meets at a hotel with the third country national (typically to North African countries like Tunisia or Egypt) to meet the person, and in a number of cases they also marry there, while in other cases they marry in the nearby Austria or in Hungary. Based on the number of marriages, a report suggests that there is organizational background behind these journeys. Other circumstances could also be important, like the lack of a mutually spoken language, differences in age, poor financial situation and/or no proper education of the third country national, or the lack of prior travel references of the Hungarian party. In several cases Serbian authorities received information of Hungarians stemming from the same small Hungarian city/village conducting marriages in high number. After proving the parties do not know each other deeply enough, the marriage of convenience nature of such relationships could be proven. It is important to highlight that immigration officers do not have the right to check emails or non-public Facebook accounts of the parties"[216].

In the Netherlands, "Article 35 of Directive 2004/38/EC allows Member States to adopt the necessary measures to "refuse, terminate or withdraw" any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience, provided the conditions referred to in that article are respected. As discussed earlier in question 3.6.2, only a justified negative advice of the Superintendent will allow the municipal official to decide not to conclude the marriage or registered partnership. This national practice is in line with Article 16(4) of Directive 2003/86"[217].

In Spain, "the proof of the convenience is usually based on judicial presumptions (Art. 386 Spanish Civil Procedure Act; Art. 16 Regulation of the Civil Registry), apart from strange cases in which there is a confession (direct proof). The judicial presumptions admit proof to the contrary by the parties. Furthermore, it is always possible to repeat the application for authorisation or recognition of the marriage if new facts or circumstances appear, because the resolutions concerning Spanish Civil Registry do not have the effect of *res judicata.* As leading Case: Instruction of 31 January 2006, BOE n. 41, 17

[214] See H. De Waele et al., National Report-Belgium, § 3.6.4.
[215] See S. Adamo, National Report-Denmark, § 3.6.4.
[216] See T. D. Ziegler, National Report-Hungary, § 3.6.4.
[217] See B. Safradin, National Report-The Netherlands, § 3.6.4.

February 2006 adopted as presumptions of convenience: a) ignorance of basic personal and family data; b) inexistence of previous relations in presence or by mail, email, telephone, the Internet"[218].

[218] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 3.6.4.

4. LIFE EVENTS AND REGISTRY OFFICES

Case 4.1: Civil registration systems

Background: the different registration models existing in Europe are based on event-based systems, on person-based systems or population registers. An event-based registration system records all relevant changes to the civil status of a person occurring in the respective country at the place where the event occurred. A person-based registration system records all relevant changes to the civil status of a person occurring in the respective country at a central place. Population registers are based on an inventory of the inhabitants and their characteristics, such as for example their sex and the facts regarding birth, death and marriage, and the continuous updating of this information. Each system poses different difficulties. For example, the event-based systems promote register tourism and can generate problems for accessing the Registry Offices of other States (for instance, the Registry of their nationality). The person-based systems allow a single record of the person but always require recognition of civil status acts created in other States.

4.1.1. WHAT KIND OF REGISTRATION SYSTEM EXISTS IN YOUR COUNTRY?

-*Model Case:* While on vacation in France, a child of a Spanish couple is born in that country. The child's birth was recorded in a French Registry Office. Later, the birth also has to be recorded in the Spanish Registry Office.

Conclusion:

There is no single model of register. The States have different register models: an event-based registration system and a person-based registration system. One common feature to all States is, at least, that they recorded acts relating to civil status that occur in their own State.

In Belgium, "there are different types of register in which the relevant changes of a civil status that a person can have in his/her life are recorded. In this regard, we can identify an event-based registration system and a person-based registration system. In Belgium another two types of registers exist. Inscription in these registers is elective. These optional registers are: 1) the register of the nationality acts, its aim is to receive the final decisions with regard to nationality (person-based registration system); 2) the supplementary registers wherein all the acts on the civil status of a person that do not fit or cannot be registered in any of the previous registers are inscribed (person-based registration system). This pertains to acts such as the recognition of children, adoptions, etc."[219].

In Denmark, "the CPR-registry (Central Person Registry) is regulated by the Central Persons Register Act, the most updated version being in 2013. The objective of the legislation is to set up a system that registers important information about everyone living in Denmark. This objective is attained by assigning a 10-digit number to every person that is born in, or moves to Denmark"[220].

[219] See H. De Waele et al., National Report-Belgium, § 4.1.1.

[220] See S. Adamo, National Report-Denmark, § 4.1.1.

The Hungarian system "mixes event-based and person-based solutions. Firstly, regarding domestic matters, according to Section 7 of Act I of 2010 on registry procedure, the Hungarian authorities register the births, marriages, deaths and registered partnerships in Hungary. Moreover, according to Section 10, the Hungarian registry authority registers (i) the birth, marriage, registered partnership or death of a Hungarian citizen abroad, (ii) the birth of a foreign citizen person abroad if he/she was adopted by a Hungarian citizen, (iii) the death of a Hungarian citizen, if his/her place of birth is outside Hungary or unknown, (iv) the death of a non-Hungarian citizen if Hungarian courts ruled about the death, (v) the birth, marriage, registered partnership of a stateless person residing or the death of a stateless person who resided in Hungary. Some other actions such as adoptions conducted abroad must also be registered"[221].

The Netherlands "applies an *event-based* registration system, which contains the registration of births, marriages, registered partnerships and deaths. The registrations are executed by the appropriate municipality where the event occurred, or in the case that the event took place abroad, in the municipality of The Hague. Alongside these civil status registers, the Netherlands also has a population register, which records additional details of citizens living in the Netherlands. However, the population-based registration should be seen as a continuous record of current available data on Dutch citizens, such as current addresses. It is the task of each municipality to update the population registers. The events are registered chronologically. The indexes are sorted alphabetically by surname. All registers are held in duplicate form and one is submitted to the Ministry for Foreign Affairs to be deposited in the central files (*Centraal Bewaarplaats* in Dutch)"[222].

In Spain, "the Spanish Registry Office records all relevant changes to the civil status of a person occurring in Spain (an event-based registration system) and records all relevant changes to the civil status of Spanish citizens occurring abroad (a person-based registration system) (Article 15 of the 1957 Law of Registry Office; and Article 9 of the 20/2001 Law of Registry Office, not yet in force)"[223].

4.1.2. HAVE FUNDAMENTAL RIGHTS ANY CONSEQUENCE ON THE CONTENT OF THE CIVIL REGISTRATION?

-*Model Case:* The parenthood of an adopted child is recorded in a Registry Office. The question is whether it should be or should not be included in the Registry Office that the parentage derived from an adoption.

Conclusion:

There is a direct relationship between the protection of fundamental rights and access to the registration of certain acts of civil status, especially when minors are involved. In the case of adoptions, the data of the biological family are not recorded or have limited access. However, the case law of the European Court of Human Rights has been taken into account that ruled that the individuals' interest in knowing the truth about their genetic descent constitutes a fundamental right, on the basis of the right to 'private life' as enshrined in Article 8 ECHR. This states the fundamental right of adopted children to access the content of the civil registration to trace their

[221] See T. D. Ziegler, National Report-Hungary, § 4.1.1.
[222] See B. Safradin, National Report-The Netherlands, § 4.1.1.
[223] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.1.1.

origin.

In Belgium, "the model of protection of fundamental rights established in the Belgian Constitution affects the registry, in the sense that all the events affecting the civil status of a person in the Belgian territory will be recorded"[224].

In Denmark, "in the case of adopted children, only the relationship of the adoptive parents is registered in the CPR-register, not the relationship of the family of origin of the adopted child. Information is also included about who holds custody of the child. At the same time the register does not have information on the parent who gave up a child for adoption. Access to the CPR register can, under certain conditions, also be given to private persons. Therefore, everyone listed in the register has the right to apply to the CPR-register for protection of data, in order not to have one's information passed on to private persons. The protection is only valid for a year. Moreover, the registered person can ask their local authority not to be included in directories, and can ask not to be contacted for statistical, scientific, business or marketing purposes"[225].

In Hungary, "in closed adoption processes, the name and data of biological parents are not signed in the registry, but the child may receive information on them unless it is against his/her interest (in the case of minors, the Guardianship Authority and the persons having parental responsibility must also support the child's demand)"[226].

In the Netherlands, "with respect to the rights of adopted children, in 1994 the Dutch High Court (*Hoge Raad)* ruled on a landmark case in *Valkenhorst II*, which granted adopted children better access to their adoption documents. The court clarified here that the rights of children to trace their origin generally prevailed over the right of the mother to keep such information secret. Hence, the court recognised the rights of children to fully and freely develop their own personality, including the right to trace the identity of their biological parents. With regard to foreign adoptions, adoption agencies are obliged to gather the information that is needed to trace the origin and background of the child and to keep a file for every case for at least 30 years *after* the child arrived in the Netherlands. Hence, from this it can be concluded that fundamental rights do have a consequence on the content of the civil registration in the case of adopted children, as their right to trace their origin is developed in Dutch case law as a fundamental right. In addition, the Strasbourg Court ruled in various cases that the individuals' interest in knowing the truth about their genetic descent constitutes a fundamental right, on the basis of the right to 'private life' as enshrined in Article 8 ECHR"[227].

In Spain, "the model of protection of fundamental rights enshrined in the Spanish Constitution affects the Registry Office. Thus the model of our matrimonial law, allowing marriage of same sex couples, allows the record of these marriages in the Registry Office. The protection of equality and non-discrimination between men and women ensures a system of double surnames derived from maternal

[224] See H. De Waele et al., National Report-Belgium, § 4.1.2.
[225] See S. Adamo, National Report-Denmark, § 4.1.2.
[226] See T. D. Ziegler, National Report-Hungary, § 4.1.2.
[227] See B. Safradin, National Report-The Netherlands, § 4.1.2.

and paternal parentage. The protection of the right to equality of all children justifies a limited access to birth certificates which contain the record of the adoption"[228].

Case 4.2: Documents to registry offices

Background: The register of the acts performed in other States can be carried out on the basis of different documents (judgements, notarised documents, civil status certificates). The requirements for the effectiveness of the documents depend on the document in question and also on the State which they come from. The control of equivalence between the authorities involved in the State of origin and the role of the authorities of the requested State becomes important. In the case of foreign judgements, it may be necessary to previously go to a procedure of exequatur. The document requirements must be established in order to access the registry of each State.

4.2.1. Civil status certificates of foreign Registry Offices.

-Model Case: A marriage between a Spanish citizen and an Italian citizen is celebrated and recorded in an Italian Registry Office. The couple provides the certificate of the Italian civil register to apply for register in the Spanish Registry Office.

Conclusion:

Civil status certificates of foreign Registry Offices are recognised and can access the national registers. However, these certificates have to fulfill different requirements depending on the private international law rules of each State. Generally, the control of authenticity (by legalisation or apostille) and a translation are required. Aditionally, a requirement to check the validity of the civil act according to applicable law could be imposed.

Belgium "recognises the effect of legal civil status acts drawn up by an official foreign body. Under the principle of mutual trust, this kind of legal civil acts may be considered valid within the legal order of the forum concerned. In this sense, the recognition of any official document obtained in a foreign country concerns the verification of its legality, following the indications of the conflict of laws rules of the forum concerned. Under the article 31 CPIL, the officer of the registry or the depository of the act is to check that the decision satisfies the conditions to be recognised imposed by the relevant legislation. The verification is done by the registry officer or the depositary, subject to judicial review"[229].

In Denmark, "civil status certificates, such as marriage certificates, also foreign, have to be presented to the Danish municipal authority where the foreigners live or have lived before they moved abroad. The municipality will then send the information about the civil status to the CPR-register. The couple seeking to have a marriage certificate from abroad registered in Denmark will also have to complete a form answering questions such as: which authority performed the marriage; if both spouses were present at the ceremony (a full description is requested); if witnesses were present at the ceremony; if the marriage was registered by the authority that performed the marriage; and permission

[228] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.1.2.
[229] See H. De Waele et al., National Report-Belgium, § 4.2.1.

to contact local authorities (Police, Immigration Service, Social Appeal Board, municipality of residence, and regional state administration) and Danish embassies and authorities in the country were the marriage took place"[230].

In Hungary, "the validity of foreign actions like marriage must be supported by document(s) issued by the foreign authority. According to Section 14 (3) of Act I of 2010 on registries, if the document was issued by a foreign authority outside Hungary, in general, diplomatic legalisation of the document is necessary by Hungarian consulates (or by the Chamber of Public Notaries in Hungary). Moreover, in cases in which the documents were written in a language other than Hungarian, an official translation is also required. Legalisation is not required if an international agreement exists with the country (eg. apostille can be used), or regarding certain documents issued by the consulates of the foreign country in Hungary. The scope of authority of the issuers of the document is generally not examined by the Hungarian authorities: it is a foreign law related question which they do not check. When Hungarian authorities receive a foreign document, in most cases they only check whether the rules on legalisation or apostille are met"[231].

In the Netherlands, "a document that is legally valid in another State is not always recognised in the Netherlands. In order to be recognised, the authorities of the country where the document originates from must show its authenticity, usually by issuing it with stamps and signatures by means of a process called legalisation. The specific conditions for the recognition of foreign certificates are regulated under Article1:25 DCC, which stipulates that birth certificates, marriage certificates, certificates of a registered partnership and death certificates, issued outside the Netherlands by *a competent authority in accordance with the local regulations*, are registered by instruction of the Public Prosecution Service or at the request of an interested person in the registers of births, marriages, registered partnerships or deaths of the municipality of The Hague, in the following two situations: a) if the certificate concerns a person who at the moment of the application is a Dutch national or who, at any time, has had Dutch nationality or, although not being of Dutch nationality, has once been a legal resident of the Netherlands; or b) if the certificate concerns a person who lawfully resides in the Netherlands pursuant to Article 8, under point (c) and (d) of the Aliens Act 2000. With regard to foreign marriage certificates, paragraph 4 of provision 1:25 DCC stipulates that before the Registrar of Civil Status of the municipality of The Hague registers a marriage certificate, a declaration must be received as enshrined in Article 44 (1) (k) of the Aliens Act 2000 from the chief of police as referred to in that Act. This declaration will be issued at the request of the spouse or the registered partner to whom it relates. In addition to the request a certified copy as stipulated in Article 44 paragraph 1, under point (a) of the Aliens Act 2000, must be submitted. In the case that the person making the request has no habitual residence in the Netherlands, this declaration will be issued at the request of the other spouse or registered partner. A declaration as referred to in the Aliens Act is not required in the following circumstances: a) if since the conclusion of the marriage or registration of the partnership at least ten years have passed or b) if the marriage or registered partnership has ended"[232].

In Spain, "in the Spanish Registry Office, it is necessary to enter a foreign certificate to check the validity of the civil act (marriage, adoption…) according to the rules of international law applicable.

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[230] See S. Adamo, National Report-Denmark, § 4.2.1.

[231] See T. D. Ziegler, National Report-Hungary, § 4.2.1.

[232] See B. Safradin, National Report-The Netherlands, § 4.2.1.

The translation and legalisation (or Apostille) is also usually required, unless the registrar knows the language and is confident of the authenticity of the document. According to 20/2011 Law of Civil Registry (not yet in force), for the entry of these certificates the validity of the act according to the rules of private international law, the public policy control, the control of competence of foreign authority and the control of equivalence between the foreign certificates and Spanish certificates is required"[233].

4.2.2. FOREIGN NOTARISED DOCUMENTS.

-*Model Case:* A married couple applies for the record of the matrimonial agreement in the Registry Office. The agreement is included in a public document provided by a German Notary.

Conclusion:

Foreign notarised documents can access the national registers. However, these documents have to fulfill different requirements depending on the private international law rules of each State. Generally, the control of authenticity (by legalisation or apostille) and the translation are required. Additionally, a requirement to check the equivalence of authorities could be imposed. The general rule is that the foreign authentic instrument is recognised in the required State by any authority without the need for any procedure.

Belgium "applies the principle of automatic recognition of a foreign authentic act. By this assumption, Belgium admits that the foreign authentic act will produce legal effects in its territory (Article 27.1 CPIL). A foreign authentic instrument is recognised in Belgium by any authority without the need for any procedure. This automatic recognition applies if the validity of the act is established under the CPIL, and more specifically, under articles 18 and 21. Notwithstanding, the foreign authentic act must satisfy the necessary conditions for its authenticity in accordance with the law of the State in which it was established. Furthermore, Article 28 of the same Code establishes the prerequisites that a foreign authentic instrument has to meet in order to be considered authentic in Belgium and have value before any authority. These conditions are related to the form of the act and the necessary conditions for its authenticity according to the law of the state in which it was granted. Findings made by a foreign authority are excluded if their content is manifestly contrary to the Belgian public order. In the present case in which the aim is to register a foreign notarised document, the conditions for transcription of the document in the Belgian register of civil status are: 1) the foreign civil status certificates must have been drawn up by the relevant foreign local authority in the standard form used in the foreign country; 2) a literal copy of the act must have been issued by the foreign authority that initially drew it up. This copy must be legalised by the competent local authority and also by the competent Belgian consulate or affixed with an apostille, and; 3) the authentic version drawn up in a foreign language must be translated into Dutch, French or German, depending on the language of the Belgian community where the certificate is to be registered/transcribed. The translation must be a sworn translation"[234].

In Denmark, "only civil status information is included in the CPR-register, such as: single status; married status; divorced status; widow or widower status; information about a registered partnership or about the dissolution of a registered partnership; surviving partner or death; information on the CPR-

[233] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.2.1.
[234] See H. De Waele et al., National Report-Belgium, § 4.2.2.

number of the spouse, registered partner and on separation. Previous civil status information is also kept in the CPR-register (historic register)"[235].

In Hungary, "in general, diplomatic legalisation by the Hungarian authorities is necessary. However, if the country is a member of the 1961 Hague apostille agreement, apostille can be used on the documents. Finally, if correlation exists with the related country (ie. Hungarian judgements/public documents are recognised without apostille or legalisation), the Hungarian authorities also accept such documents without any special procedure (of course, translation is necessary). According to Section 27 of Act CXL of 2004 on the general rules of administrative proceeding, the existence of such relations is presumed regarding countries belonging to the EEA. The German system on public notaries is very similar to the Hungarian. As a result, the documents issued by them are not questioned and would be accepted without legalisation. In the case of the USA, the situation would be basically different. There, the authority and system of public notaries is different state-by-state, and this difference could cause problems. The solution in that case is the usage of apostilles for such documents"[236].

In the Netherlands, "documents issued in French, German or English will not be translated when being accepted by the Registry Office (*Burgerlijke stand*) in The Hague at the National Tasks Division (*Landelijke Taken*). If foreign documents are issued in other languages, the applicant will need to supply a translation from a sworn translator. The foreign documents also require an *Apostille* stamp in order to be legalised or to be verified in the Netherlands, if the country is party to the *Apostille* Convention"[237].

In Spain, "a foreign notarised document (given by a foreign notary) enters a Spanish Registry Office when certain conditions are met: the control of the formal guarantees of the document (translation and legalisation/apostille, unless the registrar knows the language and the authenticity of the document); the control of the competence of the granting authority; the control of equivalence between the foreign notary function to the Spanish notary. It is also necessary that the registrar check the validity of the act stated in the document (the testament, the acknowledgement of a natural child) according to the rules of private international law applicable and that this act passes the control of public policy. In the area of patrimonial law, the Spanish Supreme Court stated the entry in the Property Registry of a mortgage included in a document authorised by a German notary based on the equivalence of the notarial functions between German notaries and Spanish notaries (Sentence of Supreme Court, of 19 June 2012). When there is no equivalence, the entry is not possible (Resolution of General Directorate of the Registries and Notaries, of 22 February 2012). In the same sense, the equivalence of authorities is required in the Article 60 of the Law 29/2015, of 30 July, on International Legal Cooperation in Civil Matters"[238].

4.2.3. FOREIGN JUDGEMENTS.

-*Model Case:* A judgement issued in France establishes that a Spanish citizen is the biological father of a child. The father provides this judgement to the Spanish Registry Office to register the fatherhood in

[235] See S. Adamo, National Report-Denmark, § 4.2.2.
[236] See T. D. Ziegler, National Report-Hungary, § 4.2.2.
[237] See B. Safradin, National Report-The Netherlands, § 4.2.2.
[238] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.2.2.

the birth record of the child.

Conclusion:

The recognition of a foreign judgement to access a register is generally allowed. The general principle is the automatic recognition, without special procedure, except in the Netherlands, which requires a previous declaratory court order which establishes that a foreign act or judgement is amenable for inclusion in the register. In all cases, the foreign judgments are required to fulfill conditions for the recognition: public policy, control of competence, requirements to service of documents, control of authenticity and translation of the judgement.

In Belgium, "the general principle applicable is the automatic recognition of a foreign judgement. This automatic recognition gives an immediate effect to the judgement, i.e., it will produce legal effects in the territory of Belgium (Articles 22 and following of the CPIL). The prerequisites for this recognition are that the judgement should not contravene the conditions settled in the article 25 CPIL. These are: no contravention of Belgian public policy; the rights of the defence have not been violated; the decision was obtained in a matter where persons could freely dispose of their rights; the judgement may not be still pending appeal in the state where the decision was taken; the judgement must not be irreconcilable with a judgement given in Belgium or a previous decision made abroad; the judgement may not be the result of an application made abroad after the introduction in Belgium of an application still pending between the same parties for the same purpose, in the situation in which the Belgian courts had exclusive jurisdiction to entertain the application. Furthermore, according to Article 26 CPIL, a foreign judicial decision is authentic and constitutes proof of the findings made by the foreign judge, if it meets the necessary conditions for its authenticity under the law of the state where it was granted. The findings made by the foreign judge contrary to Belgian public order are to be excluded. The foreign civil status judgement or certificate must have been drawn up by a relevant local authority in the standard form used in that country; it is also necessary that the judgement is definitive; and its translation into one of the official languages in Belgium is required"[239].

In Denmark, "foreign judgements as such are not registered in the CPR-register, which only contains personal information. However, a judgement can be used in order to register the paternity of a child in the CPR-register"[240].

In Hungary, "no special procedure is necessary for the recognition of an official foreign decision, but the parties have the right to ask for a decision on recognition by the courts. Translation of the judgement is necessary. If Hungarian courts have exclusive jurisdiction, the judgement cannot be recognised. There are also other circumstances which must be fulfilled: (i) the decision is construed as definitive by the law of the state in which it was made, (ii) there is reciprocity between Hungary and the state of the court or authority in question: i.e. the foreign country would also accept (recognise and enforce) a Hungarian judgement in its territory, and (iii) neither of the grounds for denial prevail. An official foreign decision shall not be recognised, if (i) doing so would violate public order in Hungary; (ii) the party against whom the decision was made did not attend the proceeding either in person or by proxy because the subpoena, statement of claim, or other document on the basis of which the

[239] See H. De Waele et al., National Report-Belgium, § 4.2.3.

[240] See S. Adamo, National Report-Denmark, § 4.2.3.

proceeding was initiated was not served at his/her domicile or residence properly or in a timely fashion in order to allow adequate time to prepare the defence, or (iii) the findings of the procedure were based on processes that seriously violate the basic principles of Hungarian law (like basic rules on human rights), (iv) the prerequisites for litigation for the same right from the same factual basis between the same parties before a Hungarian court or another Hungarian authority have already taken place before the foreign proceeding, or (v) a Hungarian court or another Hungarian authority has already resolved a case by definitive decision concerning the same right from the same factual basis between the same parties"[241].

In the Netherlands, "pursuant to Article 1:26 DCC, the court could be asked to issue a declaratory court order which establishes that a foreign act or judgement is amenable for inclusion in the Dutch Civil Registry. The applicant is required to provide the judge with a certified copy of the judgement, and a certificate of the court of origin, identifying the court and the parties of the judgement. Such petition can be filed on behalf of the claimant by a Dutch attorney/lawyer. The preliminary relief judge will not examine the grounds on which an application for enforcement can be denied, but only test if all formalities have been complied with. The court only looks into the refusal grounds if the party against whom the judgement is given appeals the declaration of enforceability. The court is not allowed to review the case on its merits"[242].

In Spain, "the Article 44 of Law 29/2015, of International Legal Cooperation in Civil Matters and the Article 11 of Law 15/2015, of Voluntary Jurisdiction provide for the automatic recognition (no special procedure is necessary) of a foreign decision, but the parties have the right to ask for the issue of a declaratory court order. In all the cases, there are established conditions for the recognition of foreign judgements: the authenticity of the documents, the international competence of the judge of origin, the requirements of service of documents, public policy control and the foreign judgement should not be inconsistent with a previous Spanish judgement or lis pendens. Upon Law 20/2011 of Registry Office comes into force, the foreign judgement could be entered with automatic recognition before the Registry Office. The registrar has to check the authenticity of the documents, the international competence of the judge of origin, the requirements of service of documents and public policy control"[243].

Case 4.3: Control of equivalence between registry offices

Background: according to some European laws, the registrar has to control the legality of the act before recording it in the Registry. This control is made according to family law and international private law rules in force in each State. These rules differ significantly between the States. The registrar also has to refuse the entry if the act violates public policy. Due to the fact that this control could be an obstacle to the free movement of persons, the scope of this control of legality might be affected by the mutual recognition principle.

4.3.1. ARE REGISTRARS COMPELLED TO CARRY OUT A CONTROL OF LEGALITY OF THE CIVIL ACT?

[241] See T. D. Ziegler, National Report-Hungary, § 4.2.3.
[242] See B. Safradin, National Report-The Netherlands, § 4.2.3.
[243] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.2.3.

-*Model Case:* The parenthood of a child, born by a surrogacy arrangement, is established by a foreign judgement. The intending parents provide this judgement to the registry officer in order to register the filiation of the child. In accordance with the law, the officer of the register may refuse to register if he/she is obliged to control public policy.

Conclusion:

The registrars are compelled to carry out control of legality of the civil status act contained in the document. Notwithstanding, the extent of this control is different in each State. As a rule, a control of public policy is provided. Additionally, it is also possible to check the civil status act under the rules of private international law of the required State.

Belgium "applies the automatic recognition of a foreign judgement or notarised or legalised document. As mentioned, the prerequisites necessary for the automatic recognition are that the foreign act or judgement comply with the necessary conditions as to its authenticity according to the law of the state in which it was granted. Consequently, the officers from the different registers in which the foreign act or judgement is to be registered are compelled to preclude from extending its effect if its content is manifestly contrary to Belgian public order"[244].

In Denmark, "foreign documents that have impact on family life are controlled as far as their authenticity is concerned. A circular is in force on the recognition of foreign documents such as: marriage (marriage certificates, civil status certificates etc.), divorce and separation, documentation for death abroad, parental custody, name and paternity. The municipality where the foreigners live is the first instance where the documents are delivered in order to be ascertained as authentic and afterwards they are registered"[245].

In Hungary, "it is highly likely that the authorities and courts would use the public policy argument and not recognise a foreign judgement. There are some ongoing court cases, in which the Ukrainian consulate of Hungary noticed surrogacy agreements were concluded and did not recognise the biological mother of the child as the mother. That conformed with the letter of Hungarian law, but was contrary to Ukrainian and Strasbourg law and also violated the content of public documents produced in Ukraine. The final court judgement in these cases has not yet been adopted"[246].

In the Netherlands, "the content of the document is recognised if the instrument is made in a foreign country, following the local requirements and by an authorised authority (Article 1:21b DCC). The majority of civil status documents contain specific rules determining their recognition. The recognition of the following civil status records will be dealt with by the Registrar according to the following provisions: Birth: Article 10:100-10:101 DCC; Marriage: Article10:31-10:34 DCC; Registered Partnership: Article 10:61-10:62 DCC; Death: Article 10:100-10:101 DCC. The document may itself be recognised, but the effects of the document may be restricted by virtue of, for example, the public policy exception. A general public policy exception exists for the entire application of Dutch private international law as enshrined in Article 10:6 DCC. An authority will sometimes first try to verify the

[244] See H. De Waele et al., National Report-Belgium, § 4.3.1.
[245] See S. Adamo, National Report-Denmark, § 4.3.1.
[246] See T. D. Ziegler, National Report-Hungary, § 4.3.1.

content of the document or it may also ask the applicant to produce additional documents. In addition, the Registrar can have the legalised document verified in the country where it originated by asking the authorities in that State whether the information in their register confirms the information in the document"[247].

In Spain, "according to the Article 23 of 1957 Law of the Registry Office, the registrar has to assess that the civil act is legal. This means that when international civil acts must be recorded, the registrar has to check their validity under the rules of private international law applicable and to control public policy. On these grounds, for example, the refusal to record the parenthood derived from surrogacy arrangements has been justified. Leading case: Sentence of Supreme Court of 6 February 2014. In the same sense, the Additional Provision Third of Law 15/2015, of Voluntary Jurisdiction establishes the need to check the validity of the civil act under the rules of private international law applicable and to control public policy"[248].

4.3.2. How do registrars control marriages of convenience? (see also question 3.6.2.)

-Model Case: The registry officer refuses to record the registration of a marriage between a Spanish citizen and an Ecuadorian citizen on the grounds that it is a marriage of convenience.

Conclusion:

The marriages of convenience are known in the States in order to achieve advantages for immigration or nationality reasons. There are different types of rules depending on the place of marriage: in the host State or in a foreign State. In some cases, the registrar can refuse to register a marriage of convenience; in other cases, the registrar has to report it to the relevant immigration service or a judgement to declare a marriage void is required.

In Belgium, "it is necessary to distinguish between marriages celebrated in Belgium, and marriages celebrated in a foreign country and how Belgium recognises them. As regards the marriage whose celebration is planned in Belgium, the legal applicable framework in order to prevent the marriage is article 167 CC. These articles award a wide discretion and control to the officer of civil status. The law of 12 January 2006 amending the Law of 15 December 1982 on access to the territory, residence, establishment and removal of foreigners explicitly refers to marriages of convenience. This text introduces a special provision penalising marriages of convenience and further sanctions that were also already referred to in the context of question 3.6.4. As regards the marriages celebrated in a foreign country, the general rule applicable is the foreign authentic/notarised/legal acts are, *a priori*, fully recognised in Belgium without any extra procedure regarding this fact (Article 29 CPIL). This general rule has to be seen in the context of a marriage of convenience. In those cases, the controls that Belgium can carry out are *a posteriori*, meaning that it would be a control exercised by the judge in the context of a claim in order to declare a marriage invalid"[249].

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[247] See B. Safradin, National Report-The Netherlands, § 4.3.1.

[248] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.3.1.

[249] See H. De Waele et al., National Report-Belgium, § 4.3.2.

In Denmark, "in cases where the marriage is concluded in Denmark, the municipal authority where the marriage is supposed to take place has a duty to report to the Immigration Service if there is a suspicion that the marriage may be a marriage of convenience. The question is of relevance in cases where marriage is supposed to constitute the basis for an application for family reunification in Denmark. Suspicion may arise if the two parts seem not to know each other or if they do not speak the same language. A mere suspicion however does not give the municipal authorities the right to deny a marriage certificate"[250].

In Hungary, "such marriages are valid: even if in certain cases they have criminal law consequences (as in the case when a Hungarian person wants to support the stay of a foreign person in Hungary for financial benefit), they have similar effects to any their marriages, and must also be registered. It is of course possible that the registering authority may ask the Immigration Office to check the background of the parties"[251].

In the Netherlands, "Dutch law provides for the prevention of misuse of the right to family reunification. One example is the Marriages of Convenience (Prevention) Act as already discussed in §3 above. The registrar is required to request a declaration from the chief of police in cases where one of the partners to be does not hold a legal permanent residence status. The police is responsible for investigating the situation and conducting home visits and interviews in order to ascertain whether or not the relationship concerns a marriage of convenience"[252].

In Spain, "the Instruction of the Directorate General of Registries and Notaries, of 31 January 2006, contains the guidelines for the control of marriages of convenience. The Spanish Judge of the Registry shall emit a report prior to the access of the marriage to the Spanish Registry Office. If a certificate of a foreign Registry is provided, the registrar controls this certificate and complementary statements obtained by separated and confidential interviews (art. 246 Regulation of Civil Registry)"[253].

4.3.3. How do registrars control the filiations of complacency?

-*Model Case:* After the acknowledgement of fatherhood of a child, the registrar rejects the registration on the grounds that it is a recognition of filiation by complacency.

Conclusion:

"Filiation of complacency" means the recognition of fatherhood by someone who knows that he is not the biological father of the children with the sole aim that the son or daughter acquires the nationality of the father or a residence permit. The Registrar of civil status can refuse the registration of the birth certificate on the basis that the acknowledgement of fatherhood is not in accordance with the law. If the birth certificate has already been registered, the Registrar or the Public Prosecutor service can turn to the court to ask for a declaratory court order.

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[250] See S. Adamo, National Report-Denmark, § 4.3.2.
[251] See T. D. Ziegler, National Report-Hungary, § 4.3.2.
[252] See B. Safradin, National Report-The Netherlands, § 4.3.2.
[253] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.3.2.

In Belgium, "under article 31 CPIL, the authorities responsible for registering a parenthood are requested to mention, transcribe or use as a basis for registration a foreign act or decision after verifying that specific conditions are met. In case of serious doubts as to whether or not the conditions are met, these authorities will transfer the foreign act or decision to the Public Prosecutor, who will carry out additional checks before rendering advice. The offence is difficult to detect by the authorities, but there are certain elements that may warn the Belgian authorities that they are confronted with a filiation of complacency. These elements are the factor linked to the relationship between the declaring person and the child, as well as between the declaring person and the mother/father of the child, the precarious or illegal residence status of the mother/father, the number of children recognised, among others. All these elements may indicate that the recognition is being used with a view to obtaining or extending a residence permit. All these elements may prevent a Belgian authority from registering a filiation"[254].

In Denmark, "filiation by complacency is not a legal notion which is used in Danish legislation"[255].

In Hungary, "the acknowledgement (statement) is full proof in itself. Such a statement can be made if someone else is not recognised as the father of the child and if at least 16 years of difference exists between the age of the child and the prospective father. The approval of the mother is also necessary. The statement can be challenged in court if the father was not in connection with the mother in the related time, or if the statement was based on failure, misrepresentation or duress (Section 4:107 of the Civil Code). The presumption of paternity may only be challenged by the presumed father, the mother, the child, or by the child's descendants after his/her death. Section 35-38 of the related Ministry of Justice decree [(32/2014. (V. 19.) KIM decree)] contains general provisions on the statement of fatherhood. The authorities only try to prove whether the child was not someone else's, based on the general rules (such as, for example, in the case whare a mother was married to someone else at the time of birth)"[256].

In the Netherlands, "'Filiation of complacency' in this context resembles the recognition of fatherhood by someone who knows that he is not the biological father of the child with the sole aim that the son or daughter acquires the nationality of the father or in some cases the permanent residency. In principle, non-biological fathers are allowed to recognise the child under Dutch law. However, if recognition of a child is done for certain fraudulent reasons, such as solely to acquire Dutch nationality, the recognition is not allowed. This is regulated in Article 1:205(1)(c) DCC, which stipulates that a request for the nullification of a recognition of paternity – on the grounds that the man who has recognised paternity is not the biological father of the child –may be filed at the District Court "by the mother if she had been moved to give her consent to the recognition of paternity under the influence of threat, mistake or fraud (deception) or, provided that the influence occurred in a period that she was still under age, under the influence of abuse of circumstance." If it concerns a filiation of complacency, (*schijnerkenning*) the Registrar of civil status can refuse the registration of the birth certificate on the basis that it conflicts with Dutch public order in the case that the foreign child has been recognised by a Dutch father for the sole purpose of obtaining admission to the Netherlands. Pursuant to Article 1:18b(3), the Registrar of civil status will notify the Aliens police on his/her findings. If the birth

[254] See H. De Waele et al., National Report-Belgium, § 4.3.3.
[255] See S. Adamo, National Report-Denmark, § 4.3.3.
[256] See T. D. Ziegler, National Report-Hungary, § 4.3.3.

certificate has already been registered, the Registrar or the Public Prosecutor service can turn to the court to ask for a declaratory court order. If the judge rules that the foreign recognition constitutes a filiation of complacency (*schijnerkenning*), this can lead to – upon the request of the Public Prosecutor Service – the situation that a wrongly registered certificate is removed from the registration (Article 1:24 DCC). In April 2003, a new law on Dutch nationality entered into force (*Rijkswet*). Before this amendment, children born out of wedlock would acquire Dutch citizenship automatically if a Dutch father recognised them. Due to the increasing fraudulent forms of recognitions, this law was amended. The Dutch government decided that children born out of wedlock could only acquire the Dutch nationality in the case that the Dutch father took care of them for a minimum of three years. However, if – in the meantime – these children did not acquire the mother's nationality, this would render them stateless. Consequently, the law was amended again in 2009. As things stand, children will automatically acquire Dutch nationality if their Dutch father recognises them before they reach the age of seven. After this age, fatherhood has to be confirmed by means of a DNA test"[257].

In Spain, "the Instruction of the Directorate General of Registries and Notaries, of 20 March 2006, over prevention of documentary fraud with respect to civil status, may refuse to register, for example, if there is no evidence of cohabitation between the mother and alleged father at the time of pregnancy or there are data that make the reality of parenthood suspect (Resolution of Directorate General of Registries and Notaries, 5 July 2006; Resolution of 25 November 2011; Resolution of 10 February 2012; Resolution of 4 May 2012). The Registrar of civil status can refuse the registration of the birth certificate on the basis that it is not in accordance with the law in the case that the foreign child has been recognised by a Spanish father"[258].

Case 4.4: Cross-border cooperation between registry offices

Background: the different registration systems of the States and the lack of harmonisation of the registry law cause different obstacles to the free movement of persons. Particularly important, in order to guarantee the right to sole identity, is the ability to communicate the data of the civil status that may affect the nationals of other States. It is also important to facilitate the performance of the events that affect civil status in other States. However, there could be problems due to the requirement in one State of the event of documents that were unknown to the State of the register.

4.4.1. ARE THERE ANY SPECIFIC INSTRUMENTS IN YOUR COUNTRY FOR CROSS-BORDER COOPERATION BETWEEN REGISTRY OFFICES?

-*Model Case:* A national of one State seeks to celebrate their marriage in another State (State B), whose authorities requested a certificate of no impediment to the marriage. Requested the certificate, the registrar of Registry Office of State A refuses to supply that document because such a document is unknown in its law.

Conclusion:

Conventions of the International Commission on Civil Status, of which Belgium, the Netherlands and

[257] See B. Safradin, National Report-The Netherlands, § 4.3.3.

[258] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.3.3.

Spain are party, facilitate and enhance international cooperation between civil registration authorities. In other cases, Denmark and Hungary, there are specific international or bilateral agreements to achieve this goal.

Belgium "is party to a number of international conventions concluded under the sponsorship of the International Commission of Civil Status. These tend to favour the international scope of actions and the exchange of information between authorities of different Member States. In fact, Belgium has participated in a great range of International Conventions in order to enhance the international cooperation between civil registration authorities. An example of this cooperation between registries is the fact that the birth certificate of a foreign child will not only be registered in Belgium, but transmitted to the authorities of his/her nationality with which Belgium has concluded an agreement of cooperation. The transmission will be immediate. Countries with which Belgium has concluded such an agreement are Luxembourg, Switzerland, Bulgaria and Italy"[259].

In Denmark, "only cooperation between the CPR-registers of the Nordic countries (Denmark, Sweden, Finland, and Norway) exists (Executive Order on Nordic Agreement on National Registry, BKI no. 8 of 01.02.2007)"[260].

Hungary "has some international, bilateral agreements concluded with the following states: Albania, Algeria, Bulgaria**,** Cyprus, Czech Republic and Slovakia (concluded as Czechoslovakia), Egypt, Finland, France, Greece, Iraq, Yugoslavia, China, Korea, Cuba, Poland, Mongolia, Italy, Austria, Romania, Syria, former Soviet Union, Turkey, Tunisia, Ukraine, Vietnam and Moldova. According to some of the agreements, certain data (the data on civil status) is automatically transmitted to other authorities"[261].

In the Netherlands, "the Conventions of the International Commission on Civil Status, of which the Netherlands is party, facilitate the traditional cooperation between the civil status authorities. However, these Conventions have not been ratified by all Member States. In addition, all Member States of the EU have ratified international legalisation conventions, which make the legalisation procedure easier. One example is the Apostille Convention that entered into force on 5 October 1960. This convention makes it possible for the applicant to legalise his/her document by a single procedure – the issue of an Apostille stamp – and immediately use that document in any state that is a party to the Apostille Convention by means of mutual recognition. A birth certificate issued in the Netherlands for example is legally valid in all countries that have ratified the Apostille Convention and hence no translation is necessary"[262].

In Spain, "the Registry Office establishes the annotation of events that affect civil status of Spanish citizens or events performed in Spain affecting the civil status under a foreign law. Also foreign judgements are noted in the Registry even if they could not be recognised in Spain (art. 153 of Regulation of Civil Registry). The Conventions of the International Commission on Civil Status, of which Spain is a party, facilitate the traditional cooperation between the civil status authorities. Spain is a Member of the ICCS Convention to facilitate the celebration of marriages abroad, Paris, 10 September

[259] See H. De Waele et al., National Report-Belgium, § 4.4.1.
[260] See S. Adamo, National Report-Denmark, § 4.4.1.
[261] See T. D. Ziegler, National Report-Hungary, § 4.4.1.
[262] See B. Safradin, National Report-The Netherlands, § 4.4.1.

1964 (ICCS Convention nº 7). It is also a Member of the ICCS Convention on the issue of a certificate of legal capacity to marry (ICCS Convention nº 20)"[263].

4.4.2. Are there any means for the communication of registry data when they may affect the nationals of other States?

-*Model Case:* A French national marries in Spain. The marriage is registered at the Spanish civil register but not in France. On returning to France, the French national wants to marry before a French authority. It raises the question of proof of the capacity of the spouse.

Conclusion:

The national legislations do not provide for the communication of registry data when they may affect the nationals of other States. Based on the Conventions of the International Commission on Civil Status, administrative cooperation in cases of civil status documents could be developed. Belgium, the Netherlands and Spain are Members of the ICCS Convention on the international exchange of information relating to civil status, 4 September 1958. Additionally, civil registrars currently undertake administrative cooperation on an informal basis.

Belgian legislation "does not prevent this kind of data communication between registries. However, in cases where the foreign authority was called upon to celebrate a marriage and proof of the capacity of the spouse is required, the Belgian diplomatic or consular post abroad can deliver a certificate of non-impediment to a marriage to the Belgian national"[264].

In Denmark, "cooperation between registries is in place only as far as the Nordic countries are concerned. In all other cases, the Danish authorities will have to evaluate the foreign certificates provided in order to process a particular application"[265].

In Hungary, "Hungarian authorities transfer data registered in Hungary in the above-mentioned cases automatically. Regarding other cases, according to Section 27 of Act CXL of 2004 on the general rules of administrative proceedings, the registry offices may communicate with each other, if necessary. Moreover, if the foreign authority is unknown to the Hungarian authorities, the Foreign Minister must be addressed"[266].

In the Netherlands, "as things stand, there is no harmonisation with regard to civil status documents and their recognition in the EU. However, civil registrars in some Member States - including the Netherlands - currently undertake administrative cooperation on an informal basis. In addition, based on the CIEC Conventions, in particular Conventions No 3, 8 and 26, administrative cooperation in cases of civil status documents could be developed. Pursuant to Convention No 3, when civil registrars issue a record of marriage, they must give notice of this to the civil registrar for the place of birth of each one of the spouses, using a standard form. This Convention is in force in eleven Contracting States, six of which are EU Member States, including Austria, Belgium, France, Germany, Italy, Luxembourg, the

[263] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.4.1.
[264] See H. De Waele et al., National Report-Belgium, § 4.4.2.
[265] See S. Adamo, National Report-Denmark, § 4.4.2.
[266] See T. D. Ziegler, National Report-Hungary, § 4.4.2

Netherlands, Poland, Portugal and Spain. In addition, the European Commission issued a Green Paper on this matter proposing automatic recognition of civil status documents such as marriage certificates. According to the Commission's Green Paper [COM (2010) 747 final], automatic recognition implies that 'each member state would accept and recognise, on the basis of mutual trust, the effects of a legal situation created in another Member State`. That automatic recognition should be accompanied by compensatory measures in order to prevent fraud and abuse. Public order rules in the Member States should be taken into account in this matter"[267].

In Spain, "Spanish civil status registrars do not transmit information about civil status acts and changes of citizens of other EU Member States. Spain is a Member of the ICCS Convention on the international exchange of information relating to civil status, 4 September 1958 (ICCS Convention nº 3). It is also a Member of the ICCS Convention on the issue of a certificate of differing surnames, The Hague September 1982 (ICCS Convention nº 21)"[268].

4.4.3. In the issuance of civil status certificates, are language requirements or other formal conditions of other States considered?

-Model Case: A birth certificate of a French national who is registered in the Spanish Civil Registry is requested. The certificate is requested to provide it to a French authority. Is it possible that the certificate be issued in French?

Conclusion:

The civil status certificates can be issued in the language of other States according to the rules of Conventions in force between the States. In this field, the Conventions of International Commission on Civil Status are important in that they establish a uniform format for civil status documents (i.e. marriage, death, and birth).

In Belgium, "pursuant to the Vienna Convention of 8 September 1976, an international or multilingual birth certificate can be requested and provided. This certificate is issued in the official language of all the signatories of the agreement"[269].

In Denmark, "the Names Executive Order (in section 3) states that the documents to be provided to the civil registration officer have to be the original documents and translated into Danish, although an official translation is not typically required. If the document is written in Norwegian, Swedish, Finnish, Icelandic, English, or German a translation is not required. Also, the Social Appeal Board informs that a document in a foreign language will not need to be translated if the personnel in the municipality treating the document have a good command of the language involved"[270].

In Hungary, "all the documents are issued in Hungarian by the Hungarian authorities"[271].

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[267] See B. Safradin, National Report-The Netherlands, § 4.4.2.
[268] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.4.2.
[269] See H. De Waele et al., National Report-Belgium, § 4.4.3.
[270] See S. Adamo, National Report-Denmark, § 4.4.3.
[271] See T. D. Ziegler, National Report-Hungary, § 4.4.3.

The Netherlands "is party to the Convention on the Issue of Multilingual Extracts from Civil Status Records, which has as its purpose to define a uniform format for civil status documents (i.e. marriage, death, and birth). States that are party to this Convention, including the Netherlands, are obliged to issue multilingual extracts if requested and accept the abstracts of other States and treat them equally compared to their national abstracts. States should hereby provide for translations of basic elements on the civil status records for inclusion by the other party States"[272].

In Spain, "the rules about the issuance certificates according to foreign requirements are included in the Conventions in force. For example, according to the Article 9 of the ICCS Convention on the issue of a certificate of differing surnames (ICCS Convention nº 21), the certificate shall be printed in one of the official languages of the State in which the certificate is being issued, and also in French"[273].

Case 4.5: Evidentiary value of civil status certificates

Background: the diversity of the national registries affects the value of the certificates issued and their evidentiary value in other States. Moreover, this evidentiary value is affected by the different rules of evidence established in the States. There could also be differences depending on the type of authority (judicial or administrative) which the certificate is provided to.

4.5.1. WHAT EVIDENTIARY VALUE DOES THE CERTIFICATE OF A FOREIGN REGISTRY HAVE IN YOUR COUNTRY?

-*Model Case:* A citizen presents a birth certificate to prove their age. The Registry Office of the State of origin based their records solely on the strength of a declaration made by the person concerned thereby, without additional control of legality by the registrar. This certificate is provided in a judicial procedure before a Spanish court.

Conclusion:

The foreign registry act has evidential value when the document has met the conditions about authenticity and the formal requirements are fulfilled. In many States, the foreign public documents must be handled in the same way as those issued in the required State (Hungary, Spain). In some cases, it is expressly provided that the foreign certificate must be issued by a foreign registry with equivalent functions (Spain). In other States, the foreign documents can be considered as free evidence at the discretion of the judge in the particular case (the Netherlands). The evidential value of a foreign registry act does not prevent the validity of the fact of the civil status act included in the document.

In Belgium, "here Article 27 CPIL covers a gap in Belgian legislation by explicating the validity, and thus the recognition and evidential value of a foreign registry act. In this regard, the article states that an authentic foreign instrument is recognised in Belgium by any authority without the necessity of any additional procedure aiming at establishing its validity. The authentic foreign act must satisfy the

[272] See B. Safradin, National Report-The Netherlands, § 4.4.3.

[273] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.4.3.

necessary conditions as to its authenticity according to the law of the state in which it was established"[274].

In Denmark, "Danish authorities normally do not require a particular kind of documentation for the authenticity of documents stemming from Europe, USA, Canada, Australia, New Zealand, Turkey or several other countries. However, if the authorities find a concrete need for it, they can require further documentation to be provided in order to ascertain the authenticity of the documents in question. In other cases where the foreign Registry is not located in one of these countries, a 'legalisation' has to be provided in order to admit a certificate from abroad (please refer to answer to question 1.2.1. above). Also, Denmark has ratified the Apostille Convention; thus, if a document has an Apostille Certificate, which has been issued by a public authority in the country where the document was originated, and the authority is on the list provided by The Hague Conference on Private International Law, the authenticity of the foreign document will automatically be confirmed"[275].

In Hungary, "public documents are accepted as full proof of the data they contain providing the other formal requirements are fulfilled [see Section 195 (8) of Act III of 1952 on civil procedure, which says that foreign public documents must be handled in the same way as those issued in Hungarian]. This means that until the opposite is proven, they are accepted as valid documents with full proof"[276].

In the Netherlands, "with regard to the evidential value of certificates of civil statuses in general, Article 1:22 DCC stipulates that certificates of civil status have the same evidential value as other authentic deeds. Some foreign certificates issued by a qualified instance such as birth certificates, certificates of registered partnerships and death certificates can be registered in the Dutch registry of civil status in The Hague. This constitutes certificates of people that at the moment of registration are Dutch, have been Dutch for a certain amount of time or have been accepted in the Netherlands by means of a refugee status (Article 1:25 (1) DCC). Pursuant to Article 1:25 (2) DCC, birth certificates issued outside the Netherlands by a competent authority "in accordance with the local regulations are registered on instruction of the Public Prosecution Service or at the request of an interested person in the register of births of the municipality of The Hague, if the birth certificate concerns a person of foreign nationality and a later mark must be added to the birth certificate pursuant to a statutory provision of Book 1 of the Dutch Civil Code." With regard to the legality of the facts of the civil status that have been included in a foreign certificate, the Dutch District Court can be asked to issue a declaratory court order on a certificate or court order, stating that the act or decision has been issued according to the local regulations by a qualified instance and that this act or decision can be issued in the Dutch registers of civil statuses (Article 1:26 DCC). With regard to the general rules for acceptance of foreign documents in judicial proceedings: only authentic instruments issued by authorities from the Netherlands (i.e. notaries, the public or civil registrar) must be accepted before a Dutch court in judicial proceedings. Other instruments can be considered as free evidence at the discretion of the Dutch judge in the particular case"[277].

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[274] See H. De Waele et al., National Report-Belgium, § 4.5.1.
[275] See S. Adamo, National Report-Denmark, § 4.5.1.
[276] See T. D. Ziegler, National Report-Hungary, § 4.5.1.
[277] See B. Safradin, National Report-The Netherlands, § 4.5.1.

In Spain, "the registers are judicial registers and there is a presumption of exactitude of the content of the register. This presumption is a consequence of the control that the registers have to make about the validity of the act before recording it. That explains that the certificate has a special evidentiary value related to other means of proof. For example, the certificate prevails over the statements made by a witness. The certificate of a foreign Registry Office only contains this presumption if it is equivalent to Spanish Registry Office. If the Registry Office of the State of origin has a purely advertising function, the certificate issued will have a lower evidentiary value before Spanish authorities"[278].

4.5.2. Is the foreign registration certificate given the same evidentiary value in the judicial sphere as at the administrative level?

-*Model Case:* A certificate of marriage is provided before an administrative authority to apply for a visa for family reunification.

Conclusion:

In general the States establish the same evidentiary value of the foreign documents in the judicial sphere as at the administrative level. The foreign documents do not need to be accepted in all cases as proof by the authorities of the requested State. It is possible to check the content of the document and ask the applicant for additional evidence. In some States, such as Spain, at a procedural level, the certificate of the foreign register establishes the presumption of exactitude of the content if it is equivalent to a Spanish certificate.

In Belgium, "no distinction is made as to the destiny of the certificate; thus, if it is valid in Belgium and meets all the conditions for its authenticity, it will be accepted by the administrative authority. This is established in the article 27 CPIL"[279].

In Denmark, "a foreign registration certificate has the same evidentiary value in the judicial sphere as at the administrative level"[280].

In Hungary, "both levels are the same. Regarding immigration, family relationship can be proven in numerous ways. If acquiring proper documents would cause difficulties (eg. the person stems from a war zone), the existence of public documents may be replaced by the statement of the person involved in their content"[281].

In the Netherlands, "a legally valid document in a foreign country is not always recognised. In order for a marriage certificate to be recognised, the authorities in the State from which the document originates have the duty to show its authenticity, in most cases this is done by the foreign ministry. Once this process has been finalised, the document should also be legalised by a Dutch mission located in that State. However, legalisation of a document does not automatically lead to acceptance by Dutch authorities of that document as proof. An authority will sometimes first try to verify the content of the document or it may also ask the applicant to produce additional documents. Furthermore, the Registry

[278] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.5.1.
[279] See H. De Waele et al., National Report-Belgium, § 4.5.2.
[280] See S. Adamo, National Report-Denmark, § 4.5.2.
[281] See T. D. Ziegler, National Report-Hungary, § 4.5.2.

Office can ask for verification of the legalised document in the country where it originated by asking the authorities in that State whether the information in their register confirms the information in the document. In addition, pursuant to article 1:20 (b) DCC, a foreign certificate or foreign court order might not be recognised if it conflicts with Dutch public order. With regard to the general rules for acceptance of foreign documents in judicial proceedings, these instruments can be considered as free evidence at the discretion of the Dutch judge in the particular case"[282].

In Spain, "in the field of immigration, to exercise family reunification, the family relationship must be proved in each case (marriage, parentage...). To this end, usually accreditation by a certificate issued by the Registry of origin suffices. When there is suspicion of fraud, an authority will sometimes first try to verify the content of the document or it may also ask the applicant to produce additional documents. On a procedural level, the certificate of the foreign register establishes the presumption of exactitude of the content only if it is equivalent to a Spanish certificate (Article 323 of Civil Procedure Law). That means full proof of the act included in the document"[283].

4.5.3. In what cases may the evidentiary value of the foreign certificate be rejected?

-Model Case: A marriage certificate, issued by a foreign registry, is provided without translation or legalisation. In addition, there are contradictory data in the registry of origin.

Conclusion:

The States establish different reasons to reject the evidentiary value of the foreign certificate. A common ground is the non-acceptance of the document if it is not legalized. Aditionally, depending on the State, it is possible to reject the document when the officer has serious doubts concerning its validity. In this context, the Recommendation of the International Commission on Civil Status No. 9 on combating documentary fraud with respect to civil status and translations is important, as it includes criteria for refusing foreign documents.

In Belgium, "as indicated in article 30 CPIL, a foreign judgement or authentic act must be legalised in order to produce legal effect in Belgium. The legalisation certifies the authenticity of the signature, the capacity in which the person signing the document has acted, and where appropriate, the identity of the person to which the document pertains. In the same vein, article 31 indicates that a foreign authentic instrument concerning the civil status cannot be mentioned in the margin of an act of civil status or be transcribed in a Belgian register of civil status or provide the basis for an entry in a population register, a register of foreigners or waiting register before the verification that the conditions referred to in article 27 CPIL are met. The verification will be carried out by the depositary of the act or the registry officer, and the Minister of Justice may establish guidelines to ensure uniform application of the conditions. If the depositary of the act or the officer has serious doubts concerning its validity, the instrument can be transferred to the prosecutor who will, if necessary conduct further checks"[284].

In Denmark, "the evidentiary value of a foreign certificate can be rejected if it stems from a country which is not a European Member State (or USA, Canada, Australia, New Zealand, Turkey, or

[282] See B. Safradin, National Report-The Netherlands, § 4.5.2.
[283] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.5.2.
[284] See H. De Waele et al., National Report-Belgium, § 4.5.3.

other selected countries), and has not been legalised (also called 'chain certification'), or does not present an Apostille Certificate. For certificates that according to Danish rules have to be legalised, the Danish Social Appeal Board notifies on its website the procedures required according to the countries concerned"[285].

In Hungary, "the validity of a foreign document is presumed. If concerns are raised, the Office of Immigration and Nationality has an expert group which gives advice on the validity of the document. However, the final decision on the document must be made by the proceeding authority"[286].

In the Netherlands, "Article 1:18(b) DCC lists the following grounds on the basis of which a registrar may refuse to draw up (foreign) certificates: 1) where a party to a certificate of civil status or an interested person fails to submit a document with all the legally required documents or where the Registrar is of the opinion that a submitted document is inadequate; 2) the Registrar will refuse to draw up a certificate if he/she finds that this would be contrary to Dutch public order; 3) the Registrar will notify all parties to the certificate and all interested persons in writing a refusal, hereby stating the reason for the refusal as well as the available solutions to rectify the situation. In addition, a copy of this written notification will be sent to the chief of the local police force"[287].

In Spain, "the ICCS issued the Recommendation No. 9 on combating documentary fraud with respect to civil status and translations. The Instruction of the Directorate General of Registries and Notaries, of 20 March 2006, on prevention of documentary fraud in civil status, on the basis of Recommendation 9 ICCS, established different criteria to refuse foreign documents that generate doubts concerning the exactitude of the documentary evidence. Such criteria could refer to the accuracy of the data derived from the document (implausible aspects observed in the document) and factors "external" to the document (eg, past practices of irregularity in the register of origin)"[288].

[285] See S. Adamo, National Report-Denmark, § 4.5.3.
[286] See T. D. Ziegler, National Report-Hungary, § 4.5.3.
[287] See B. Safradin, National Report-The Netherlands, § 4.5.3.
[288] See P. Jiménez Blanco/A. Espiniella Menéndez, National Report-Spain, § 4.5.3.

GENERAL CONCLUSION

The life events of the EU citizens express the national identity and culture of the Member States. For these reasons, a great part of these events has not been -and should not be- harmonised at the EU level in accordance with Article 4 of the Treaty on EU. However, we recommend the application of five mechanisms in order to mitigate the barriers related to the life events of EU citizens and the free movement of persons

1. **Adoption of Private International Law acts by the EU.- It is recommended as a third way**, other than the EU harmonisation of Family Law or the nationalisation of Family Law. Unification of the jurisdiction rules, applicable law and recognition is easier and more recommendable than the harmonisation of the Family law of the Member States. In accordance with the proportionality and subsidiary principles, the adoption **of EU acts of Private International Law concerning filiations, names and forenames and marriage**, could be interesting, in a similar vein to the EU acts on maintenance or successions.

2. **Mitigation of barriers to the free movement by the general principle of the effectiveness of life events ocurred in other Member States.-** National authorities shall achieve this aim under two criteria: **mutual recognition of life events** as a principle which is being consolidated by the CJEU; and the **principle of unique identity** established by the ECHR.

3. **Progressive replacement of the national public policy by a public policy at an EU level**.- The EU Chapter of Fundamental Rights and the European Convention of Human Rights should be considered with this aim, as well as the progressive attenuation of the application of national public policy.

4. **Uniform and coordinated identification and persecution of fraud and abuses of the free movement of persons.-** National and EU authorities shall identify and pursue in a coordinated and uniform manner these practises in cases such as marriages of convenience, the filiation of complacency or the evidentiary value of public documents. An EU harmonization through soft law based on guidelines, recommendations or handbooks is useful.

5. **Harmonisation of civil registries of Member States.-** This could be an interesting way, due to the barriers to the free movement of persons arising from double registrations or even from different requirements. Meanwhile, **the improvement of cooperation between the Registries** is fundamental in order to admit the effectiveness of certifications of other Member States and to facilitate the expedition of documents for life events in other Member States.

FINDINGS RELATED TO PARENTAGE

1. Types of parentage

- The European States recognise different forms of parentage, including biological parents (born in or out of wedlock) and adopted children. **The difference between** matrimonial or non-matrimonial parentage is how the filiation is established (presumptions of paternity, the requirement of recognition by the father)**.** Once the filiation is established, the children are equal before the law, irrespective of their parentage and the marital status of the parents.
- No difference is made between biological and adopted children. This applies to parent-child relationships, maintenance obligations or inheritance rights. However, this equality occurs only in the case of full adoptions, not in the case of simple adoptions.
- The principle of equality between the adopted (by full adoptions) and the biological child is considered a principle of public policy. Consequently, a foreign law or a foreign judgement which contains discriminative measures towards a child would not be applied, recognised or enforced.

2. Ways to ascertain parenthood

- The acknowledgement of natural children made before a foreign authority is valid in the required State. Generally, this document must be recognised according to the general rules of foreign public documents, such as the requirements of authenticity (legalisation), the equivalence of authorities of both States and the control of public policy.
- DNA testing is possible to ascertain the paternity of a child. Where there is a lack of regulation (Belgium), there is proof based on a blood examination on the basis of scientifically sound methods. The practice of DNA testing cannot be enforced, without the consent of the father, except in Hungarian law. That said, recognition of a foreign decision would be refused on the grounds of enforcing the DNA test. However if the alleged father refuses to undergo the test without justification, the court may consider the existence of a presumption that he is the biological father.
- The foreign act concerning the civil status (birth certificate) could be registered in the required State but different conditions are required, depending on the State, such as the the authenticity of the document, the validity of the act under the rules of private international law and the control of public policy.

3. Surrogacy arrangements

- According to the laws analysed, commercial surrogacy agreements are illegal. These agreements are not punishable, except in the Netherlands. There is not a complete set of rules prohibiting surrogacy in Belgium, Denmark or the Netherlands and these States allow altruistic surrogacy agreements. Notwithstanding, if the intending parents wish to become legal parents of the child, legal parentage has to be transferred to them. According to Hungarian and Spanish law a surrogacy agreement of the surrogate is void and cannot have any legal effect.
- In States where surrogacy is allowed, such as Belgium or the Netherlands, the recognition of filiation is possible, established in a foreign judgement or in a foreign birth certificate that

recognises the intending parents. However, in Denmark, when a Danish couple is involved, it is necessary that a transfer of the custody from the surrogate mother to the Danish father has to take place in the country of birth. In States where surrogacy is forbidden, like Hungary and Spain, there are different practices in order to give effect to the foreign judgement on surrogacy.

- There is no single answer to this case. Some national courts, try to accept the parenthood established abroad or find a way to maintain the status quo of the relationship already generated between the intending parents and the children, even if in the domestic law surrogacy is not allowed (Spain). In other cases, a step-adoption of the child is required upon returning to the State (Denmark). Finally, it is possible not to recognise the parentage established abroad and not give effects to it (Hungary).
- The *Mennesson* and *Labassee* cases have impact in those States where the child, whose legal parenthood is established abroad, has no way of establishing a relationship with the intending parents (such as recognition of the biological father or adoption). These cases may change the position of those States that reject all the effects of surrogacy.

4. Filiation and adoption

- According to the States analysed, the simple adoption is only available in Belgium. In other cases, the adoption establishes a filiation with the adopting parents and the relationship with the family of origin of the adopted child elapses. Generally, the full adoption is irrevocable, but many States (Hungary and the Netherlands) establish ways to revoke the adoption under the fulfillment of certain guarantees and in some special circumstances. In Denmark, the annulment of the adoption is also possible in a series of circumstances.
- The States recognised adoption by singles or legal cohabitants, but the joint adoption is usually granted to heterosexual married couples or registered partners. When the State recognises same-sex couples (the Netherlands and Spain) the joint adoption of a child is possible. Belgium also allows the adoption by cohabitants, heterosexual or of the same sex, in a permanent and affective way.
- All States analysed are party to the Hague Convention of 1993 on protection of children and Cooperation in respect of international adoption. Consequently, if an adoption order comes from a State party to the Hague Convention, this adoption shall have the effect of the establishment of legal family ties between the child and his/her adoptive parents. It is possible the recognition of adoption orders that do not terminate the child's legal relationship between his/her biological parents. In this case, an additional order is required according to the private international law rules of the host State.
- The States provide for the acquisition of nationality in case of adoption of a minor, although different age requirements and conditions are established.

FINDINGS RELATED TO FORENAMES AND SURNAMES

1. Disparities between legal systems

- Frequently, the law of the nationality of the applicant governs the name and surnames. The nationality of the parents is generally transferred to the children with a more restricted extension in certain cases.

- The law of the State of which he/she is a national was applied except for certain countries in which the law of residence is applied. However, relevant differences are observed in relation to the acquisition of the nationality of a Member State by the children regarding the residence of the foreign parents.
- Two models are observed: the model of one surname and the model of two surnames (father and mother). In the first case, the main issue is the choice of the surname (desirably by agreement of the parents but the combination of the two surnames is possible in some countries or the using of non-protected last names). In the second model, the main issue is the order of the surnames (desirably by agreement of the parents).

2. Gender Equality

- Gender equality is being incorporated and the maiden surname of the wife is conserved. The tradition of some countries concerning the acquisition of the husband's surname remains as a free option (not a duty) either by incorporation of a hyphen or a mere reference in the Registry or the indication of the marital status.
- Gender equality is being incorporated and the transmission of the maiden surname of the mother is possible as an option, or even that the child has only one surname. However, it is true that, in the absence of choice, in some countries the child automatically obtains the father's surname.

3. Public Policy

- The countries refuse some names as being against human dignity under the principle of violation of public policy. Some countries use a database in order to check the admission of the name. The issues concerning nobility are not dealt with uniformly.
- Some examples of attenuated public policy are observed as the recognition of the gender-determined ending of last names, designation by the legal surname but also by maiden surname, the possibility to adopt patronym and matronym names, and the possibility to adopt as a last name a first name of a parent, grandparent or spouse's first name.

4. Diversity of surnames by nationality and place of birth

- Countries which apply the law of nationality do not recognise other surnames, but countries which apply the law of residence recognise other surnames.
- The requirements of the Judgement of the Court of EU of 14 October 2008 (Case C-353/06, *Grunkin Paul*) are absolutely applied. Although some countries originally found issues in the application of this case law, nowadays relevant issues are not observed.

5. Diversity of surnames by dual nationality

- Some countries prefer the application of their own law, due to the fact that the persons are nationals of that State. Thus dual nationality is dealt with differently depending if the dual nationality refers to two Member States or to a third country. In contrast, some countries provide the same rules for dual nationals, irrespective if the other nationality is that of a Member State or not.
- *García Avello* jurisprudence applied in full, but under certain conditions in some countries.

FINDINGS RELATED TO MARRIAGE

1. Disparities between legal systems

- There are a lot of disparities between legal systems in the way they affect the right to marry of EU Citizens, concerning questions such as gender, age, consent and form (religious or civil form).

2. Cross-border conclusion of marriage

- Many countries require that at least one of the spouses is either a national or a foreigner with legal residence in the country, although some countries consider marriage a fundamental right irrespective of the unlawful residence of both spouses.
- In countries which admit consular marriage, the Consular Officers may conclude marriage provided that, at least, one spouse is from the State of the Officer, neither spouse is national of the receiving State, and there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular office. However, some countries do not admit this kind of marriage or admit it in exceptional cases.
- The prevention of matrimonial tourism is reached by requiring at least one of the partners (or both in some cases) entering into a marriage must be a permanent resident or domiciled or a national of the State. Exceptionally, non-prevention of matrimonial tourism has been considered as a way of tacit protest against the prohibition of gay marriage in some countries.

3. Recognition of marriages concluded abroad

- The general rules are that the marriage is recognised if it was concluded in accordance with the law of the State where the marriage was celebrated, unless the marriage violates fundamental principles of *ordre public*. No distinctions are established between civil and religious forms except in the case of Spain regarding canonical marriage (this marriage is valid although it is not permitted in the State of conclusion).
- Polygamous marriage under personal law is not admitted for reasons of public policy. But some countries admit the attenuation of the public policy in order to protect the family or to obtain maintenance or inheritance or even widowhood pensions for successive spouses. Forced marriages are not recognised, unlike “arranged marriages” in which both parties fully and freely consent to the marriage proposed by the family leader.

4. Acquistion of the nationality of the spouse

- The requirements for acquisition of the nationality of the spouse are very different (from 1 year to 8 years of residence, 3 years being the main rule). Exceptionally, prior common residence can count as marriage.
- The residence must be legal and, in general terms, at the moment of application. Some exceptions are observed concerning when a Danish spouse is posted abroad to work for Danish interests, the application can be admitted if the residence requirement of 6 years has been met.

- At the time of application, the applicant cannot be divorced or *de facto* or legally separated for cases of preferential acquisition of nationality. They will have to satisfy the main rule regarding the residence requirement.

5. SPOUSE REUNIFICATION

- In general terms, the application for reunification requires the previous recognition of the marriage. Forced marriages and polygamous marriages are not considered valid marriages under public policy grounds. Thus, the possibility of family reunification is refused. Some theoretical exceptions can be observed in Belgium where it would be possible to reunify the family of a polygamous person. The treatment of forced marriages are not equal. In any case, Denmark does not apply the EU Directive.
- Most countries require a real marital relationship, but proof of that is different (proof that the spouses are not separated or proof of common residence for 1 year before the application or acknowledgement for 2 years before the application). Denmark does not apply the EU Directive.
- In cases of divorce the requirements are different (2, 3 or 5 years). In cases of widowhood, the widow can automatically obtain this permit, without any temporal requirement. Denmark does not apply the EU Directive.
- Some differences are observed from rules that do not require minimum ages to rules that do require that the spouse be of the age of 21. Nevertheless, the marriage cannot violate public policy under grounds of minors. Denmark does not apply the EU Directive and it requires that the spouse be of the age of 24.
- In general terms, and although some countries do not include rules, registered partners can be reunited, unlike unregistered partners. Denmark does not apply the EU Directive.
- With some exceptions, the spouse can prove his/her condition of family of an EU Citizen by any means admitted by Law. Denmark does not apply the EU Directive.

6. MARRIAGE OF CONVENIENCE

- When the spouses, both or one of them, do not truly consent to the marriage, the simulated marriage is null so they do not have effects and cannot be authorised or recognised. In consequence, this marriage is invalid for the acquisition of nationality or family reunification. These marriages can be punished by criminal law on the grounds of forgery or fraud.
- The control of marriages of convenience is basically made at the moment of conclusion of the marriage or at the moment of its registration in the Civil Register. Despite some differences, interviews and questionnaires are the main tools used to investigate fraudulent marriages.
- The different countries provide control mechanisms for marriages of convenience at the moment of recognition by their authorities. However, the procedural rules for the control are very different.
- The main proof and presumptions concerning convenience are in accordance with EU recommendations in relation with a lack of cohabitation; lack of the partners' capability to communicate in the same language; a wide age gap/difference between the partners; a lack or limited knowledge of the partners before marriage was concluded; and any previous marriage entered into by the spouses.

FINDINGS RELATED TO LIFE EVENTS AND REGISTRY OFFICES

1. CIVIL REGISTRATION SYSTEMS

- There is no single model of register. The States have different register models: an event-based registration system and a person-based registration system. One feature common to all the States is, at least, they record acts relating to civil status that occur in their own State.
- There is a direct relationship between the protection of fundamental rights and access to the registration of certain acts of civil status, especially when minors are involved. In the case of adoptions, the data of the biological family are not recorded or have limited access. However, the case law of the European Court of Human Rights has been taken into account, which ruled that the individuals' interest in knowing the truth about their genetic descent constitutes a fundamental right, on the basis of the right to 'private life' as enshrined in Article 8 ECHR. This means adopted children have the fundamental right to access the content of the civil registration to trace their origin.

2. Documents to Registry Offices

- Civil status certificates of foreign Registry Offices are recognised and can access the national registers. However, these certificates have to fulfill different requirements depending on the private international law rules of each State. Generally, the control of authenticity (by legalisation or apostille) and the translation are required. Aditionally, a requirement to check the validity of the civil act could be imposed according to the applicable law.
- Foreign notarised documents can access the national registers. However, these documents have to fulfill different requirements depending on the private international law rules of each State. Generally, the control of authenticity (by legalisation or apostille) and a translation are required. Additionally, a requirement could be imposed to check the equivalence of authorities. The general rule is that the foreign authentic instrument is recognised in the required State by any authority without the need for any procedure.
- The recognition of a foreign judgement to access a register is generally allowed. The general principle is the automatic recognition, without special procedure, except in the Netherlands, which requires a previous declaratory court order establishing that a foreign act or judgement is amenable for inclusion in the register. In all the cases, the foreign judgements are required to fulfill conditions for the recognition: public policy, control of competence, requirements to service of documents, control of authenticity and translation of the judgement.

3. Control of equivalence between EU Registry Officies

- The registrars are compelled to carry out control of the legality of the civil status act contained in the document.
- Notwithstanding, the extent of this control is different in each State. As a rule, a control of public policy is provided. Additionally, it is possible to also check that the civil status acts under the rules of private international law of the required State.
- Marriages of convenience are known in the States in order to achieve advantages for immigration or nationality reasons. There are different types of rules depending on the place of marriage: in the host State or in a foreign State. In some cases, the registrar can deny the register of the marriage of convenience; in other cases, the registrar has to report it to the relevant immigration service or a judgement is required to declare a marriage void.
- "Filiation of complacency" refers to the recognition of fatherhood by someone who knows that he is not the biological father of the child with the sole aim that the son or daughter acquires the nationality of the father or a residence permit. The Registrar of civil status can refuse the registration of the birth certificate on the basis that the acknowledgement of fatherhood is not

in accordance with the law. If the birth certificate has already been registered, the Registrar or the Public Prosecutor service can turn to the court to ask for a declaratory court order.

4. Cross-border cooperation between Registry Offices

- Conventions of the International Commission on Civil Status, of which Belgium, the Netherlands and Spain are party, facilitate and enhance the international cooperation between civil registration authorities. In other cases, Denmark and Hungary, there are specific international or bilateral agreements to achieve this goal.
- The national legislations do not provide for the communication of registry data when they may affect the nationals of other States. Based on the Conventions of International Commission on Civil Status, administrative cooperation in cases of civil status documents could be developed. Belgium, the Netherlands and Spain are Members of the ICCS Convention on the international exchange of information relating to civil status, 4 September 1958. Additionally, civil registrars currently undertake administrative cooperation on an informal basis.
- The civil status certificates can be issued in the language of other States according to the rules of Conventions in force between the States. In this field, the Conventions of International Commission on Civil Status are important as they establish a uniform format for civil status documents (i.e. marriage, death and birth).

5. Evidentiary value of civil status certificates

- The foreign registry act has evidential value when the document has met the conditions about authenticity and the formal requirements are fulfilled. In many States, the foreign public documents must be handled in the same way as those issued in the required State (Hungary, Spain). In some cases, it is expressly provided that the foreign certificate must be issued by a foreign registry with equivalent functions (Spain). In other States, the foreign documents can be considered as free evidence at the discretion of the judge in the particular case (the Netherlands). The evidential value of a foreign registry act does not prevent the validity of the fact of the civil status act included in the document.
- Generally the States establish the same evidentiary value of the foreign documents in the judicial sphere as at the administrative level. The foreign documents do not need to be accepted in all cases as proof by the authorities of the requested State. It is possible to check the content of the document and ask the applicant for additional evidence. In States such as Spain, on a procedural level, the certificate of the foreign register establishes the presumption of exactitude of the content if it is equivalent to a Spanish certificate.
- The States establish different reasons to reject the evidentiary value of the foreign certificate. A common ground is the non-acceptance of the document which is not legalised. Additionally, depending on the State, it is possible to reject the document when the officer has serious doubts concerning its validity. In this context, the Recommendation of the International Commission on Civil Status No. 9 on combating documentary fraud with respect to civil status and translations is important, as it includes criteria to refuse foreign documents.

ANNEX 1: LEGISLATION

1.1. NATIONAL PROVISIONS

Belgium

Code Civil de 21 Mars 1804, Titre Preliminaire et Liver I : Des personnes (art. 1-515) / Burgerlijke Wetboek, Inleidende Titel en Boek I : Personen (art. 1-515). M.B. / B. S. 3 September 1807.

Loi du 15 Décembre de 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen. M.B./ B. S. 31 December 1980.

Code du 28 juin 1984 de la nationalité belge / Wetboek van de Belgische nationaliteit. M.B. / W.S. 12 July 1984. M.B. / B.S. 22 June 1984.

Loi 31 Mars 1987 modifiant diverses dispositions légales relatives à la filiation / Wet tot wijziging van een aantal bepalingen betreffende de afstamming. M.B. / B.S. 27 May 1987.

Circulaire de 25 mai 1998 relative à l'entrée en vigueur et à l'application de la Convention relative à la délivrance d'extraits plurilingues d'actes de l'état civil, et Annexes, faites à Vienne le 8 septembre 1976, et du Protocole additionnel à la Convention concernant l'échange international d'informations en matière d'état civil, signée à Istanbul le 4 septembre 1958, et Annexe, faits à Patras le 6 septembre 1989 / Circulaire betreffende de inwerkingtreding en de toepassing van de Overeenkomst betreffende de afgifte van meertalige uittreksels uit akten van de burgerlijke stand, en Bijlagen, gedaan te Wenen op 8 september 1976, en van het aanvullend Protocol bij de Overeenkomst inzake de internationale uitwisseling van gegevens op het gebied van de burgerlijke stand, ondertekend te Istanbul op 4 september 1958, en Bijlage, gedaan te Patras op 6 september 1989. M.B. / B. S. 12 June 1998.

Loi du 4 Mai 1999 modifiant certaines dispositions relatives au marriage / Wet tot wijziging van een aantal bepalingen betreffende het huwelijk. M.B. / B.S. 1 July 1999.

Loi du 16 Juillet 2004portant le Code de droit international privé / Wet houdende het Wetboek van internationaal privaatrecht. M.B./ B.S. 27 July 2004.

Circulaire du 23 Septembre 2004 relative aux aspects de la loi du 16 juillet 2004 portant le Code de droit international privé concernant le statut personnel / Circulaire betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht die betrekking hebben op het personeelstatuut. M.B. / B.S. 28 September 2004.

Loi 1st Juillet 2006 modifiant des dispositions du Code civil relatives à l'établissement de la filiation et aux effets de celle-ci / Wet tot wijziging van de bepalingen van het Burgerlijk Wetboek met betrekking tot het vaststellen van de afstamming en de gevolgen ervan. M.B. / B.S. 29 December 2006.

Loi du 15 Septembre 2006 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen. M.B. / B. S. 6 October 2006.

Circulaire relative à la loi du 2 juin 2013 modifiant le Code civil, la loi du 31 décembre 1851 sur les consulats et la juridiction consulaire, le Code pénal, le Code judiciaire et la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, en vue de la lutte contre les mariages de complaisance et les cohabitations légales de complaisance / Omzendbrief inzake de wet van 2 juni 2013 tot wijziging van het Burgerlijk Wetboek, de wet van 31 december 1851 met betrekking tot de consulaten en de consulaire rechtsmacht, het Strafwetboek, het Gerechtelijk Wetboek en de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, met het oog op de strijd tegen de schijnhuwelijken en de schijnwettelijke samenwoningen. M.B. / B.S. 23 September 2013.

Circulaire du 6 Septembre 2013 relative à la loi du 2 juin 2013 modifiant le Code civil, la loi du 31 décembre 1851 sur les consulats et la juridiction consulaire, le Code pénal, le Code judiciaire et la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, en vue de la lutte contre les mariages de complaisance et les cohabitations légales de complaisance / Omzendbrief inzake de wet van 2 juni 2013 tot wijziging van het Burgerlijk Wetboek, de wet van 31 december 1851 met betrekking tot de consulaten en de consulaire rechtsmacht, het Strafwetboek, het Gerechtelijk Wetboek en de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, met het oog op de strijd tegen de schijnhuwelijken en de schijnwettelijke samenwoningen. M.B. / B.S. 23 September 2013.

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Loi du 8 Mai 2014 modifiant le Code civil en vue d'instaurer l'égalité de l'homme et de la femme dans le mode de transmission du nom à l'enfant et à l'adopté / Wet tot wijziging van het Burgerlijk Wetboek met het oog op de invoering van de gelijkheid tussen mannen en vrouwen bij de wijze van naamsoverdracht aan het kind en aan de geadopteerde. M.B. / W.S. 26 May 2014. M.B. / B.S. 26 May 2014.

Circulaire du 30 mei 2014 relative à la loi du 8 mai 2014 modifiant le Code civil en vue d'instaurer l'égalité de l'homme et de la femme dans le mode de transmission du nom à l'enfant et à l'adopté / Omzendbrief betreffende de wet van 8 mei 2014 tot wijziging van het Burgerlijk Wetboek met het oog op de invoering van de gelijkheid tussen mannen en vrouwen bij de wijze van naamsoverdracht aan het kind en aan de geadopteerde**.** M.B. / B.S. 30 May 2014.

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Administration of Justice Act, LBK no. 1308 of 09.12.2014, *Bekendtgørelse af lov om rettens pleje* (*Retsplejeloven*)

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Spain

Civil Code;

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Act 54/2007, on International Adoption

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- ICCS Convention on the issue of a certificate of differing surnames, 4 September 1958.

- ICCS Convention to facilitate the celebration of marriages abroad, Paris, 10 September 1964

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- ICCS Convention on the issue of a certificate of legal capacity to marry, 5 September 1980

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ANNEX 3: NATIONAL REPORTS

1.BELGIUM

RAPPORTEUR: H. DE WAELE, MARIA TERESA SOLIS SANTOS

INDEX

PARENTAGE

CASE 1.1: TYPES OF PARENTAGE

1.1.1. What types of parentage exists in your law?

- Model Case: A couple has a child born out of wedlock. After marriage, they have another child born in wedlock and they adopt a third child. Do these children deserve the equal treatment?

Article 334 of the Belgian Civil Code[289] (hereinafter: CC) states that *"[…] Quel que soit le mode d'établissement de la filiation, les enfants et leurs descendants ont les mêmes droits et les mêmes obligations à l'égard des père et mère et de leurs parents et alliés, et les père et mère et leurs parents et alliés ont les mêmes droits et les mêmes obligations à l'égard des enfants et de leurs descendants [..]".* Thus, whatever mode of filiation is established, children and their descendants have the same rights and the same obligations in respect of parents and their parents and relatives. On the other hand, the parents and their parents and relatives have the same rights and the same obligations in respect of children and their descendants.

Consequently, the relationship between the child and his / her parents will be the same, irrespective the form of his/her filiation: biological or adoptive, matrimonial or not matrimonial, legal cohabitation, parents being recognised same-sex partners, etc. The key matter is to determine if the filiation is fully established or not. It has to be pointed out that in case of a heterosexual marriage, there exists the presumption of paternity of the husband of the biological mother. According to article 315 of the CC, if the child is born during the marriage or within 300 days after its dissolution or annulment, the husband of the biological mother is to be considered as the father. In contrast, this rule is not applicable in the context of same-sex marriages.[290] Thus, under Belgian law the *only* difference, according to the model case proposed, will be how the filiation is established.

1.1.2. Does the type of parentage have consequences on its content?

-Model Case: Due to the fact that in the Spanish Law there is an equal treatment for all children, there could not be any difference related to the content of the parent-child relationship, maintenance obligations or inheritance rights.

As indicated above, the CC requires equal treatment of children regardless of how the paternal and maternal filiation have been established. There is no distinction in terms of rights and obligations between a biological and an adopted child. Consequently, this equal treatment is also maintained in the

[289] Code Civil de 21 Mars 1804, Titre Preliminaire et Livre I: Des personnes (art. 1-515) / Burgerlijke Wetboek, Inleidende Titel en Boek I : Personen (art. 1-515), *Moniteur Belge / Belgisch Staatsblad* 3 September 1807. The Code came into force on the 13 of May 2014.

[290] As is established in art. 143 CC.

inheritance rights and obligations. The only substantial difference that can be made is the fact that in the case of simple adoption, the inheritance rights from the grandparents are not transmitted, with the filiation, to the adopted child.

1.1.3. It is the principle of policy in your country the equal treatment of children?

-Model Case: A deceased leaves two sons, one biological and one adopted. The law of the competent court for the succession states the equality between children. The law applicable to the succession only recognizes inheritance rights to biological child.

Article 353.15 of the CC states, in a context of simple adoption: "[…] *L'adopté et ses descendants conservent tous leurs droits héréditaires dans la famille d'origine. Ils acquièrent sur la succession de l'adoptant ou des adoptants les mêmes droits que ceux qu'auraient un enfant ou ses descendants, mais n'acquièrent aucun droit sur la succession des parents de l'adoptant ou des adoptants [...]".* Thus, the adopted and his/her descendants retain the inheritance rights in the family of origin. In the same vein, the adopted and his/her descendants have the same rights on the inheritance of the adopter as his/her biological descendants. However, the adopted do not have inheritance rights of the parents of the adopter, i.e. the grandparents.

The principle of equality between the adopted and the biological child of the adopter is considered in Belgium a principle of public policy. This principle, amongst others, has inspired the most recent reforms of the CC. In this regard, the establishment of a parenthood between the child and a man or a woman creates *ipso facto* a series of rights and obligations between the parties.[291] These rights and obligations are transmitted to the biological child as well as the adopted child, regardless of whether the adoption is simple or full.

However, article 350 of the CC provides for an exception to this principle of equality, namely when the establishment of the filiation comes after an adoption order in respect of a person other than the adopter or adopters. In this case, the filiation shall only have effect to the extent that it is not in conflict with those of the adoption, in the case of a simple adoption. In the case of a full adoption, the parentage will produce no other effect than the legal impediments to marriage.[292]

CASE 1.2: WAYS TO ASCERTAIN PARENTHOOD

1.2.1. What effects has the acknowledgement natural children before a foreign authority?

- Model Case: The birth record of a natural child only named a person as the mother as the mother in the Registry Office of State A. The child is acknowledged at a later date by the biological father. This acknowledgement is made before a notary of State B. The father provides this document to the Registry Office of A to register paternal parenthood.

In similar vein, article 64 of the Belgian Code of Private International Law (hereinafter: CPIL) reads: *"[…] L'acte de reconnaissance est établi selon les formalités prévues, soit par le droit applicable à la filiation en vertu de l'article 62, § 1er, alinéa 1er, soit par le droit de l'Etat sur le territoire duquel il est établi […]".* An act of paternity or maternity is valid if it complies with the required formalities contained

[291] A-C. VAN GYSEL (ed.), *Les Personnes. Incapables, Droit judiciaire familial, Questions de droit International Privé (Volume I)*, Bruxelles: Bruylant 2015, p. 687.

[292] Ibid., p. 687.

in the law governing the filiation or in accordance with the rule of *locus regis actum* established by the law of the state in which it is established.[293]

According to article 65 of the CPIL, an act of recognition can be established before a notary in Belgium if:

- the author is Belgian, is domiciled or habitually resident in Belgium at the establishment of the act;
- child was born in Belgium or;
- the child is habitually resident in Belgium at the establishment of the act.

In any case, Belgium applies the automatic recognition of a foreign notarised or legalised document. The prerequisite for enjoying automatic recognition is the compliance of the foreign act or judgment with the necessary conditions for its authenticity according to the law of the state in which it was granted. In any case and prior to the inscription or transcription of the foreign authentic act, the depositary of the act in the register must check that the prerequisites required by the article 27 of the CPIL are met. . If so, it is to be accepted by the Belgian officers from the different registers in which the foreign act is intended to be registered. On the other hand, these officers are compelled to deny the effect of the act if its content is manifestly contrary to the Belgian public order.[294]

1.2.2. How is regulated in your law the biological test of fatherhood?

-Model Case: The alleged father refuses to practice a DNA test to prove the paternity of a child. The State where the test shall be performed allows the coercive practice of the test. Nevertheless, the court where the fatherhood procedure was raised rejects this practice on the ground of public policy.

There is a lack of regulation in Belgium of the DNA paternity test. In the context of a judicial procedure regarding to an action of filiation, a court can order, upon a request or *ex officio*, a blood examination on the basis of scientifically sound methods, according with what it is established in article 331*octies* of the CC. While there does not exist a coercive method for men to be involved in an action for filiation, it is stipulated that the refusal of a man to take a test entitles a court to presume that he is the biological father.[295] Various courts have rendered judgments on the basis of this assumption theory.

1.2.3. It is possible to register the parenthood in your State on the basis of a certificate of civil status issued by a foreign Registry Office?

-Model Case: The record of the birth of a child is in the Registry Office of the State where he is born (State A). Then, it is applied the recognition of the certificate of the Registry Office of A to record the child in the Registry Office of their nationality (State B).

In accordance with article 48 of the CC, a Belgian national or his/her legal representative may request that an act of civil status concerning a Belgian and made in a foreign country is transcribed in the registers of civil status of his/her hometown or his/her first settlement upon his/her return to the territory of Belgium. It deserves mentioning that this transcription will be made on the margin of the

[293] A-C. VAN GYSEL (ed.), *Les Personnes (Volume II)*, Bruxelles: Bruylant 2015, p. 1405.

[294] See further article 28 CPIL.

[295] See further H. VAN BROSSUYT, C. AERTS & C. VAN ROY (eds.), *Wet en duiding, Kids-Codex, Boek II, Personen en Familierecht*, Ghent: Larcier 2014.

current records on the date due to which the act relates. In the absence of a domicile or residence in Belgium, the transcription can be entered on the registers of civil status of his/her last residence in Belgium or one of his/her ascendants or of his/her birth's place. If none of the previous options is available, the concerned person can request transcription into the Brussels' civil status register. The transcription of an civil status act concerning a Belgian held in a foreign country may also be requested by a public prosecutor.[296]

The foreign act concerning the civil status may, however, be subject to a mention in the margin of the records in the register, be transcribed into a register of civil status or provide the basis for an entry in a population register, a register of foreigners or provisional register, until its verification by the depositary of the act in the registry. The conditions for the foreign act to be included in a Belgian register are settled in article 27.1 CPIL. These conditions are:

- The validity of the act is established;

- The act has to meet the necessary conditions for its authenticity under the law of the state in which it was held.[297]

If the access to the register is refused by the officer of the civil status, articles 30 and 31 CPIL allow for an appeal procedure against the decision denying the registration.

CASE 1.3: SURROGACY ARRANGEMENTS.

1.3.1. Are surrogacy arrangements allowed or prohibited in your country?

-Model Case: A couple signs a surrogacy arrangement in their home country. When they applied for registration the child birth, the problem of the parenthood of the child arises: has the parenthood be established to the intending parents or to the gestational carrier (surrogate mother)?

Currently, Belgium only allows altruistic surrogacy agreements. These are the only 'legal'[298] surrogacy agreements. Commercial surrogacy agreements are illegal. There is no legal framework regulating the surrogacy arrangement; in practice, it are certain Belgian hospitals that themselves settle the conditions to be met by the intended parents, in order to take part in the program. As a result, the filiation established via surrogacy does not have a specific legislation.

It should be noted that a surrogacy contract, by which the surrogate mother would commit to carry the child and give birth the child on behalf of 'intentional' mother, is illegal under the inalienable right of every woman to her motherhood, established in respect of the child that she gives birth to. Thus, a contractual commitment of the surrogate is void and cannot have any legal effect. Specifically,

[296] Commission Internationale de l'État Civil, *Guide pratique international de l'etat civil – Belgique* (edition 1 December 2012), 'Introduction générale, chapitres 1 à 9', p. 19. The full text is accessible via <www.cier1.org>.

[297] Ibid., p. 19.

[298] Although altruistic surrogacy is legal, there is only one hospital that takes in such couples, and the rules to participate in this programme are extremely strict. These difficulties cause a great number of couples to look for special treatment or surrogacy mothers outside Belgium.

article 348.4, first paragraph, of the CC states that a woman can only consent to the adoption of her child after two months since the birth.[299]

The current system regarding the establishment of the parenthood is as follows. A distinction has to be made between maternal and paternal parentage. With maternal parentage, the assumption that the legal mother is the mother giving birth applies in Belgium.[300] In this case, the intended mother has to start the adoption procedure of the child, regardless of whether she has a biological link with the child, with a view to establish the maternal parentage or filiation. This adoption procedure can be initiated by the intended mother on her own as a single,[301] or it can be a joint adoption procedure together with her spouse/cohabitant, if he could recognise the child.[302]

In order to establish the father parentage/filiation, the husband of the surrogate mother is considered the legal father. This assumption is made in compliance with the paternity presumption rule, established in article 315 CC. Nevertheless, in case the surrogate mother is not married, the intended father can, in application of articles 319 and 329 *bis* CC, recognise the child with the consent of the surrogate mother.[303] This recognition procedure allows the intended father to establish a parentage, without engaging an adoption procedure. Otherwise, as happens with the intended mother, he will have to commence an adoption procedure in order to establish the filiation. This procedure, as mentioned above, can be initiated by the intended father on his own or in a joint adoption procedure with his spouse / cohabitant, if she recognises the child.[304]

The law applicable to the procedure of adoption to the intended parents is governed by the classic Belgian adoption rules that aim to establish a filiation. Thus, no genetic relation is required between the child and the intended parents in order to be eligible for the adoption procedure.[305]

1.3.2. It is recognized in your country the legal parenthood acquired abroad by a surrogacy arrangement?

- Model Case: The intending parents register in an USA Registry Office the legal parenthood of a child establish by a USA judge. Then, they applied to register this parenthood in their home country (receiving State). Is it possible that registration if the law of the receiving State prohibits the surrogacy arrangements?

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[299] VAN GYSEL, op. cit. (n. 3), p. 620.

[300] This applies even when the subrogated mother has no genetic relation to the child, while the intended mother is the genetic mother.

[301] Belgium authorises the adoption by a single parent as well as by same-sex couples.

[302] Directorate General for International Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, 'A Comparative Study on the Regime of Surrogacy in EU Member States', 2013, pp. 206-233, p. 211 (available on <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf>).

[303] If the surrogate mother does not consent, a conciliation will be held before a court. In case this conciliation is not attained, the court can reject the claim of the intended father on the basis that it is proven that the intended father is not the biological father of the child.

[304] Directorate General for International Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, 'A Comparative Study on the Regime of Surrogacy in EU Member States', 2013, pp. 206-233, p. 211.

[305] Ibid.

As indicated in the Model Case, when the Belgian filiation by surrogacy is established as a result of a judgment, the principle of direct recognition of a foreign judgement will apply. Even though there is a lack of surrogacy regulation, Belgium does not forbid it totally, as there exists a specific situation in which the surrogacy is allowed. However, there is no certain solution under Belgian law for this particular question. In order to recognise a Belgian parenthood established abroad through a judgment granted on the bases of a surrogacy agreement (allowed in the state in which it has been concluded), it will be necessary to apply the rules of private international law.

Belgium recognises foreign judicial decisions relating to parentage automatically. This general rule will not be applicable if a ground for non-recognition under the article 25 CPIL can be invoked. In preventive fashion, a person may request that a foreign decision determining a filiation is recognised in Belgium without having to wait until a problem were to arise in this regard. The foreign decision has an interest in what parentage is enshrined in Belgian law with the authority of *res judicata*.[306]

Under Belgian law, there are two main grounds for denying recognition and thus, registration of a foreign judgment. The first is that the judgment is against the Belgian public policy. Second, the exception of legal fraud can be invoked.

According to the first, if the foreign judgment is against public policy, the court will examine the validity of the judgment to check the conflict of laws settled in article 29 CPIL. This article excludes the recognition in Belgium of a foreign judgment or a foreign authentic act if the necessary conditions for its recognition are not met.[307] To resolve this conflict of laws, Belgian law refers to the necessary compliance with the national law where the judgment was granted.

Invocation of the exception of legal fraud is rarely used in a filiation context, but has made a timid appearance in the context of the recognition of filiation from a surrogacy. Invoking this exception appears to be a viable approach to stymie the maneuvers of intended parents looking for the establishment of a filiation by surrogacy in a foreign country because they cannot obtain a filiation in this way in their own country[308].

Strictly speaking, the exception of legal fraud is useless when a foreign act is not required for a judgment. In this case, it will be enough to apply the national law of the authority that has issued the act. Moreover, if the foreign act is purely provided for in a judgment, a fraud within the meaning of article 18 CPIL is not deemed to exist.[309]

To minimise application of the exception of legal fraud, the rules on recognition of foreign judgements are applicable.[310] Yet, according to article 25.1 CPIL, a foreign judicial decision is not recognised or declared enforceable in Belgium if:

> *" […] 3º the decision was obtained in a matter where persons did not freely dispose of their rights, with the sole purpose of avoiding the application of the law designated by this act; […]"*

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[306] VAN GYSEL, op. cit. (n. 5), p. 1408.
[307] VAN GYSEL, op. cit. (n. 5), pp. 1408-1409.
[308] Ibid., p. 1409.
[309] Ibid., p. 1410.
[310] Ibid., p. 1410.

[…] 8º the jurisdiction of the foreign court was based solely on the presence of the defendant or property without direct relation to the dispute in the state in which that court functions; […]".

1.3.3. In the case of no recognition of the legal parentage established abroad, what will be the future status of minors?

-Model Case: The record of birth of a child named the intending mother as the mother in the Registry Office of State A. Nevertheless, the receiving State B does not recognize and establishes the motherhood to the gestational carrier (surrogate mother). Then, who should take charge of this child?

In Belgium, there is no legal instrument that regulates this topic. However, there does exist a constant jurisprudence and a wide range of judgements on the matter. Belgian courts follow the theory of the "best interest of the child". This theory indicates that a child cannot be punished for the illegality of the surrogacy contract/arrangement on which his/her filiation depends. Consequently, the courts just accept the parenthood. This theory has been invoked either in national and international surrogacy situations. In most of the Belgian surrogacy cases, in more than 90% of situations, there was a genetic link between the child and the intended parents or parent. Some examples in this regard are the following judgments:[311]

- Judgment of the Court of Antwerp of 14 January 2007, on appeal from the judgment of the Youth Court of Antwerp of 11 October 2007

- Judgment of the Court of Ghent of 18 May 2009, on appeal from the judgment from the Youth Court of Ghent of 31 March 2009

- Judgement of the Court of Ghent of 30 April 2012, on appeal from the judgment from the Youth Court of Bruges of 19 January 2012.

1.3.4. What shall the impact be on your country of the case law of the European Court of Human Rights in the *Mennesson* and *Labassee* cases?

-Model Case: According to Mennesson and Labassee cases, the non-recognition of a legal parenthood already registered in another State infringes the right of the child to respect for their private life according to article 8 of the European Convention of Human Rights.

In Belgium, the bond of filiation with the biological father is always recognised, so that the *Mennesson and Labasse* cases has no direct impact for the Belgian legal system[312].

CASE 1.4: FILIATION AND ADOPTION.

1.4.1. Are allowed in your country the simple or revocable adoptions?

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[311] The list of judgments is taken from 'A Comparative Study on the Regime of Surrogacy in EU Member States', op. cit. (n. 16), pp. 215-217.

[312] VAN GYSEL, op. cit. (n. 5), pp. 1410-1411.

Model Case: A child is adopted in a country A by a simple or revocable adoption. Later, the adoptive parents aim the recognition of such adoption in the State B.

In Belgium there exist two types of adoption, irrespective of whether it concerns a national or international situation. The two types are simple adoption and full adoption. Articles 343-368 of the CC regulate the different types of adoption.[313]

The simple adoption is regulated in article 353 and following. Under this type, minors and adults can be adopted. This adoption creates a parentage link between the adoptee and the adopter or adopters (and their descendants). It has consequences for the benefit of certain effects of the filiation law while maintaining ties with the origin family in which the adoptee and his/her descendants retain all his/her inheritance rights.[314]

Articles 354-1, 354-2 and 354-3 contain provisions in other to revoke a simple adoption. The revocation of the simple adoption may be instigated for very serious reasons. This revocation must be requested by the adopter or adopters, the adoptee or the public prosecutor. In case the adoption was made by either spouses or cohabitants, the Family Tribunal will pronounce the revocation in respect of both of them.

Full adoption operates only for the minors, i.e. those under 18 years old. It is regulated in article 355 CC and following. In principle, it clears the links between the adoptee and his/her original family. It confers to the adoptee's descendant's rights and obligations identical to those they would have had if the adoptee was a biological child of the adopter or adopters. However, the adopted child, even the adopter has deceased, does not cease to belong to the family of the spouse or cohabitant of the latter; only the relations with the parent of the deceased and his/her family are extinguished.[315] This kind of adoption is irrevocable, as is settled in article 356-4 CC. Article 349-3 CC indicates that no claim for nullity can be lodged against this adoption.

1.4.2. Is it allowed in your country the adoption by single-parent families or by couples of the same sex?

-Model Case: A single person adopts a child in a State A and applies for its recognition in his home State (receiving State B).

Article 343 CC[316] establishes that adoption can be done by a single person, by a married couple or legal cohabitants, heterosexual or of the same sex. Even two persons living together (for more than 3 years at the moment of the adoption request) in a permanent and affective way can adopted a child.

According to article 348-2 CC, when a person adopts alone and (s)he is married and living with his/her spouse or is cohabiting, the consent of the spouse or partner is required unless (s)he is deemed absent[317] and (s)he cannot express his / her will.[318]

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[313] The last alteration of the CC was made by the law of 24 April 2003 amending adoption; with this law, international adoption was included in the Civil Code.

[314] *Guide pratique international de l'etat civil* , op. cit. (n. 8), p. 26.

[315] *Guide pratique international de l'etat civil* , op. cit. (n. 8), p. 26.

[316] This article was modified by the Law of 18 May 2006 amending certain dispositions of the Civil Code in order to allow the marriage between persons of the same sex.

The recognition of adoptions pronounced abroad is a more complex matter. It implies, in fact, juggling with different pieces of legislation. First, it needs to be ascertained whether the adoption falls within the scope of application of the Hague Convention of 29 May 1993 on protection of children and co-operation in respect of inter-country adoption. This Convention contains specific rules to ensure the recognition of adoption judgments. If there are no links with the Convention, it is necessary to return to the mechanisms resulting from the common private international and national federal law on recognition of adoptions, i.e. the CPIL and CC.[319]

According to article 72 CPIL "[…] *par dérogation aux dispositions de la présente loi, une décision judiciaire ou un acte authentique étranger portant établissement, conversion, révocation, révision ou annulation d'une adoption n'est pas reconnu en Belgique si les dispositions des articles 365-1 à 366-3 du Code civil n'ont pas été respectées et tant qu'une décision visée à l'article 367-1 du même Code n'a pas été enregistrée conformément à l'article 367-2 de ce Code […]".* The decision of the Federal Central Authority which delivered the recognition of the foreign decision must be recorded in accordance with article 367-2 CC. Only upon registration of the foreign judgment will it be recognised in Belgium[320].

The conditions contained in article 365-1 CC extend the jurisdictional control to the foreign authority that has granted the adoption as the applicable law that this authority has used in order to grant the adoption. This verification, therefore, exceeds not only the marginal control applied to a foreign decision but also the simple conflict of law examination under article 27 CPIL for the authentic instruments.[321] Moreover, an international adoption may only be recognised if it can be considered as a *res judicata* in the state of origin.

Regarding international adoptions, their recognition also implies that the procedure referred to in articles 361-1 to 361-4 CC has been complied with. In this vein, article 361-1 states that the persons or persons resident in Belgium and willing to adopt a child whose residence is in a foreign state shall, prior to taking any steps whatsoever with a view to an adoption, seek a declaration of qualification to be able to undertake an international adoption.[322] Conflicts may arise when a homosexual couple or a single person wants to adopt a child. The main problem could then be that the foreign law does not allow adoption by a same-sex couple or by a single person.

1.4.3. Is it allowed in your country the recognition of foreign adoptions which do not create a permanent parent-child relationship?

-Model Case: A couple adopts a child in a State A, which does not create a permanent parent-child relationship. How is recognized that adoption in the receiving State B?

Both the simple adoption and the full adoption – in national and international situations – create a permanent parent-child relationship link under Belgian Law. The conditions for the adoption contained in the CC are that they will be recognised in Belgium in application of the Belgian private

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[317] His/her/residence being unknown, or when it is established, by a reasoned report of the court, that (s)he is unable or incapable to express his/her will.

[318] VAN GYSEL, op. cit. (n. 3), p. 714.

[319] VAN GYSEL, op. cit. (n. 5), pp. 733-734.

[320] VAN GYSEL, op. cit. (n. 5), p. 737.

[321] VAN GYSEL, op. cit. (n. 5), p. 737.

[322] This obligation applies on the adopters, even if they are related to the child they wish to adopt.

international law rules. Belgium is party to the Hague Convention of 1993 on protection of children and Cooperation in respect of international adoption. In application of this Convention, adoptions will create a permanent parent-child relationship. However, the adoption is susceptible to revocation; in that case the parent-child relationship link is broken.

1.4.4. Is a consequence of the adoption the acquisition of nationality?

-Model Case: A Spanish citizen adopts a child of 10 years old and another for 18 years old. It raises the question if the children acquire the Spanish nationality as a result of the adoption.

According to article 9 of the Belgian Nationality Code,[323] a simple adoption or a full adoption of a foreign child under 18 years old confers the Belgian nationality onto the child from the day the adoption has effect. The Belgian nationality is granted under the conditions of article 9. In case of revocation of the adoption, regardless whether it concerns the simple or full adoption, the child will retain the Belgian nationality.[324]

The Belgian nationality can however be lost in the following situations, established in the article 22 of the Belgian Nationality Code:

1.- When the child has reached the age of 18 years and (s)he renounces the Belgian nationality;[325]

2.- With regard to a non-emancipated child who has not reached the age of 18 and is subject to the tutelage of a single adopter, when the adopter loses the Belgian nationality, (s)he will lose the nationality also.[326] In this case the child will acquires the nationality of the adopter;

3.- With regard to a non-emancipated child who has not reached the age of 18 and is (subsequently) adopted by a foreigner, the child will acquire the nationality of the adopter by the effect of the adoption.[327]

In case adults are adopted, these will not be granted Belgian nationality, but they are granted the possibility to initiate a procedure of naturalisation in order to obtain it.

2. FORENAMES AND SURNAMES

CASE 2.1: DISPARITIES AMONG LEGAL SYSTEMS

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[323] Code du 28 juin 1984 de la nationalité belge / Wetboek van de Belgische nationaliteit, *Moniteur Belge / Belgisch Staatsblad* 12 July 1984.

[324] *Guide pratique international de l'etat civil* , op. cit. (n. 8), p. 34.

[325] This declaration can only be made if the person concerned proves that (s)he has or will subsequently acquire a foreign nationality.

[326] A non-emancipated person who has reached the age of 18 will not lose the Belgian nationality if one of the adopters still possesses it.

[327] (S)he will not lose the Belgian nationality if one of the adopters is Belgian.

2.1.1. Explain your conflicts of law rules, highlighting the cases in which your national legislation is applicable.

-Model Case 1: a child was born in a third country, where the parents (national of your Member State) reside.

In the Belgian legal system, the attribution of the name and the surname is considered as an effect of filiation.[328] In this context, article 37 CPIL settles the general rule when indicating in its first paragraph that the determination of a person's name is governed by the law of the state of his/her nationality[329]. Therefore, prior to answering the model case proposed, it is necessary to indicate whether the child holds the Belgian nationality or not.

In a first scenario, when a child was born in a third country and the parents, Belgian nationals, reside there, the juridical situation is the following one. To clarify if a child has the Belgian nationality or not, three possibilities have to be considered:

1. The case in which the child is born from Belgian parents before 01.01.1967. The Belgian nationality will then be applicable if the child is a legitimate child, i.e., the child was born from a couple (married) and the father is Belgian. Or, the child was born outside a marriage and one of the parents or both are Belgian. In this case, it is necessary that the first who had recognized the child had the Belgian nationality. The moment of recognition is crucial in order to establish since when the child would have the Belgian nationality. In these two situations, the child will acquire the Belgian nationality from the date he/she was born.[330]

2. The case in which the child was born between 01.01.1967 and 31.12.1984. The child will acquire the Belgian nationality, since the conditions indicated above are met for a child born before the 01.01.1985.[331]

3. The case in which the child was born after 01.01.1985. In this case, the child would have the Belgian nationality if the parents were born in Belgium or in Belgian Congo before the 30.06.1960, or in Rwanda or Burundi before 01.07.1962. Or, if the Belgian parents were born abroad and make a declaration[332] requesting that the child is granted Belgian nationality. Or, when the Belgian parents were born abroad and did not submit the "award declaration" (*déclaration d'attribution/toekenningsverklaring*) within a period of five years following the child's birth, and the baby is not provided with another nationality before he/she turned 18.[333]

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[328] J. FIERENS, 'Comment tu t'appelles? La Loi du 8 Mai 2014 modifiant le Code Civil en vue d'instaurer l'égalité de l'homme et de la femme dans le mode de transmission du nom à l'enfant et á l'adopté', in: N. GALLUS (ed.), *Actualités en Droit de la Famille*, Brussels: Bruylant 2015, p. 9.

[329] "La détermination du nom et des prénoms d'une personne est régie par le droit de l'État dont cette personne a la nationalité".

[330] <http://diplomatie.belgium.be/> .

[331] <http://diplomatie.belgium.be/> .

[332] The declaration has to be made within a period of five years following the birth of the child. It is known as the "award declaration" (*déclaration d'attribution/toekenningsverklaring*) and must be lodged at the Belgian consulate offices where the parents are registered in the (consular) population register abroad.

[333] However, in the case in which the child was granted with another nationality before he/she turns 18, he/she loses the Belgian nationality.

Once the establishment of the Belgian nationality is clear, and in the model case the child has assumed the Belgian nationality since birth, Belgian law will apply to the determination of the child's surname. The currently applicable law is that of 8 May 2014 amending the CC to establish equality between men and women in the transmission of the name to the child or the adopted child.[334]

-Model Case 2: a child was born in your Member State, where his foreign parents reside.

As already mentioned, article 37 CPIL indicates that a person's name and surname are governed by the law of the country of which that person is a national.[335] In this model case, the nationality has been properly transferred from the foreign parents to the newborn. Assuming that the newborn holds a foreign nationality, the applicable law will be his/her national law. In this particular case, when the Officer of the civil status will register this newborn, (s)he will verify if the rules contained in the national law are complied with. However, Belgian law will be applicable in the case of a child born in Belgium from parents who hold another nationality, but were born in Belgium and have lived in Belgium for at least five years during the 10 years preceding the birth.[336]

It is important to respect the foreign law regarding the attribution of the name and the surname. In this regard, the Judgment of 29 June 2007 of the Court of First Instance of Liège deserves highlighting.[337] In this judgement, the Court ordered the rectification of the birth certificate of a Bulgarian child in Belgium in which the Bulgarian law was not respected. The officer of the civil status had indicated the name of the mother, ending with the suffix "-ova", in the act of childbirth. However, according to Bulgarian law, the surname comes by sex of the person concerned, the suffix "-ov" is masculine and "-ova" feminine. The Court ordered the correction of the child's birth certificate so that his surname ended with the suffix "-ov".

2.1.2. Explain briefly the main rules concerning forenames and surnames, especially focusing on number, limits, civil acts which affect to forenames and surnames, admission of foreign forenames and surnames, and translations of them.

-Model Case: a child born in your State whose parents are nationals and resident in your State.

As mentioned, in the Belgian tradition, the attribution of the name and surname is a direct effect of the filiation. As also mentioned above, the Law of 8 May 2014 amending the CC to establish equality between men and women in the transmission of the name to the child or the adopted child, is the current law governing the attribution of name and surname in Belgium. So, establishing the filiation will be the cornerstone for obtaining the surname of the father or of the mother.

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[334] Loi du 8 mai 2014 modifiant le Code civil en vue d'instaurer l'égalité de l'homme et de la femme dans le mode de transmission du nom à l'enfant et à l'adopté / Wet tot wijziging van het Burgerlijk Wetboek met het oog op de invoering van de gelijkheid tussen mannen en vrouwen bij de wijze van naamsoverdracht aan het kind en aan de geadopteerde, *Moniteur Belge / Belgisch Staatsblad* 26 May 2014. This law came into force on 1 June 2014.

[335] < http://diplomatie.belgium.be/en/services/services_abroad/registry/giving_a_name/>.

[336] <http://diplomatie.belgium.be/en/services/services_abroad/nationality/being_granted_belgian_nationality/born_in_belgium/>.

[337] VAN GYSEL, op. cit. (n. 5), p. 1390.

In the situation in which the filiation has been established only by one of the parents (father or mother), the child will take the surname of the parent (father or mother) whose parentage has been established.[338]

When the filiation of the parents have been established simultaneously, there are different possibilities. Hereby, it is necessary to distinguish between situations arising before the Law of 8 of May 2014 entered into force, and after. Before 1 June 2014, the system established by the law of 3 March 1987[339] and the Law of 1 July 2006[340] was that the child takes the father's name. With the new Law, from 1 June 2014, as incorporated in its article 2 providing for a new reading of article 335 CC, the parents have different options; either the surname of one of the parents, or a combination of both names.[341] At present, the trend in Belgium remains a traditional one, whereby the child is conferred the father's surname.

The last situation that can be encountered is when the filiation of the parents has been established for one parent, but with the acknowledgement of the other with regard to the surname the child will take. Before 1 June 2014, in case both filiations had been established, it had to be distinguished which filiation was established before. In case that was the father's filiation, the child would take the surname of the father. In the opposite situation, the child took the surname of the mother[342]. After 1 June 2014, the following rules are applicable:

- If the child's filiation was acknowledged before the birth or in the birth certificate, the applicable rule will be the same as when the parentage has been simultaneously established;

-If the child's filiation was acknowledged after birth in a separate document, the surname of a Belgian child can be changed later (it is not automatically changed).[343]

Other essential elements to be taken into consideration with regard to the name and the surname are the following.[344] The surname is formed by three elements, two essentials and one

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[338] <http://diplomatie.belgium.be/en/services/services_abroad/registry/giving_a_name/>. See also in this regard VAN GYSEL, op. cit. (n. 3), p. 226 and FIERENS, op. cit. (n. 39), pp. 7-45.

[339] Loi 31 Mars 1987 modifiant diverses dispositions légales relatives à la filiation / Wet tot wijziging van een aantal bepalingen betreffende de afstamming, *Moniteur Belge / Belgisch Staatsblad* 27 May 1987. This law came into force on 6 June 1987.

[340] Loi 1st Juillet 2006 modifiant des dispositions du Code civil relatives à l'établissement de la filiation et aux effets de celle-ci / Wet tot wijziging van de bepalingen van het Burgerlijk Wetboek met betrekking tot het vaststellen van de afstamming en de gevolgen ervan, *Moniteur Belge / Belgisch Staatsblad* 29 December 2006. This law came into force on the 1 of July 2007.

[341] If the couple already has children together born before 1 June 2014, the choice is more limited. However, the law of 8 May 2014 provides a certain number of transactional measures through which a name that has already been given can be changed by a parent's declaration. Since 1 January 2015, this declaration, which could previously only be executed at the Belgian municipality where the child was registered in the population register, can now also be lodged at the Belgian consulate where the child is registered in the population register. See <http://diplomatie.belgium.be/en/services/services_abroad/registry/giving_a_name/>

[342] VAN GYSEL, op. cit. (n. 3), pp. 226-227.

[343] The change of the name must be explicitly mentioned in the acknowledgement of parentage, at the request of both parents. The options to choose a surname are the same as when the filiation has been simultaneously established for both parents.

[344] VAN GYSEL, op. cit. (n. 3), pp. 224-225.

optional. The essential one is the surname.[345] Graphically, it is composed by a group of letters that will be formed by one or more words. When the surname was originally composed of characters related to a different alphabet,[346] the Officer of the civil status will "translate" the surname to the applicable alphabet based upon the phonetic expression of the surname in its original alphabet. The second element is the name. The name allows to distinguish the different members of a same family. Currently, parents can freely choose the name of their child, but the Officer of the civil status may refuse to register any ridiculous name.[347] Under the reservation of "asexual" names, the name is linked to the gender of the child. Thus, an entry can be refused – due to the reason that it is ridiculous – of a name of a boy given to a girl, and vice versa.

The name is given by the person who declares the child with the Officer of the Civil Status, and (s)he can give it one or more names. The final aspect concerns the title of nobility recognised in Belgium. This title is also a part of the name, and has to be indicated in all the acts relating to the civil status of the noble.[348]

CASE 2.2: GENDER EQUALITY

2.2.1. Which are the main issues with the surnames of the wife?

-Model Case: a wife with maiden surname kMs. Smith and married name Ms. Fernandez. How is she referred in your Civil Register?

The name is classified as an autonomous connection category. The law applicable to the name does not depend on the relationship status with the person's name carries, such as, for example, a filiation or marriage. It is the national law of the wife, not the law of marriage effects, which decides whether she takes or may choose to adopt the name of her husband.[349] Thus, under Belgian law, marriage does not have any effect on the surname of the spouse(s). Consequently, a wife will keep her maiden surname. In her daily life, she might be referred to by the surname of her husband.

However, the last paragraph of article 38 CPIL reads: "[…] *Lorsque le droit de l'Etat dont l'un des époux a la nationalité lui permet de choisir un nom à l'occasion du mariage, l'officier de l'état civil mentionne ce nom dans l'acte de mariage […]".* This entails that when the law of the state that one spouse is a citizen of allows him/her to choose a name for his/her wedding, the officer of the civil status will mention that name in the marriage certificate.[350]

2.2.2. Which are the main issues with the surnames of the mother?

Model Case: a husband and a wife (maiden name: Ms. Smith; married name: Ms. Fernández) has a child. Which are his surname?

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[345] 'Nom patronymique'/'familienaam'.

[346] In particular, names or surnames (or both) in Roman characters that originally had a Greek spelling, Cyrillic, Arabic or a compound ideogram, may pose difficulties when a civil status officer must draw up a foreign authentic act. See VAN GYSEL, op. cit. (n.3), p. 225.

[347] A name ridiculous by itself, or a name that, in conjunction with a surname, may result in something ridiculous.

[348] VAN GYSEL, op. cit. (n. 3), pp. 224-225.

[349] VAN GYSEL, op. cit. (n. 5), pp. 1389-1390.

[350] See further VAN GYSEL, op. cit. (n. 3), pp. 2365-236.

As has been indicated, the marriage in Belgium does not have any effect on the spouse's surname. The tradition remains that the marriage required a woman to precede her maiden name with her husband's name, and add a hyphen between the two. But this surname does not become her legal name, as the legal name of the woman does not change at all. Passports and all official documents will continue to be issued with her maiden name, even though the words "spouse of ……" may be added. The surname given to the child will therefore be governed by the Law of 8 May 2014. This means that depending on the filiation, different options are granted. She may very well transmit her maiden name onto the child, unless her national law allows the change of the surname based on marriage reasons.

CASE 2.3: PUBLIC POLICY

2.3.1. Explain cases of absolute application of public policy, in which foreign law is not applied in any situation without exceptions.

Model Case: a foreign law of a child permits names which affect dignity of the persons.

In order to consider the model case proposed, it is first necessary to distinguish between Belgians and foreigners. Article 39.2 and 3 CPIL read:*"[…] 2° ou la détermination du nom ou des prénoms n'est pas conforme au droit belge lorsque cette personne était belge lors de cette détermination; ou 3° dans les autres cas, cette détermination ou ce changement n'est pas reconnu dans l'Etat dont cette personne a la nationalité [...]"*. Thus the situation is as follows;

- the name of a Belgian determined abroad, in violation of Belgian law, is not recogniSed in Belgium;

- the name of a foreigner is recognised in Belgium if the name is also recognised in the state the person is a citizen of; this requires an examination not only of the foreign substantive law, but also of the (possibly conflicting) rules of foreign private international law.[351]

2.3.2. Explain cases of attenuated public policy, in which foreign law is applied in a "soft" way (material attenuation) or in which public policy is only applied when the case is connected with the territory or nationals of your Member State (spatial attenuation).

Model Case: "foreign wife" who is mother with the legal surname of the husband.

As indicated, in Belgium marriage has no effect on the surname of the wife. Nevertheless, it is possible that this rule is different in the country she is a national of. In this case, there is still a considerable freedom for the parents to choose the surname of their child. Notwithstanding the wide margin of appreciation granted to Member States, the refusal of the authorities to register the first name of a child chosen by her parents is considered a violation of article 8 of the European Convention of Human Rights (the right to respect the private and family life) so long as that surname is neither ridiculous nor whimsical, is pronounceable in the national language, and therefore not likely to harm the child.[352]

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[351] VAN GYSEL, op. cit. (n. 5), p. 1390.

[352] N. GALLUS 'La personalité', in: D. CARRÉ, S. DEGRAVE, N. GALLUS, G. HIERNAUX, N. MASSAGER and S. PFEIFF, *Droits des personnes et des familles. Chronique de jurisprudence 2005-2010*, Ghent: Larcier 2012, p. 17.

Consequently, under Belgian law, in her everyday life she can use her married surname, even in the case of a divorce if the ex-husband consents. This is a case of material attenuation, because the foreign law is not absolutely excluded. As a general rule, the surname that will be transferred from the mother onto the child is her maiden surname in order to respect the Belgian public policy (a case of special attenuation). Nevertheless, if that were to lead to a violation of article 8 ECHR in the abovementioned sense, it is possible that the mother will transferred the married surname to the child (a case of special attenuation).

CASE 2.4: DIVERSITY OF SURNAMES BY NATIONALITY AND PLACE OF BIRTH.

2.4.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in a third country.

Model Case: nationals from your Member State born and resident in a Member State of the EU.

This is detailed in the Circular of 30 May 2014 on the Law of 8 May 2014 amending the CC to establish equality of men and women in the mode of transmission of the name of the child and the adopted,[353] which merely applies the new legislation to the provisions of the CPIL, as recalled, in the event of birth abroad from 1 June 2014. The name mentioned on the foreign birth certificate that conforms to the choices offered by the new law must be recognised in accordance with article 27 CPIL. Article 27 states that these basic rules are applicable to the recognition of a foreign authentic act.[354]

In contrast, if the name mentioned in the foreign birth certificate does not comply with the choices offered by the new law, it cannot be recognised by the officer of the civil status.

2.4.2. Explanation and indication of leading/Model Cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in other Member State.

Model Case: nationals from your Member State born and resident in a Member State of the EU.

The rules of the CPIL may conflict with those applicable in another country.[355] Nevertheless, the rules of the CPIL are called upon to resolve a conflict of laws with the laws of other Member States, as occurred in Case C-353/06, *Grunkin and Paul*.[356] The approach currently adhered to conforms with the gist of that judgment. Article 18 of the EC Treaty was held to preclude the authorities of a Member State, in applying national law, refusing to recognise the surname of a child as determined and

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[353] Circulaire du 30 mei 2014 relative à la loi du 8 mai 2014 modifiant le Code civil en vue d'instaurer l'égalité de l'homme et de la femme dans le mode de transmission du nom à l'enfant et à l'adopté / Omzendbrief betreffende de wet van 8 mei 2014 tot wijziging van het Burgerlijk Wetboek met het oog op de invoering van de gelijkheid tussen mannen en vrouwen bij de wijze van naamsoverdracht aan het kind en aan de geadopteerde, *Moniteur Belge / Belgisch Staatsblad* 30 May 2014. This law came into force on 30 May 2014.

[354] The procedure of the recognition of an authentic act is explained under point 4.2.2, 'Foreign notarised documents', to which we refer.

[355] VAN GYSEL, op. cit. (n. 5), p. 1391.

[356] ECJ, **Case C-353/06 Stefan Grunkin and Dorothee Regina Paul** [2008] ECR I-07639.

registered in another Member State where the child was born and (s)he has been resident since his/her birth – even if (s)he has only the nationality of the first Member State.[357]

On 27 September 2012, the European Commission decided to refer Belgium to the Court of Justice of the European Union in the context of an infringement proceedings, due to the local authorities still refusing to register children with two Member States nationalities under a different name than their father, even if the child was already registered under a double surname allowed in another Member State. The entry into force of the new law of 8 May 2014 amending the CC to establish equality between men and women in the transmission of the name to the child or the adopted child[358] has put an end to these practices.[359]

CASE 2.5: DIVERSITY OF SURNAMES BY DOUBLE NATIONALITY

2.5.1. Explanation and indication of leading/Model Cases concerning "diversity of surnames", in relation with nationals from your Member State who are also nationals from third countries.

Model Case: nationals from your Member State who are nationals from third countries.

According to article 38 CPIL, the change of name or surname of a person by voluntary act or by operation of law is governed by the law of the state the person belongs to at the time of the change. The voluntary change of name or surname as part of the acquisition of Belgian nationality referred to in articles 15[360] and 21[361] of the Code of Belgian Nationality[362] is governed by Belgian law.[363]

Belgian law remains very much attached to the principle of immutability of the name. This conception of immutability of the name in a domestic law is reflected in Belgian private international law. Under article 39 CPIL, a change of name or names by judicial or administrative decisions which occurred abroad will not be recognised in Belgium. If the act or judgment concerns a foreigner, the change in name will be recognised in Belgium if it is recognised in the state of which the foreigner is national. The legal control of such a judgment will be done by applying, exceptionally, the foreign law under which the judgment was rendered.[364] This connection to national law may form an 'obstacle' when people hold several nationalities, as the surname may vary from one state to the other.[365] Thus, in conformity with the *Garcia Avello* judgment of the CJEU, in Belgium there now apply two different

[357] Ibid.

[358] Loi de 8 mai 2014 modifiant le Code civil en vue d'instaurer l'égalité de l'homme et de la femme dans le mode de transmission du nom à l'enfant et à l'adopté / Wet tot wijziging van het Burgerlijk Wetboek met het oog op de invoering van de gelijkheid tussen mannen en vrouwen bij de wijze van naamsoverdracht aan het kind en aan de geadopteerde, *Moniteur Belge / Belgisch Staatsblad* 26 May 2014. This law came into force on 1 June 2014.

[359] FIERENS, op. cit. (n. 39), p. 36.

[360] Concerning the declaration of residence abroad of the foreigner before the Officer of the civil status.

[361] Concerning the naturalisation application.

[362] Code de 28 juin 1984 de la nationalité belge / Wetboek van de Belgische nationaliteit, *Moniteur Belge / Belgisch Staatsblad* 12 June 1984. This law came into force on 22 June 1984.

[363] VAN GYSEL, op. cit. (n. 5), p. 1393.

[364] VAN GYSEL, op. cit. (n. 5), pp. 1393-1394.

[365] VAN GYSEL, op. cit. (n. 5), p. 1394.

regimes to the change of surname when the person has a double nationality, i.e. Belgian – another Member State or Belgian – third country.[366] This is further elaborated upon below.

2.5.2. Explanation and indication of leading/Model Cases concerning "diversity of surnames", particularly, in relation with nationals from your Member State who are also nationals from other Member States.

Model Case: nationals from your Member State who are nationals from other Member States.

In Belgium the *García Avello* jurisprudence applied in full, but under certain conditions. The legal framework with regard to this particular situation is settled by the Circular of 23 September 2004 on aspects of the law of 16 July 2004 on the CPIL of personal status.[367]

The CPIL has integrated the lessons of the judgment, which concerns only changes in the administrative name. Consequently, the principles applicable to name and first names are now as follows:

1. The judgment has had no impact on the question of the law applicable to the determination of names and surnames, which remains governed, as is currently the case, by the law of the state of which that person is national;

2. The change of name or surname of a person by voluntary act or by operation of law, is governed by the law of the state whose nationality is subject to change.

As is indicated in the Circular, the effect on the name of a state change is governed by the law applicable to the determination of the name and not by the law applicable to the relevant state relationship. For example, the effect of marriage on the name will be governed by the law applicable to the name, and not by the law applicable to the effects of marriage[368].

The circular is however a bit more restrictive, in stating that: "the *García Avello* rule will be applicable in case of voluntary change of name of a person who would have both Belgian nationality and the nationality of another Member State, this person being granted the right to obtain, by changing his/her administrative name, the name which would be incumbent under the law and tradition of the second Member State. This should not, however, affect the work of registrars because the change of name or surname on a voluntary basis is granted by royal decree".[369]

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[366] Case C-148/02 *Carlos* ***García Avello*** *v Belgian State* [2003] ECR I-11613.

[367] **Circulaire du 23 Septembre 2004 relative aux aspects de la loi du 16 juillet 2004 portant le Code de droit international privé concernant le statut personnel / Circulaire betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht die betrekking hebben op het personeelstatuut, *Moniteur Belge / Belgisch Staatsblad* 28 September 2004.**

[368] Ibid.

[369] VAN GYSEL, op. cit. (n. 5), p. 1395, footnote 2842.

3. MARRIAGE

CASE 3.1: DISPARITIES AMONG LEGAL SYSTEMS.

Short explanation and indication of leading/Model Cases about the main requirements of the national legislation, concerning matrimonial capacity, legal impediments, gender requirements and issues of the marriage of the same sex, matrimonial consent and religious and civil forms:

-Model Case: spouses nationals and residents of your Member State.

Prior to explaining the main prerequisites of marriage in Belgium, it is necessary to engage in some preliminary considerations. Under Belgian legislation, marriage has three essential characteristics: it is a solemn institution, it is a secular act, and it is indissoluble.[370] The essential constituent elements of marriage can be classified as follows: the marriage is a community of life, between two persons, which the civil law institutes and protects; the spouses are attached by a voluntary and solemn act; it can only be dissolved only in the cases prescribed by the law.[371]

Taking into account the juridical nature of the marriage, i.e. a civil contract, the main conditions required to marry under Belgian law are the following:

1.- *Capacity*. As an obvious fact, to be able to marry in Belgium the future spouses must be alive. This rule cannot been circumvented as is the case in some other states.[372] As regards the age of the future spouses, Belgian legislation in the article 144 CC requires them to have attained the age of civil majority, i.e. be 18 years old.[373] The provision specially indicates the prohibition to marry under that legal age, without distinction to gender.[374] However, article 145 CC provides an exception to this general rule. It indicates that the judge (of the family court) may lift the prohibition if there is a "serious reason".[375] In this vein, article 146 CC indicates that in a case of marriage of a minor, the parents always have to express their consent. As regards the exemption, the problem in granting it is to determine when the court is facing a "serious reason". This problem was solved by the Youth Court of Charleroi in the judgment of 5 July 2006[376], in which it concluded that this notion should be understood in a broad sense "without allowing marriage for any young person under 18 who expresses the wish to found a homestead". The trend in Belgian case law in these kind of situations is not to grant the exception. Nevertheless, in very specific cases it has been awarded. This is the case of the judgment rendered by the Youth Court of Ghent on 5 November 2007, in which a girl of 17, with a stable relationship of two years with her fiancé, requested the permission or exemption of the judge to marry. [377] After a period of investigation and interviews with her social circle and family, it seemed clear that the couple lived

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[370] VAN GYSEL, op. cit. (n. 3), p. 324.

[371] VAN GYSEL, op. cit. (n. 5), pp. 325-327.

[372] In contrast, a marriage can be contracted in *articulo mortis* if the consent of the future spouses is valid. See further VAN GYSEL, op. cit. (n. 3), p. 342.

[373] "Nul ne peut contracter mariage avant dix-huit ans."

[374] VAN GYSEL, op. cit. (n. 5), pp. 342-343.

[375] The claim must be made by both or by one of the parents of the minor, or by the tutor of the minor or by the minor himself/herself in absence of the consent of the parents or of the tutor.

[376] The abstract of the case is taken from G. HIERNAUX 'Le mariage', in: D. CARRÉ, S. DEGRAVE, N. GALLUS, G. HIERNAUX, N. MASSAGER and S. PFEIFF, *Droits des personnes et des familles. Chronique de jurisprudence 2005-2010*, Ghent: Larcier 2012, p. 85.

[377] Ibid., p. 87.

independently, not reliant on their parents. In this particular case, the marriage was authorised because the young girl seemed to possess the necessary maturity to marry.

2.- *Gender requirements*. Since the entry into force of the Law of 13 February 2003 regarding the opening of marriage to same sex persons and amending certain provisions of the CC, marriage can be celebrated both among people of different genders and between people of the same gender, in accordance with the provision of article 143 CC.[378] Originally, gay marriage was reserved to a nationals of states whose national law permitted such a wedding. Article 46 CPIL opened the possibility of gay marriage to all persons having the nationality of one state and the permanent resident of another state in which gay marriage is allowed[379].

3.- *Legal impediments*. As already indicated, the marriage of a minor is not allowed in Belgium, as indicated in article 144 CC. There is a legal impediment to contracting a second or subsequent marriage before the dissolution of the previous one, as stated in article 147 CC. Article 161, specifically, forbids marriage in direct line between ascendants and descendants in the same line. In the collateral line, marriage between brothers, sisters or brothers and sisters is forbidden (article 162 CC). Article 163 CC still forbids a marriage between uncle and niece/nephew, or between aunt and niece/nephew. Nevertheless, article 164 CC leaves room for the King to lift the prohibitions stipulated in the previous articles.

The abovementioned provisions apply to both the natural family of origin and the adoptive family, and to the child adopted by a full adoption.[380] These prohibitions also apply to both the natural or adoptive family of the adopted children through a simple adoption. Further, marriage is prohibited between the adopter and the adoptee or his descendants, between the adoptee and the former spouse of the adopter, between the adopter and the adoptee's former spouse, including adopted children, and even between the adopted son of a same adopter and between the adopted child and the adoptive parent.[381]

4.- *Matrimonial consent*. The consent to marry it is not necessary if the future spouses have reached the legal age, i.e. are over 18 years old. However, if the future spouses (or at least one of them) is under 18, the consent of the parents (mother and father, or at least one of them) is needed.[382] As already been mentioned, if the parents refuse to provide the consent, a judge of the Youth Court can give the authorisation to celebrate the marriage in case it found that the refuse of the parents is not based on genuine reasons, or if the refuse is abusive.[383]

5.- *Religious and civil form*. In Belgium, the only form of marriage which produces legal effects is civil marriage. In addition, it is required that the civil marriage takes place before the religious marriage,

[378] VAN GYSEL, op. cit. (n. 3), pp. 346-347.
[379] Ibid.
[380] As settled in article 356.1 CC.
[381] All this prohibitions are settled in the article 353.13 CC.
[382] See further article 145 CC.
[383] As established in article 148 CC.

as it indicated in article 21 of the Belgian Constitution and article 267 of the Belgian Penal Code. There is only one exception to this general rule, and that is of a marriage celebrated *in extremis*.[384]

CASE 3.2: CROSS-BORDER CONCLUSION OF MARRIAGE.

3.2.1. Explanation and indication of leading/Model Cases concerning the conclusion of marriage to foreigners in your Member State.

-Model Case 1: Marriage between a national of your Member State and national of other Member State.

-Model Case 2: Marriage between spouses of a Member State other than your Member State.

Under Belgian legislation, it is possible to conclude mixed marriages, i.e. marriage between future spouses of different nationality whereby (only) one of the spouses is Belgian and even a marriage between foreigners. In Belgium there is no international convention that applies to this matter,[385] so the applicable rules to a mixed marriage will be settled by the CPIL.

Article 46 CPIL designates that it is the national law of each of the spouses at the time of the marriage which determines the validity of the marriage, i.e. the qualities and conditions required. The connection with the respective laws of the spouses will operate in a distributive form, i.e. each spouse must comply with the requirements of his/her national law.[386]

Article 47 CPIL settles the formalities that govern the law of the marriage. In principle, it is the law of the state in whose territory the marriage is celebrated. In the same vein, article 48 specifies the effects of the marriage. These effects will be governed by a complex rule of connection with the situation of the couple. In any case, in practice Belgian law will be the law applicable to most of the spouses established in Belgium. The objective of the legislator was the integration of the couple in their current social environment, and their subjection to Belgian immigration laws.[387]

However, in the model cases proposed some prerequisites have to be met. The main and most important one is that at least one of the future spouses has a Belgian residence or a Belgian nationality. It is required that one of the future spouses is a Belgian citizen at the time of the ceremony of the celebration of the marriage, or, that one of them has had his or her place of residence in Belgium for more than three months.[388]

However, the only form of marriage recognised in Belgium is civil marriage. A marriage celebrate in another form has no legal effects. In any case, the Officer of the civil status may not refuse to celebrate a marriage between foreigners on grounds of the mere fact that a foreigner is illegally

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[384] *Guide pratique international de l'etat civil* , op. cit. (n. 8), p. 37. See further VAN GYSEL, op. cit. (n. 3), pp. 328-329.

[385] VAN GYSEL, op. cit. (n. 5), p. 1421.

[386] VAN GYSEL, op. cit. (n. 5), p. 1422.

[387] VAN GYSEL, op. cit. (n. 5), pp. 1425-1426.

[388] The prerequisite of residence in Belgium for more than three months can be demonstrated by any means: a flight ticket, an evidence of administrative formalities completed by the authorities, etcetera.

present in the country. In this vein, as indicated above, the foreigner must satisfy the marriage conditions of his/her home country.[389]

3.2.2. Can the Consular officers from your Member State conclude marriage? If so, which are the requirements?

-Model Case: The Consular Officer of your Member State concludes a marriage in other Member State.

The only one who can celebrate marriages in a Belgian consulate abroad is the head of the consular post. The head of the consular post is able to celebrate a marriage if one of the futures spouses has the Belgian nationality,[390] as stipulated in article 18 of the Consular Code of 21 December 2013.[391] The head has this competence if (s)he has been authorised to this purpose by the Minister, as indicated in article 20 of the Consular Code.

The main requirement for a marriage celebrated by the head of a consular post is laid down in article 21 of the abovementioned Code. For the head of a consular post to be able to celebrate a marriage, three conditions apply:

- to be placed in the consular district of the consular post where the Belgians and non-Belgians have their habitual residence;

- compliance with the legislation in force in Belgium in the field of notaries;

- respect for the international rules concerned binding on Belgium.

Nevertheless, acts which do not fulfil all the formal requirements prescribed by Belgian laws, only because of their being established abroad, are still valid.

3.2.3. Has your Member State adopted some legal measures to prevent the conclusion of marriage by its authorities when this one can be considered matrimonial tourism? If so, are they applied by Consular Officers too?

-Model Case: marriage of spouses of same sex and the origin country of one of them does not admit marriage of the same sex.

As indicated in previous answers, Belgian law allows for the marriage between two foreigners, and this includes gay marriages. Under article 46.2 CPIL the application of a law pursuant to the nationality of the spouses will be discarded in the event this provision prohibits same-sex marriage. This is done when one of them is a national of or has his/her habitual residence in the territory of a state in which same-sex marriages are allowed. Consequently, Belgian law recognises same-sex marriage of two foreign as a result of the application of articles 44 and 46 CPIL . In this regard, article 44 provides that the marriage can take place when one of the spouses is Belgian, is domiciled in Belgium, or after three months of habitual residence in Belgium when the marriage is planned to be celebrated. In this sense,

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[389] <http://www.belgium.be/en/family/becoming_a_belgian_citizen_by_marriage/>.

[390] In this case, if one of the spouses is not a national of the state in which the consulate is located, there is nothing in Belgian law that would prevent the celebration of the marriage by the head of the consular post.

[391] Code Consulaire / Consulair Wetboek, *Moniteur Belge / Belgisch Staatsblad* 1 July 1999. This law came into force on the 21 of January 2014.

article 46 states that a same-sex marriage may be entered into in Belgium when one of the spouses is Belgian or has his/her regular resident in Belgium for three or more months.[392]

Diplomatic and consular agents to whom the functions of the registrar of civil status have been transferred are competent to celebrate marriages, as long as one of the future spouses has (at least) the Belgian nationality. On the other hand, there are no conditions attached with regard to the nationality of the other (future) spouse.[393]

CASE 3.3: RECOGNITION OF MARRIAGES CONCLUDED ABROAD.

3.3.1. Conditions of recognition in your Member State of marriages concluded by authorities of other Member States or by religious form:

-Model Case: marriage between a national of your Member State and a foreign spouse, concluded by the authorities of other Member States or by religious form within the territory of other Member State.

Belgium has not ratified the Hague Convention of 14 March 1978 on Celebration and Recognition of Marriages. The CPIL, however, contains specific provisions aimed at the recognition of foreign authentic instruments concerning civil status.[394] Belgian law does not make a distinction between civil and religious forms.[395]

Since marriage is not a judicial decision but a legal act, its recognition is conditioned on its validity, which must be assessed in the light of the applicable law according to the Belgian rules of conflict of laws.[396] Recognition of marriages celebrated abroad is automatically granted, i.e., without the necessity to introduce a particular procedure to have this effect. Article 48 CC allows any Belgian to demand, upon his/her return, the transcription of an act of civil status carried out abroad.[397] In any case, the officer of civil status will verify if the decision or act satisfies the conditions imposed by the law to be recognised, in accordance with article 31 CPIL. This verification is carried out with the possibility of judicial review.[398]

Like any foreign authentic instrument, the recognition of a marriage presupposes that the act meets all necessary conditions for its authenticity flowing from the law of the state in which it has been established. However, article 24 CPIL allows a judge to accept equivalent documents if the parties cannot produce the original foreign documents.[399]

3.3.2. Cases of public policy which imply the refusal of recognition of marriages.

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[392] *Guide pratique international de l'etat civil* , op. cit. (n. 8), pp. 37-38.

[393] Ibid., p. 41.

[394] P. WAUTELET, F. COLLIENNE and S. PFEIFF, 'Actualités en droit familial international' in: D. PIRE (ed.), *Droit des familles*, Louvain-la-Neuve: Anthemis 2007, p. 278.

[395] In Belgium the only type of marriage that will produce legal effects is the civil marriage.

[396] VAN GYSEL, op. cit. (n. 5), p. 1427.

[397] VAN GYSEL, op. cit. (n. 5), p. 1427.

[398] VAN GYSEL, op. cit. (n. 5), pp. 1427-1428.

[399] VAN GYSEL, op. cit. (n. 5), p. 1428.

-Model Case: a polygamous marriage concluded abroad between a third country national and an EU citizen.

The public policy exception is applied under Belgian law either to prevent the application of foreign law in Belgium in order to have a marriage recognised; or to prohibit a celebration in Belgium of a marriage that would (only) be admissible under the national law of the spouses or the law of the place of celebration.[400] In this vein, for example, a foreign polygamous person cannot invoke his national law to conclude on Belgian territory a second union before the dissolution of the first one. The public policy exception also applies in respect of a polygamous union celebrated by a foreign consular or diplomatic agent in Belgium.[401]

However, the application of the exception should be based on a double criterion. First of all, the nature of the effects postulated, and second, the connection with the intensity of the situation with Belgian law. There is an exception for cases where the application of the foreign law contradicts a principle of international law.[402] Consequently, a polygamous union validly concluded abroad can still produce certain effects in Belgium, even when the parties do not rely on their personal status to contract a second marriage, without the dissolution of the first one.[403]

It is has to be pointed out that monogamy is a fundamental value of the Belgian legal system. Thus, it is unthinkable to celebrate a marriage of a person who is still in the bonds of a previous marriage, whatever his/her nationality. Any divergence pursuant to foreign law is ruled out by the international public policy exception. Yet, this exception is not as severe, as already been mentioned, when it comes to appreciating the validity of a marriage celebrated abroad.[404]

Polygamous marriages have given rise to the theory of "the attenuated effects of the international public order". According to this theory, the reaction to provision of foreign law contrary to public order is different if it impedes the acquisition of a right in Belgium, or if it does not allow the effects of a law validly acquired abroad in Belgian territory.[405] On the basis of this theory, case law has allowed for an action for reparation of harm suffered by a wife after the accidental death of her polygamous husband, or a demand filed against a polygamous spouse for a contribution in the marriage expenses. Judges have also recognised the effects of polygamous marriage filiation.

The Belgian Cassation Court in its judgement of 3 December 2007,[406] rendered in a matter of social security (more precisely the rights to a pension), has ruled that the Belgian international public order (*ordre public*) stands in the way of recognition in Belgium of the effects of a validly celebrated marriage abroad when one spouse was, when the second marriage was celebrated, already engaged in the bonds of a prior marriage, not yet dissolved. It proceeded in this vein on the basis that Belgian law does not recognise polygamous marriages.

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[400] F. RIGAUX and M. FALLON, *Droit International Privé*, Ghent: Larcier 2005, p. 520.
[401] Ibid.
[402] Ibid.
[403] Ibid.
[404] VAN GYSEL, op. cit. (n. 5), p. 1430.
[405] VAN GYSEL, op. cit. (n. 5), p. 1430.
[406] Summary of the judgement in VAN GYSEL, op. cit. (n. 5), pp. 1430-1431.

In contrast, the Belgian Cassation Court in its judgement of 18 March 2013[407] indicated that the Belgian international public order does not stand in the way of recognition in Belgium of the effects of a foreign polygamous marriage celebrated on a valid way under the national law of the spouses – even when the previous marriage was not dissolved at the moment of the celebration of the second foreign marriage (so far as the national law allows it). This judgment was based on the fact that the first wife had acquired Belgian nationality and possessed it on the moment of the decease of the polygamous husband. On the moment of his decease, the second wife presented a claim for a survival pension; however, the rights of the first wife, who had lived for more than 40 years in Belgium with her spouse until his death, were recognised. The Court did not offer an extensive justification of its judgment, but indicated that the Belgian international public order stands in the way of recognising social rights in Belgium pursuant to a second marriage.

CASE 3.4. ACQUISITION OF NATIONALITY OF THE SPOUSE

3.4.1. Which are the general requirements for acquisition of nationality of the spouse?

-Model Case: a foreigner is married to a national of your Member State.

The marriage of a foreigner with a Belgian national does not grant the foreigner Belgian nationality. There is a possibility that the foreigner acquires the Belgian nationality, but this is not an obligation.[408] The transcription of the marriage in the Belgian registries does not grant the Belgian nationality to the foreigner either, as is established in article 48 CC. In order to acquire Belgian nationality, the foreigner must submit a request to the local register of birth, marriages and deaths.[409]

In order to make the request for obtaining Belgian nationality, it is required that the spouses are living together; moreover, the time of residence in Belgium determined the residence rights of the foreigner.[410] Cohabitation and residence in Belgium is thus required to obtain the Belgian nationality.

3.4.2. If your national legislation requires a period of residence in the spouse, shall the residence meet some specific requirements?

-Model Case 1: a third national country person who is not legal resident has been married to a national of your Member State for the required period and he has illegally resided in your Member State for one year.

-Model Case 2: a foreigner has been married to a national of your Member State for the legal period and he has resided in your Member State for the legal period, but, at the moment of the application, he is residing in other State.

As mentioned in the previous answer, a residence period is required in Belgium in order to obtain the nationality. However, in Belgium there exists a naturalisation procedure in order to acquire

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[407] Summary of the judgement in VAN GYSEL, op. cit. (n. 5), p. 1431.

[408] <http://www.belgium.be/en/family/becoming_a_belgian_citizen_by_marriage/>.

[409] In the case that the main place of residence is abroad, request must be submitted in a Belgian embassy or consulate. Either the Belgian consulate or the officer of the local register of birth, deaths and marriages will contact the Belgian public prosecutor of the Court of First Instance of Brussels in order to obtain his opinion.

[410] Op. cit. <http://www.belgium.be/en/family/becoming_a_belgian_citizen_by_marriage/>.

the Belgian nationality when a foreigner has not the legal right to it. This procedure is regulated in articles 18 to 21 of the Belgian Code of Nationality[411].

The naturalisation procedure is a genuine way to acquire nationality. The particularity of a naturalisation procedure is that the foreigner applying does not have the right to get the Belgian nationality, but the House of the Representative may grant him/her with the Belgian nationality by way of 'concession'.[412] This concession can be made on various grounds. The most common ones are: marriage with a Belgian, legal residence, and filiation with a child born in Belgium. To be able to apply for this concession, the foreigner must have had his/her main place of residence in the Belgian territory for at least 3 years.[413]

In case the main place of residence is abroad, the application for the naturalisation procedure must be submitted to the Belgian Embassy or Consulate of the place of living and this institutions will forward the application to the House of Representatives. In order to have the application approved in case of living in another country, a genuine link with Belgium during a required period must be demonstrated.[414]

3.4.3. Does the national legislation contain provisions in cases of separation or divorce of the spouses?

-Model Case: a foreigner has habitual residence in your Member State for the legal required period, which is ongoing and immediately prior to the application. He has been married to a national for more of required period, but at the moment of the application, they are legally separated.

The divorce, as the marriage, has no effect on the acquisition of the nationality by a foreigner. If the foreigner meet the necessary prerequisites to acquire the Belgian nationality, either by a declaration procedure[415] or by a naturalisation procedure at the moment of the application, (s)he will be granted Belgian nationality.

CASE 3.5: SPOUSE REUNIFICATION.

3.5.1. Can the spouse be reunified under Council Directive 2003/86/CE and Directive 2004/38/EC although the marriage is not recognized in your Member State? If necessary, distinguish between the particular case of polygamous marriage (which is harmonized in relation with the Directive 2003/86/EC but not in relation with Directive 2004/38/EC) and other cases without any harmonization (for instance, persons of the same sex, "forced marriage"…).

-Model Case: application for reunification of spouse, although the marriage cannot be recognized in your Member State.

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[411] Code de 28 june 1984 de la nationalité belge / Wetboek van de Belgische nationaliteit, *Moniteur Belge / Belgisch Staatsblad* 12 July 1984. This law came into force on the 22 of July 1984.

[412] <http://www.belgium.be/en/family/naturalisation_procedure/> .

[413] If the foreigner is recognised as a refugee, the residence requires is reduced to 2 years.

[414] <http://www.belgium.be/en/family/naturalisation_procedure/>.

[415] The declaration procedure is regulated in the articles 12b to 17 of the Belgian Code of Nationality.

According to article 147 of CC a person cannot contract a marriage if the previous marriage has not been annulled or dissolved through a divorce or a death of one of the wedded partners.[416]

However, bigamy or polygamy situations are frequently found in foreigners' marriages. Belgian international public order resists the marriage of a foreigner in Belgium if the previous marriage is not annulled, even in the case that the national law of the foreigner would tolerate or allow the marriage. In any case, a second marriage duly concluded abroad in a state that admits polygamy or bigamy will be recognised in Belgium and will give a status to all the wives, especially in terms of social security and inheritance law.[417] Thus, the Belgian international order is not opposed to the recognition in Belgium of (all) effects of a marriage duly celebrated abroad (by a person already engaged in a prior marriage/s at the moment of the celebration), in accordance with the national law of the spouses.[418]

With this in mind, in theory it will be possible to reunify in Belgium the family of a polygamous person. Assuming that the polygamous person has the right to establish himself/herself in the Belgian territory for an unlimited period of time and (s)he complies with the legal conditions required to the reunification of his family, the members of the family willing to use the right to reunification have to meet the conditions established in article 10.4 of the Law of 15 December 1980[419] on access to the territory, residence, establishment and removal of foreigners. This law was amended by the law of 15 September 2006.[420] This article indicates that there is a right to reunification of the family members of the foreigner admitted or authorised for at least 12 months or indefinitely, to stay in the Belgian territory, for at least 12 months to settle. This period of 12 months will not be applicable if the marital relationship or the registered partnership existed before the arrival in Belgium, or if the family member and the foreigner have a common minor child, or in the case of family members of a foreigner recognised as a refugee or granted the right of subsidiary protection. The family members who can enjoy the right to reunification are:

- the foreign spouse with whom (s)he is bound by a registered partnership considered as equivalent to marriage in Belgium, who comes to live with him/her;[421]

- their children who come to live with them before reaching the age of 18 years and are single;

- children from abroad together with their spouse or registered partner, who come to live with them before reaching the age of 18 years and are single.[422]

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[416] VAN GYSEL, op. cit. (n. 3), p. 363.

[417] VAN GYSEL, op. cit. (n. 3), pp. 363 – 364.

[418] VAN GYSEL, op. cit. (n. 5), p. 364.

[419] Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, Moniteur Belge / Beslgish Staatsblad 31 December 1980. This law came into force on the 1 of July 1981.

[420] Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Moniteur Belge / Belgisch Staatsblad* 6 October 2006. This law came into force on 10 October 2006.

[421] In this case, both of the spouses must be over the age of 21. This minimum age is however reduced to 18 if the marital relationship or registered partnership existed already upon the date of arrival in Belgium.

[422] As far as the foreign joining spouse or registered partner has the custody and care of the child and, in case of joint custody, provided that the other holder of custody rights has given his/her consent.

In any event, article 10.5 of the abovementioned Law, indicating the conditions that the spouses need to meet in order to be reunified in Belgium, specifies that the person may not have a lasting and stable relationship with another person.

3.5.2. In accordance with Article 16 of the Council Directive 2009/86/EC about family reunification, has your Member State adopted some provisions for refusal entry and residence of the spouse regarding that marriage does not live in a real marital relationship?

-Model Case: a third country national legally reside in your Member State and applies for the reunification of his foreign spouse, but authorities observe that they do not live in a real marital relationship?

Article 10.5 of the Law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners requires a real marital relationship between the foreigners in order to establish the family reunification. It indicates that the partners need to meet the following conditions: they have to prove that they maintain a sustainable partner relationship, that this relationship is stable, and that it has been duly established. The lasting and stable nature of the relationship is established if the partners can prove that they have lived legally, in Belgium or in another country, uninterrupted for at least one year before the application. It will also be considered proof if the partners can demonstrate that they have known each other for at least two years before the application and can proffer evidence that they have maintained regular contact by telephone/electronic mail, that they have met three or more times during two years prior the application, and that these meetings in total amount to 45 days or more.

3.5.3. In accordance with Article 15 Council Directive 2003/86/EC about family reunification, has your Member State limit the granting of autonomous residence permit to the spouse in cases of breakdown of the family relationship (widowhood, divorce or separation)?

-Model Case: a third country national legally resides in your Member State and is died, after two years of residence with his foreign spouse.

In application of article 11 of the Law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners, the Belgian Minister or his delegate may decide that the foreigner who declares to find himself in one of the situations provided for in article 10 does not have the right to enter or to stay in Belgian territory if the foreigners and his/her foreign spouse do not maintain an effective marital or family life.

3.5.4. In accordance with Article 4.5 of the Council Directive 2003/86/EC about family reunification of third countries nationals, has your Member State required the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her, in order to ensure better integration and to prevent forced marriages?

-Model Case: a third country national legally resides in your Member State apply for the reunification of his foreign spouse. Both of them are 18 years old.

The law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners requires that both members of the partnership have reached the age of 21. In case (one of) the applicants are 18, reunification will be allowed if upon the arrival in Belgium they can prove a marital relationship or a registered relationship.

3.5.5. In accordance with Article 4.3. of the Council Directive 2003/86/EC, has your Member State decide that registered partners are to be treated equally as spouses with respect to family reunification?

-Model Case: a third country national resident in your Member State applies for the reunification of is registered partner.

Article 10 of the Law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners also opens the door to reunification of registered partners if they meet the conditions required. This conditions are that the legal partnership is duly established and stable. They also have to be in a genuine relationship in the way described in the reply to question 3.5.2.

3.5.6. In accordance with Article 26 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 of April 2004 on the right of citizens of the Union and their family members, does your Member State carry out checks on compliance with carry registration certificate of residence card?

-Model Case: the residence card of a spouse of the EU citizens is required by the police.

According to the Law of 15 December 1980 on access to the territory, residence, establishment and removal or foreigners, any documents are accepted that can prove the link of the foreigner with an EU citizen willing to be reunited in Belgium. Normally, when the spouse is a third country national, a visa will be required upon arrival in Belgium.

In any case, upon filing the request for reunification the foreigner has to demonstrate his/her identity. The documents that prove his/her identity allowed for in Belgium must meet the following conditions:

- it must contain the full name, place and date of birth and nationality of the person concerned;
- it is issued by a competent authority;
- it allows for the identification of a physical link between the holder and the person concerned.

CASE 3.6: MARRIAGE OF CONVENIENCE.

3.6.1. Does the law of your Member State forbid "marriage of convenience"? If so, which are the concept and effects of this kind of marriage?

-Model Case: a third country national marries to a national from your Member State in order to obtain residence permit or even nationality.

The law of 12 January 2006 amending the Law of 15 December 1982 on access to the territory, residence, establishment and removal of foreigners explicitly prohibits marriages of convenience. This text introduces a specific provision regarding such marriages, which announces that they are penalised, and even allows for the nullity of marriages celebrated with the aim of an abuse of law. It also allows for

a prison sentence[423] to be imposed on those who marry with no intention of creating a sustainable family life. Even the simple attempt to enter into a marriage of convenience can be punished.[424]

The law of 4 May 1999 amending certain provisions regarding marriage[425], inserted in the CC by article 146*bis*, had as its objective the characterisation of the marriage of convenience.[426] In this regard, it states that: *"Il n'y a pas de mariage lorsque, bien que les consentements formels aient été donnés en vue de celui-ci, il ressort d'une combinaison de circonstances que l'intention de l'un au moins des époux n'est manifestement pas la création d'une communauté de vie durable, mais vise uniquement l'obtention d'un avantage en matière de séjour, lié au statut d'époux".*

The officer of the civil status may refuse to celebrate a marriage on the grounds of a mere suspicion that the future marriage would not cover the requirements to celebrate a valid marriage, contained the article 167 CC. The latter provides:

> *"L'officier de l'état civil refuse de célébrer le mariage lorsqu'il apparaît qu'il n'est pas satisfait aux qualités et conditions prescrites pour contracter mariage, ou s'il est d'avis que la célébration est contraire aux principes de l'ordre public.*
>
> *S'il existe une présomption sérieuse qu'il n'est pas satisfait aux conditions visées à l'alinéa précédent, l'officier de létat civil peut surseoir à la célébration du mariage, le cas échéant après avoir recueilli l'avis du procureur du Roi de l'arrondissement judiciaire dans lequel les requérants ont l'intention de contracter mariage, pendant un délai de deux mois au plus à partir de la date de mariage choisie par les parties intéressées, afin de procéder à une enquête complémentaire. [….]*
>
> *S'il n'a pas pris de décision définitive dans le délai prévu à l'alinéa précédent, l'officier de l'état civil doit célébrer le mariage [1 sans délai], même dans les cas où le délai de six mois visé à l'article 165, § 3, est expiré.*
>
> *Dans le cas d'un refus visé à l'alinéa premier, l'officier de l'état civil notifie sans délai sa décision motivée aux parties intéressées. Une copie, accompagnée d'une copie de tous documents utiles en est, en même temps, transmise au procureur du Roi de l'arrondissement judiciaire dans lequel le refus a été exprimé […].*
>
> *Si l'un des futurs époux ou les deux ne sont pas inscrits, au jour du refus, dans les registres de la population, le registre des étrangers ou le registre d'attente de la commune, ou n'y ont pas leur résidence actuelle, la décision de refus est également immédiatement notifiée à l'officier de l'état civil de la commune où ce futur époux ou ces futurs époux sont inscrits dans l'un de ces registres ou ont leur résidence actuelle.*

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[423] From 8 days to 3 months; or a fine than ranges from EUR 130 to EUR 500.

[424] Services des etudes juridiques, *Étude de legislation comparé n.º 159-février 2006 – La lutte contre les mariages de complaisance*, février 2006. The full text can be accessed via <http://www.senat.fr/lc/lc159/lc159_mono.html>.

[425] Loi du 4 Mai 1999 modifiant certaines dispositions relatives au marriage / Wet tot wijziging van een aantal bepalingen betreffende het huwelijk, *Moniteur Belge / Belgisch Staatsblad* 1 July 1999. This law came into force on the 1 of January 2000.

[426] D. CARRÉ, 'Le renfoncement des mesures de lutte contre les union de compliance', in: N. GALLUS (ed.), *Actualités en Droit de la Famille*, Brussels: Bruylant 2015, p. 55.

Le refus de l'officier de l'état civil de célébrer le mariage est susceptible de recours par les parties intéressées pendant un délai d'un mois […] devant le tribunal de famille".

This means that the Officer of the civil status may refuse to celebrate the marriage when it appears that the marriage will not satisfy the qualities and conditions under which a valid marriage is celebrated. The denial of the celebration of the marriage can also be based on the presumption or belief that the celebration of the marriage will contravene the principle of public order.

Referring back to what is stated in article 146*bis*, it indicates that no marriage will be concluded in a situation in which the following two conditions are met, or presumed to be met. The first is that the intention of at least one of the future spouses or both of them is not the creation of a common and sustainable life together. The second concerns the intention of the future spouses with regard to the marriage, that is, if they mean to seek particular legal advantages, such as the legalisation of their situation, or of those linked to marital status.[427]

The direct effects of the finding of a marriage of convenience is the nullity of that marriage due to a defect in the consent. It will therefore not be recognised and will not have any effect. An *ex ante* effect is the refusal of the Register Officer to celebrate the marriage if (s)he has any belief that it would be a sham. If the marriage has already been celebrated, it is susceptible to annulment, as indicated in article 184 CC. This annulment can be pursued by anyone who has an interest, either spouses, or the Public Prosecutor. In the latter cases, it will be a control *a posteriori*.

3.6.2. How do the authorities of your Member State control if the marriage before them is of convenience? (See also question 4.3.2.).

-Model Case: see previous case and assess if, for instance, the authorities of your State can/shall interview the spouses.

The applicable legal framework to the model case is the CC (mainly article 146*bis* and 167) and the Law of 4 May 1999 amending certain provisions on marriage.[428] The law of 1999 inserted in the CC means to combat marriages of convenience. The particular measure is the one contained in article 146 *bis*. This articles states that *"il n'y a pas de marriage lorsque […] l'intention de l'un au moins des époux n'est manifestement pas la creation d'une communauté de vie durable, mais vise uniquement l'obtention d'un avantage en matière de séjour, lié au statut d'époux"*. So, as follows from this article, despite the formal consent, there is no a marriage if the intention of at least of one of the spouses was obviously not to create a sustainable family life.[429] If this is confirmed by the officer of the civil status, the Public Prosecutor may seek the annulment of the marriage.[430]

In addition, article 167 CC, instated by the law of 1999, gives a wide discretion and control to the officer of the civil status. (S)he may refuse, or defer for a period of two months, the celebration of a marriage if there exist a "strong presumption" that a marriage does not meet the conditions required.[431]

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[427] D. CARRÉ, op. cit. (n. 136), p. 56.

[428] Loi du 4 Mai 1999 modifiant certaines dispositions relatives au marriage / Wet tot wijziging van een aantal bepalingen betreffende het huwelijk, *Moniteur Belge / Belgisch Staatsblad* 1 July 1999. This law came into force on the 1 of January 2000.

[429] *Étude de legislation comparé,* op. cit. (n. 134).

[430] This prevention measure, is obviously a measure *a posteriori.*

[431] Probably after having received the opinion of the public prosecutor.

The delay of two months enables a carrying out of an additional investigation in order to check whether the future spouses meet all the conditions to marry under Belgian law. This investigation will also ensure that the intended marriage is not a marriage of convenience.[432]

The final amendment to article 167 CC was made by the Circular of 6 September 2013 regarding the Law of 2 June 2013 amending the CC, the Law of 31 December 1851 on consulates and consular jurisdictions, the Criminal Code, the Judicial Code and the Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigner, to fight against marriages of convenience and legal cohabitations of convenience.[433] It is indicated in section C.2. of the Circular that article 167 CC provides for an express right for the officer of the civil status to defer or refuse the marriage if there exists a "strong presumption". On this basis, the officer must ensure that all the formal and substantive requirements for a legal marriage are met. With this right granted to the Officer, his/her active and preventive role of the officer is emphasised. Thus, the role of the officer will not only be a passive one; some preliminary investigations are conducted in order to ensure that the future spouses meet all the legal conditions of substance and form. These investigations are carried out by the registrars, normally they take the form of an interview, and the intended spouses must fill out some forms. The investigations cover both the satisfying of the positive conditions on the one hand, and the absence of any impediments for the marriage on the other.[434] The civil registrar must therefore also check whether the requirements of article 146*bis* CC are satisfied[435].

Belgian case law has been fairly generous in judgments regarding marriages of convenience. One of the most recent judgement in this regard is the judgment rendered by the Civil Chamber of the Appeal Court of Brussels on 10 April 2014, which intimated that:[436]

> *"[…] The question is whether the marriage was entered into in compliance with the substantive requirements for marriage in accordance with the national laws of both spouses. The Belgian authorities refuse recognition because they fear that this is a fictitious marriage. It is not permitted to contract a marriage with a false license, can be as under Moroccan law (applicable to the applicant), but in any case in Belgian law (applicable to the applicant).*
>
> *Belgian law includes a specific provision in Article 146bis CC to punish the marriage of convenience if the marriage was clearly not concluded with the intention of creating a*

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[432] *Étude de legislation comparé,* op. cit. (n. 134). The parties may appeal to the Court of First Instance against the refusal decision.

[433] Circulaire relative à la loi du 2 juin 2013 modifiant le Code civil, la loi du 31 décembre 1851 sur les consulats et la juridiction consulaire, le Code pénal, le Code judiciaire et la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, en vue de la lutte contre les mariages de complaisance et les cohabitations légales de complaisance / Omzendbrief inzake de wet van 2 juni 2013 tot wijziging van het Burgerlijk Wetboek, de wet van 31 december 1851 met betrekking tot de consulaten en de consulaire rechtsmacht, het Strafwetboek, het Gerechtelijk Wetboek en de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, met het oog op de strijd tegen de schijnhuwelijken en de schijnwettelijke samenwoningen, *Moniteur Belge / Belgisch Staatsblad* 23 September 2013. This law came into force on the day of its publication.

[434] See further article C.2 of the Circular of 6 September 2013, in which the new tenets of article 167 CC are established.

[435] However, it must be prevented that every mixed marriage is *prima facie* qualified as a suspicious one.

[436] The full text of the judgment is published in the *Tijdschrift@ipr.be*, vol. 52, nr. 2 (17 July 2014), accessible via <http://www.dipr.be/>.

sustainable living community between the applicants, but only to get an edge on residence, linked to the status of spouses. As it is impossible to determine with absolute certainty the parties' intention, it is required that the evidence show a decisive and there is a clear presumption character which is not contradicted. This is in other words to indicate a set of circumstances which, with a probability close to certainty, show that the marriage has been diverted from its normal purpose and that it is indeed a matter of fictitious marriage because the parties, or at least one of them had a view that the establishment of a structure for obtaining a security or material benefits.

In its assessment, the court takes into account many facts dating from before and during the marriage as cohabitation. He noted that there are some contradictions in the statements of the applicants but for the court, are not determinative given the other elements of the case. Including the fact that the applicant was married several times is not decisive in itself. Furthermore, the difference in age of eight between applicants (the woman is older than the man), is not in itself an adequate reason to talk about fictitious marriage. Of course, the current marriage room has an advantage for the applicant but all the above data do not allow anything to deduce that marriage applicants would clearly not intended to constitute a sustainable living community, but only to get a material benefit for the applicant related to his status as a husband.

The sustainable living community will mainly appear in the common life of those concerned. An appraisal criterion relative to this common life is not really possible until now.

No conclusive evidence of falsity being present, recognition of the aforementioned act of Moroccan wedding is necessary. Recognition by the court has the consequence that the Civil Registry official shall conduct the transcription and registration of the marriage in question in the registers of civil status, on the one hand and in the register of population and foreigners, on the other […]".

3.6.3. What happens with the control of the convenience when the marriage is concluded before a foreign authority but it provokes effects in your Member State?

-Model Case: a national from your Member State and a third country national marry abroad in order to obtain residence permit in your Member State or even nationality. The marriage wishes the recognition of this foreign act by the authorities of your Member State.

The starting point is that Belgium has not signed the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Foreign Marriages. This, in combination with the fact that marriage is not a judicial decision, means that the applicable rules for the recognition and the validity of a foreign marriage will be the same as for the recognition and validity of a legal act.

Article 27.1 CPIL subjects the recognition and validity in Belgium of a foreign non-jurisdictional public act to the condition that its validity is established under the applicable law. The recognition and

validity will also be subjected to the non-existence of a fraud on the law or a manifest violation of the public order.[437]

Nevertheless, as stated in articles 46 and 47 CPIL, a marriage celebrated abroad will be recognised in Belgium if two conditions are met. The first is that the substantive or basic conditions imposed by the national law of the spouses are met; secondly, the formal requirements stated by the national law of the place of celebration of the marriage need to be respected. In any case, the recognition will always be granted subject to the reservation of the exception of the Belgian international public order or/and the exception of legal fraud.[438]

It is necessary to highlight in this regard that in Belgium the principle of the automatic recognition of an authentic or legal act applies. Consequently, it will not be necessary to apply for its recognition.[439] Based on this principle, all Belgian authorities are competent for the recognition of a foreign marriage (such as the immigration officer on the occasion of an application for family reunification, or the officer of the civil status on an application of a transcription of the marriage or the transcription of the birth child born in the wedlock).[440]

As with any foreign authentic act, the recognition of a marriage presupposes that the act meets the necessary conditions for its authenticity, i.e. the conditions established by the legislation of the state of celebration. However, article 24 CPIL authorises a court to accept equivalent documents if the parties cannot produce the original documents.[441]

In the context of the fight against marriages of convenience, many jurisdictions have invoked non-recognition based on the exception of the legal fraud. The main basis for this is that the marriage had been celebrated in a foreign country with which the spouses have no link.[442] In this vein, article 46 CPIL states that the national substantive conditions under which the foreign marriage has been celebrated is to be checked. The absence of a real consent of at least one of the partners to the marriage is indicative of an invalid marriage in most of foreign legislations. In any case, it is required to demonstrate that the aim of the foreign marriage is none other than to acquire legal privileges in Belgium. In view of the abundant case law of Belgian courts, as a single example may be mention the recent judgment of the Court of First Instance of Brussels of 13 March 2013[443], in which a recognition of a foreign marriage was refused on the following bases:

> *"[…] The conclusion of a marriage in the circumstances referred to in Article 146bis Cc (Art. 79bis of the Belgian Aliens Act) and the drafting of a fake marriage certificate (art. 196 Belgian Penal Code) abroad are extraterritorial offenses. The criminal court may convict only if the additional conditions laid down in the event of extraterritorial offenses are met (Art. 6 and subsequent of the preliminary title ICRC.). The use of the marriage as part of the procedure for obtaining a*

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[437] S. PFEIFF, 'Partie X. Droit International Privé', in: D. CARRÉ, S. DEGRAVE, N. GALLUS, G. HIERNAUX, N. MASSAGER and S. PFEIFF, *Droits des personnes et des familles. Chronique de jurisprudence 2005-2010*, Ghent: Larcier 2012, p. 690.

[438] Ibid, p. 691.

[439] Ibid.

[440] Ibid.

[441] Ibid., pp. 694-695.

[442] Ibid., p. 697.

[443] English translation of the summary accessible at <www.jura.be> .

legal right of residence (article 197 Belgian Penal Code) can be quickly ascertained in Belgium, and therefore no additional conditions will apply to deny the recognition of the marriage […]".

In conclusion, the control of convenience of a foreign marriage in Belgium is performed by different authorities. In any case, the immigration officer and the civil status officer will be the first that will be confronted with a suspicious marriage. In those cases, they will commence additional investigations to clarify all possible 'grey' points. The nature of this investigation will differ and depend on who will carry it out; the result will also be different. In some cases, they can instigate an annulment procedure for this kind of marriage.

3.6.4. Which are the main proofs and presumptions concerning convenience and are they in accordance with EU recommendations?

-Model Case: the authorities of your Member State observe that marriage formed by a national of your Member State and a foreigner ignore basic personal and family data of each other, although previous relations in presence or by mail, post mail, telephone, internet are proven.

According to the Circular of 6 September 2013 regarding the Law of 2 June 2013 amending the CC, the Law of 31 December 1851 on consulates and consular jurisdictions, the Criminal Code, the Judicial Code and the Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreign, to fight against marriages of convenience and legal cohabitations of convenience,[444] there is a combination of different factors that may constitute a serious indication of a marriage of convenience. The Circular is addressed to the officers of the civil status, and its main aim is to assist them in the implementation of the provisions in the fight against marriage of convenience.[445]

As stated in article C.2. of the Circular, a combination of the following factors, among others, can be a serious indication that the officer of the civil status is confronted with a marriage of convenience;

- the parties do not understand each other or even have difficulties in interacting or they need an interpreter;
- the parties have never encountered before the declaration of marriage;
- one of the parties cohabited with someone else in a sustainable manner;
- the parties do not know the name or even the nationality of the other;
- one party does not know where the other works;
- there is a clear divergence between the statements relating to the circumstances of how they met;
- a sum of money is promised in reward of the celebration of marriage,

[444] Circulaire relative à la loi du 2 juin 2013 modifiant le Code civil, la loi du 31 décembre 1851 sur les consulats et la juridiction consulaire, le Code pénal, le Code judiciaire et la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, en vue de la lutte contre les mariages de complaisance et les cohabitations légales de complaisance / Omzendbrief inzake de wet van 2 juni 2013 tot wijziging van het Burgerlijk Wetboek, de wet van 31 december 1851 met betrekking tot de consulaten en de consulaire rechtsmacht, het Strafwetboek, het Gerechtelijk Wetboek en de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, met het oog op de strijd tegen de schijnhuwelijken en de schijnwettelijke samenwoningen, *Moniteur Belge / Belgisch Staatsblad* 23 September 2013. This law came into force on the day of its publication.

[445] Op. cit. D. CARRE, (…), pp. 47-81, pp. 56-57.

- one of the two is engaged in prostitution;
- a party has already the right to a family reunification through a marriage or a legal cohabitation with one or more persons;
- one of the parties has already made one or more attempts of a marriage of convenience or a legal cohabitation of convenience;
- one of the parties has failed in all legal attempts to settle in Belgium;
- the intervention of an intermediary;
- a large age difference.

Further on, in the same document it is highlighted that the officer of the civil status may base his/her presumptions, among others on:

- the declarations or the testimony made by the parties themselves or by a third party;
- writings of the parties themselves or of third parties;
- investigation conducted by the police.

Concerning the proofs and presumptions of marriage of convenience, we may pointed to e.g. the judgement n.º 2013/AR/631 of 15 October 2014, rendered by the Civil Court of Antwerp (Family Chamber), indicating that the *civil status is not a matter of trade:*

> *"[…] The question of whether the agreement within the future spouses of celebrating the marriage is compatible with the public order requires a consideration of the merits of the proposed marriage and, therefore, the initial refusal of the registrar: in fact, marriage is a legal act which material intended is to change the civil status of two singles persons. The civil status of those relates to public order in the sense that this is a matter of the legal foundations on which economic and moral order of society.* ***The civil status is not a tradable matter, i.e. no person can dispose of it through an agreement or through a waiver of his / her civil status.*** *While the law allows for specific agreements on particular items for individuals, the development of such agreements is subject by law to a judgment and / or solemn formalities. (as is stated in article 1043 of the Belgian Judicial Code) […]"*[446].

[446] English translation of the summary accessible at <www.jura.be> .

4. LIFE EVENTS AND REGISTRY OFFICES.

CASE 4.1: CIVIL REGISTRATION SYSTEMS

4.1.1. What kind of registration systems exists in your country?

Model Case: while on vacation in France, a child of a Spaniard citizen couple is born in that country. The child's birth was recorded in a French Registry Office. Later, the birth has to be recorded also in the Spanish Registry Office.

In Belgium, there are different types of register in which the relevant changes of a civil status that a person can have in his/her life are recorded. In this regard, we may identify an event-based registration system and a person-based registration system. In any event, article 164 of the Belgian Constitution indicates that the drafting and the record-keeping of all the acts of a civil status are, exclusively, the competence of the municipal authorities. This means, in terms of legal framework for the Belgian civil registries, that the local authorities are responsible for deciding on the civil registries in Belgium. This implies that in Belgium there would be around 589 different laws or regulations pertaining to the prerequisites of access to a Civil Registry.[447]

In this vein, article 40 CC states that: *"Les actes de l'état civil seront inscrits, dans chaque commune, sur un ou plusieurs registres tenus doubles".* In this regard, the acts of the civil status are registered in one or more duplicate records.[448] Depending on the act to be registered, in practice there exists different registers to record the births, marriages and the demises. These are:[449]

- The one for the registration of acts that testify to the birth, date of the birth, time, place and name of the child, surname and sex, and the identity of the mother and the father, if the filiation of the father has been determined (an event-based registration system);

- The one for the registration of a marriage that offers proof of the act of the celebration of the marriage itself, of the identity of the spouses, of their quality of legal age or underage, of the identity of the parents of the spouses and, if necessary, of the witnesses (an event-based registration system);

- The one for the registration of the act of declaration of marriage (held in one sample) that demonstrates the act of wedding (an event-based registration system);

- The records of death certificates that show the death, the identity of the deceased, his filiation and, where appropriate, of the spouse. It is common to indicate in this kind of records the day and the time of death (an event-based registration system).

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[447] 589 is the number of municipalities currently existing in Belgium. Of these 308 are located in Flanders, 19 in Brussels and 262 in Wallonia.

[448] To keep duplicate records in a civil register means that the act, after it has been registered, should immediately be registered anew or simultaneously, in the same terms, on a second register.

[449] The list of the different Registers existing in Belgium is taken from the *Guide pratique international de l'etat civil* , op. cit. (n. 8), pp. 3-4.

In Belgium there another two types of registers exist. Inscription in this registers is elective. These optional registers are:[450]

- The register of the nationality acts. Its aim is to receive the final decisions with regard to nationality (person-based registration system). It is has to be noted that the nationality acts can be registered in the same record as the birth acts, or in a single register in which all the relevant acts are inscribed, or in the abovementioned nationality register specially dedicated to acts of nationality. These Registers are established under the article 25 of the Belgian Code on Nationality;

- The supplementary registers wherein all the acts on the civil status of a person that do not fit or cannot be registered in any of the previous registers are inscribed (person-based registration system). This pertains to acts such as the recognition of children, adoptions, etc.

To complete this overview, we have to take into account the registers of the consular authorities. The diplomatic agents or consular officers compile all civil status documents relating to Belgian citizens living abroad,[451] which may also be considered a person-based registration system. This register is based on a double maintenance: the original document is transmitted, on completion, to the Federal Public Service of Foreign Affairs, and the other copy is immediately deposited in the archives of the embassy or the consulate[452].

4.1.2. Have fundamental rights any consequence on the content of the civil registration?

Model Case: The parenthood of an adopted child is recorded in a Registry Office. The question is whether there should be or should not be included in the Registry Office that the parentage derived from adoption.

The Belgian model of protection of fundamental rights established in the Belgian Constitution affects the registry, in the sense that all the events affecting the civil status of a person in the Belgian territory will be recorded.

CASE 4.2: DOCUMENTS TO REGISTRY OFFICES

4.2.1. Civil status certificates of foreign Registry Offices.

Model Case: A marriage between a Spanish citizen and an Italian citizen is celebrated and recorded in an Italian Registry Office. The couple provides the certificate of the Italian Civil register to apply for register in the Spanish Registry Office.

Traditionally, Belgium recognises the effect of legal civil status acts drawn up by a official foreign body. The term “recognition of the civil certificates granted by a foreign registry offices” is, as L.

[450] Ibid.

[451] Ibid., p. 4.

[452] See further article 26 and following of the Belgian Consular Code / Le Code consulaire / Consulair Wetboek, of 21 December 2013, *Moniteur Belge / Belgisch Staatsblad* 21 January 2014.

BARNICH and S. PFEIFFindicate, not an easy term to define.[453] Under the principle of mutual trust, these kind of legal civil acts may be considered valid within the legal order of the forum concerned. In this sense, the recognition of any official document obtained in a foreign country concerns the verification of its legality, following the indications of the conflict of laws rules of the forum concerned.

Article 48 CC opts for this approach where it stipulates that:

"§ 1er. Tout Belge, ou son représentant légal, peut demander qu'un acte de l'état civil le concernant et fait en pays étranger soit transcrit sur les registres de l'état civil de la commune de son domicile ou de son premier lieu d'établissement après son retour sur le territoire du Royaume. Mention est faite de cette transcription en marge des registres courants à la date du fait auquel l'acte se rapporte.

En l'absence de domicile ou de résidence en Belgique, la transcription d'un acte visé à l'alinéa 1er peut se faire sur les registres de l'état civil de la commune du dernier domicile en Belgique de l'intéressé ou de l'un de ses ascendants ou de la commune de son lieu de naissance ou encore, à défaut, sur les registres de l'état civil de Bruxelles.

§ 2. Le procureur du Roi peut demander qu'un acte de l'état civil relatif à un Belge dressé en pays étranger soit transcrit sur les registres de l'état civil conformément au § 1er."

Thus, this article allows all Belgian nationals to require the transcription of an act of civil status executed abroad after their return to Belgium. In similar vein, article 31 CPIL indicates that:

"[…]§ 1er. Un acte authentique étranger concernant l'état civil ne peut faire l'objet d'une mention en marge d'un acte de l'état civil ou être transcrit dans un registre de l'état civil ou servir de base à une inscription dans un registre de la population, un registre des étrangers ou un registre d'attente qu'après vérification des conditions visées à l'article 27, § 1er.

La mention ou la transcription d'une décision judiciaire étrangère ne peut avoir lieu qu'après vérification des conditions visées aux articles 24 et 25 et, selon les cas, aux articles 39, 57 et 72.

Lorsque le dépositaire refuse de procéder à la mention ou à la transcription, un recours peut être introduit devant le tribunal de la famille de l'arrondissement dans lequel le registre est tenu, conformément à la procédure visée à l'article 23.

§ 2. La vérification est réalisée par le dépositaire de l'acte ou du registre.

Le Ministre de la Justice peut établir des directives visant à assurer une application uniforme des conditions visées au § 1er.

Le dépositaire de l'acte ou du registre peut, en cas de doute sérieux lors de l'appréciation des conditions visées au § 1er, transmettre l'acte ou la décision pour avis au ministère public qui procède si nécessaire à des vérifications complémentaires.

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[453] L. BARNICH and S. PFEIFF, 'Questions de Droit International Privé', in: A-C. VAN GYSEL (ed.), *Les Personnes. Incapables, Droit judiciaire familial, Questions de droit International Privé (Volume II)*, Bruxelles: Bruylant 2015, pp.1360-1387, p. 1369.

§ 3. Le Roi peut créer et fixer les modalités de la tenue d'un registre des décisions et des actes qui satisfont aux conditions visées au § 1er, lorsqu'ils concernent un Belge ou un étranger résidant en Belgique. […]"

Under this article, the officer of the registry or the depository of the act is to check that the decision satisfies the conditions to be recognised imposed by the relevant legislation. The verification is done by the registry officer or the depositary, subject to judicial review.[454]

4.2.2. Foreign notarised documents.

Model Case: A marriage applies for the record of the matrimonial agreement in the Registry Office. The agreement is included in a public document provided by a German Notary.

As mentioned above, Belgium applies the principle of automatic recognition of a foreign authentic act. By this assumption, Belgium admits that the foreign authentic act will produce legal effects in its territory. This is the result of a literal interpretation of article 27.1. CPIL which states; *"[…] un acte authentique étranger est reconnu en Belgique par toute autorité sans qu'il faille recourir à aucune procédure si sa validité est établie conformément au droit applicable en vertu de la présente loi, en tenant spécialement compte des articles 18 et 21. L'acte doit réunir les conditions nécessaires à son authenticité selon le droit de l'Etat dans lequel il a été établi […]".* This means that a foreign authentic instrument is recognised in Belgium by any authority without the need for any procedure. This automatic recognition applies if the validity of the act is established under the CPIL, and more specifically, under articles 18 and 21. In any case, the foreign authentic act must satisfy the necessary conditions for its authenticity in accordance with the law of the state in which it was established. Furthermore, article 28 of the same code establishes the prerequisites that a foreign authentic instrument has to meet in order to be considered authentic in Belgium and have value before any authority. These conditions are:

- if the foreign act fulfils the conditions of the CPIL regarding the form of the act;

- if the foreign act complies with the necessary conditions for its authenticity according to the law of the state in which it was granted.

It is necessary to take into account, as stipulated in article 28.1. last paragraph, that findings made by a foreign authority are excluded if their content is manifestly contrary to the Belgian public order.

Article 48.1.[455] of the CC states – without distinguishing on the basis of the nature of the act – that all Belgians may request that an act of civil status that has been issued by a foreign authority is entered in the register of the civil status of the community or municipality in which (s)he is domiciled, or in which (s)he has established his/hershelf upon returning to Belgium.

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[454] Ibid., p. 1369.

[455] See article 48 CC.

Therefore, in the present case in which the aim is to register a foreign notarised document, the conditions for transcription of the document in the Belgian register of civil status are:[456]

- the foreign civil status certificates must have been drawn up by the relevant foreign local authority in the standard form used in the foreign country;

- a literal copy of the act must have been issued by the foreign authority that initially drew it up. This copy must be legalized by the competent local authority and also by the competent Belgian consulate or affixed with an apostille, and;

- the authentic version drawn up in a foreign language must be translated into Dutch, French or German, depending on the language of the Belgian community where the certificate is to be registered/transcribed. The translation has to be a sworn translation.

4.2.3. Foreign judgments

Model Case: A judgment issued in France establishes that a Spanish citizen is the biological father of a child. The father provides this judgment to the Spanish Registry Office to register the fatherhood in the birth record of the child.

As mentioned, the general principle applicable in Belgium is the automatic recognition of a foreign judgment. This automatic recognition gives an immediate effect to the judgment, i.e., it will produce legal effects in the territory of Belgium.[457] This results from the application and interpretation of articles 22 and following of the CPIL. More specifically, it is article 22.1, second paragraph, that expressly states that: *"[…] Une décision judiciaire étrangère est reconnue en Belgique, en tout ou en partie, sans qu'il faille recourir à la procédure visée à l'article 23 […]".* This means that a foreign judgement is recognised in Belgium, in whole or in part, without the need to initiate an *exequatur* procedure. The prerequisites for this recognition are that the judgment should not contravene the conditions settled in the article 25 CPIL. These are: no contravention of Belgian public policy; the rights of the defence have not been violated; the decision was obtained in a matter where persons could freely dispose of their rights; the judgment may not still be pending on appeal in the state where the decision was taken; the judgment must not be irreconcilable with a judgment given in Belgium or a previous decision made abroad; the judgment may not be the result of an application made abroad after the introduction in Belgium of an application still pending between the same parties for the same purpose, in the situation in which the Belgian courts had exclusive jurisdiction to entertain the application. Furthermore, article 26 CPIL determines that: "*[…] Une décision judiciaire étrangère fait foi en Belgique des constatations faites par le juge si elle satisfait aux conditions nécessaires à son authenticité selon le droit de l'Etat dans lequel elle a été rendue. Les constatations faites par le juge étranger sont écartées dans la mesure où elles produiraient un effet manifestement incompatible avec l'ordre public […]".* This indicates that a foreign judicial decision is authentic and constitutes proof of the findings made by the foreign judge, if it meets the necessary conditions for its authenticity under the law of the state where it was granted. In case the findings made by the foreign judge would produce an effect contrary to Belgian public order, the findings are to be excluded.

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[456] <http://diplomatie.belgium.be/en/services/services_abroad/registry/registration_certificates/> .

[457] BARNICH and PFEIFF, op. cit. (n. 162), p. 1367.

Other prerequisites that must be taken into account in order to have recognised in Belgium a foreign judgment are:[458]

- The foreign civil status judgement or certificate must have been drawn up by a relevant local authority in the standard form used in that country;
- The certified copy of a judgement must have been issued by the clerk of the Court that made the judgment with the proof that the judgement is definitive.[459]

In this context, article 48.1. of the Belgian Judicial Code states that: *"[…] Tout Belge, ou son représentant légal, peut demander qu'un acte de l'état civil le concernant et fait en pays étranger soit transcrit sur les registres de l'état civil de la commune de son domicile ou de son premier lieu d'établissement après son retour sur le territoire du Royaume. Mention est faite de cette transcription en marge des registres courants à la date du fait auquel l'acte se rapporte […]".* This means that all Belgians may request that an act concerning civil status made by a foreign authority is transcribed in the register of civil status of the community of residence or the place of establishment, after his/her return to Belgium.[460]

When the aim is to register – or transcribe – a judgment concerning the filiation of a child granted by a foreign judge, article 50 CC stipulates: "[…] *L'officier de l'état civil qui reçoit la déclaration de naissance d'un enfant dont la filiation n'est pas établie à l'égard de ses père et mère, ou qui transcrit dans ses registres le dispositif d'une décision judiciaire faisant droit à une contestation du lien de filiation à l'égard des père et mère, ou à l'égard du seul parent à l'égard duquel la filiation est établie, est tenu d'en informer, dans les trois jours, le juge de paix visé à l'article 390 […]".*

The final prerequisite in order to have registered or transcribed a foreign judgment is its translation into one of the official languages in Belgium. The foreign judgment drawn up in a foreign language must be translated by a sworn translator into Dutch, French or German, depending on the language of the Belgian municipality where the certificated or the judgement will be transcribed.[461]

CASE 4.3: CONTROL OF EQUIVALENCE BETWEEN EU REGISTRY OFFICES

4.3.1. Are registrars compelled to do a control of legality of the civil act?

Model Case: The parenthood of a child, born by a surrogacy arrangement, is establish by a foreign judgment. The intending parents provide this judgment to the register officer in order to register the filiation of the child. Accordance with the law, the officer of the register may refuse to register if he is obliged to control the on the ground of public policy.

Following on what was provided in the responses to the previous questions, Belgium applies the automatic recognition of a foreign judgment or notarised or legalised document. As mentioned, the prerequisites need to enjoy the automatic recognition are that the foreign act or judgment comply with the necessary conditions to its authenticity according to the law of the state in which it was granted.

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[458] <http://diplomatie.belgium.be/en/services/services_abroad/registry/registration_certificates/> .

[459] Acquired the force of *res judicata.*

[460] Or his/her legal representative.

[461] <http://diplomatie.belgium.be/en/services/services_abroad/registry/registration_certificates/>.

Consequently, the officers from the different registers in which the foreign act or judgment want to be registered are compelled to precluded from extending its effect it its content is manifestly contrary to the Belgian public order.[462]

As regards the model case proposed, it is has to be pointed out that Belgium does not allow 'commercial surrogacy'. This is prohibited as such in Belgium, and there exists no legal framework to help couples in a surrogacy procedure. However, non-profit surrogacy is allowed. This means that the mother is not paid, and whether she will be paid, the amount received would only cover the 'reasonable expenses'. Thus, in the Model Case, the registry officer will apply the public order clause in order to deny the registration of the foreign judgment. On the basis of the exception of public order, Belgian Courts have refused to recognise the filiation between the child and the parent who was not his biological father.[463]

However, while this is general trend, some Belgians Courts have rendered contradictory judgements in similar cases, based on different points of law, including the exception of abuse of law. For example, the Court of First Instance of Huy, in the case number 09/760/B of 22 of March 2010,[464] and lately the Court of Appeal of Liège in the case number 2010/RQ/20,[465] were called upon to settle a claim for recognition of birth certificates drawn up in California.[466] The facts[467] of the present case were that a gay Belgian couple appeared as a parents in the birth certificate of two girls born in California. Before the birth, the Supreme Court of California had declared the filiation of the spouses of the unborn twins in application of the Californian law. In this regard, and in application of the article 27[468] of the Belgian Judicial Code, the Court of First Instance of Huy decided to review the validity of the birth certificate. First, it denied the recognition and eventually the registration of the birth certificate for the following reasons:

> *"[…] While recognising the validity of birth certificates of children born abroad of a surrogate mother to respond to paternity desire for a homosexual couple, the court would give effect to the agreement gestation for others, and condone the principle that children even before their birth, are subject to a trade agreement and encourage mercantile practices that undermine the child's interest and to human dignity […][469]."*

Thus, in the current case the Belgian authorities refused to recognise the filiation between the twins and the parents; and especially, as regards the father who is not the biological father, on the basis of the application of the exception of public order, due to the fact that the spouse of the biological mother was not the real father[470].

In the same vein, the Court Appeal of Liège ruled that;

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[462] This in regard article 28 of the Belgian Private International Law Code.
[463] VAN GYSEL, op. cit. (n. 5), p. 1408.
[464] The full text is available at <www.jura.be>.
[465] The full text is available at <www.jura.be>.
[466] VAN GYSEL, op. cit. (n. 5), p. 1408.
[467] The summary of the facts is taken from VAN GYSEL, op. cit. (n. 5), p. 1408.
[468] Article 27 CPIL proclaims the direct recognition in Belgium of the authentic acts. Nevertheless, in article 27.1. third paragraph, the applicable rules are provided in cases of conflicts of law.
[469] English translation of the summary accessible at <www.jura.be> .
[470] VAN GYSEL, op. cit. (n. 5), pp. 1408-1409.

"[…] the agreement of surrogacy barges into the principles of public order and its illegality contaminates the act of birth set on its base. But the interests of the children, deprived of maternal descent towards their surrogate, order the establishment of paternal lineage towards their biological father. However, the parentage of these children for another man (in this case: gay spouse of the biological father) cannot be established except by adoption […].

[..]Acts of foreign birth mentioning the two men as parents of the children cannot be recognized in that they refer to a filiation vis-à-vis the father's spouse. They must be recognized only against what they refer to a filiation with regard to the biological father […].

[…] In view of the Belgian nationality of the applicants, the Belgian law applies as to the paternity of applicants. Regarding affiliation against the biological father, Belgian law allows children to be recognized in accordance with Article 329bis Cc. The paternity of the husband of the Belgian father could not be recognized under Belgian law as via adoption. Section 143 Cc, in fact excludes the presumption of paternity in marriages between persons of the same sex. ***Filiation vis-à-vis the biological father must therefore be recognised. In this field, the American birth act must be recognised.*** *Birth certificates may not be recognized, however, where they establish filiation with regard to the spouse of the biological father (art. 27 DIP Code) […]".*

Subsequently, the Court of Appeal of Liège follows a completely opposite track compared to the one adhered to by the Court of First Instance. The Court of Appeal considers that the filiation question is fully solved in the foreign judgment, and therefore does not perceive any conflicts of laws. The main considerations of the judgment are whether the foreign judgment can be recognised or not, in accordance with criteria established in article 25 CPIL. The result of the appeal is a positive answer to the question posed.[471]

The exception of abuse of law has rarely been invoked in Belgium. A strict application of the abuse of law, laid down in article 18 CPIL, can only occur when the filiation has not been determined by a judgment. In the event that the affiliation has been determined by a judgment, it will no longer in a case of abuse of law but rather a recognition of a foreign judgment. The exception of abuse of law, then, would only be applicable on the basis of the rule of competences of the foreign courts.[472] An important judgment illustrating this reasoning is that of the Court of Antwerp, issued on 19 December 2008.[473]

4.3.2. How do registrars control the marriages of convenience? (See also question 3.6.2.).

Model Case: Before the registration of a marriage between a Spanish citizen and an Ecuadorian citizen, the register officer refuses to record it on the grounds that it is a marriage of convenience.

The legal framework applicable to the model case is the CC (mainly article 146*bis* and 167) and the Law of 4 May 1999 amending certain provisions on marriage. The law of 1999 inserted in the CC measures to fight against the marriages of convenience. The particular measure is the one contained in article 146*bis*. This articles states that: *"il n'y a pas de marriage lorsque […] l'intention de l'un au moins des époux n'est manifestement pas la creation d'une communauté de vie durable, mais vise uniquement*

[471] Ibid., p. 1409.
[472] Ibid., pp. 1409-1410.
[473] English translation of the summary accessible at <www.jura.be>.

l'obtention d'un avantage en matière de séjour, lié au statut d'époux". Therefore, under this article, despite the formal consent, there is no a marriage if the intent of at least of one of the spouses has been to not create a sustainable family life.[474] If this suspicion or conviction of the officer of the civil status is confirmed, the Public Prosecutor may pursue the annulment of the marriage[475].

However, in the prevention of marriages of convenience, it is necessary to distinguish between the marriage that would be celebrated in Belgium, and the marriages celebrated in a foreign country and how Belgium recognises these. In the first case, Belgian legislation features a specific actuation protocol, adopted in the 1990s. In the second case, the recognition of the authentic act declaring a marriage will depend on the combined application of the related articles of the CPIL and article 146*bis* of the CC.[476]

As regards the marriage whose celebration is planned in Belgium, the legal applicable framework in order to prevent the marriage is article 167 CC. This articles awards a wide discretion and control to the officer of civil status. As already mentioned above, the officer may refuse, or defer to a period of two months, the celebration of a marriage if there exist a "strong presumption" that a marriage does not meet the conditions required. The delay of two months enables the carrying out of an additional investigation in order to check whether the future spouses meet all the conditions to marry under Belgian law. This investigation will also ensure that the intended marriage is not a marriage of convenience.[477]

The Circular of 17 December 1999 regarding the law of 4 May 1999 contains certain provisions regarding specific elements that buttress the presumption of a marriage of convenience. These have already been referred to above in the context of question 3.6.4.[478]

The law of 12 January 2006 amending the Law of 15 December 1982 on access to the territory, residence, establishment and removal of foreigners[479] explicitly refers to marriages of convenience. This text introduces a special provision penalising marriages of convenience and further sanctions that were also already referred in the context of question 3.6.4.

In the same vein and with the aim of create a clear guideline for the application of the law of 15 December 1980, the Circular of 6 September 2013 amending the CC, the Law of 31 December 1851 on consulates and consular jurisdiction, the Criminal Code, the Judicial Code and the Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreigner, in order to fight against the marriages of convenience and legal cohabitations of conveniences, was adopted.[480] This

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[474] *Étude de legislation comparé,* op. cit. (n. 134).

[475] This prevention measure, is obviously a measure *a posteriori.*

[476] CARRÉ, op. cit. (n. 136), p. 51.

[477] *Étude de legislation comparé,* op. cit. (n. 134).

[478] Ibid.

[479] Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers /Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Moniteur Belge / Belgisch Staatsblad* 1 July 1999. This law came into force on the 10 of October 2006.

[480] Circulaire relative à la loi du 2 juin 2013 modifiant le Code civil, la loi du 31 décembre 1851 sur les consulats et la juridiction consulaire, le Code pénal, le Code judiciaire et la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, en vue de la lutte contre les mariages de complaisance et les cohabitations légales de complaisance / Omzendbrief inzake de wet van 2 juni 2013 tot wijziging van het

Circular replaces the previous one, and offers a specific update. The changes are made to the benefit of the officers of the civil status that are responsible for exercising a first preventive control over marriages of convenience.[481]

The other aspect in the fight against the marriages of convenience, also mentioned earlier, focuses on the marriages celebrated in a foreign country. As regards this kind of marriage, the general rule applicable is the one contained in the article 29 CPIL. The classic principle of the foreign authentic/notarised/legal acts are, *a priori*, fully recognised in Belgium without any extra procedure aiming this fact. As CARRÉ[482] indicates, this general rule has to be seen in the context of a marriage of convenience. In those cases, the controls that Belgium can carry out are *a posteriori*, meaning that it would be a control exercised by the judge in the context of a claim in order to declare a marriage invalid.

4.3.3. How do registrars control the filiation of complacency?

Model Case: After the acknowledgement of fatherhood of a child, the registrar rejects the registration on the grounds that it is a recognition of filiation by complacency.

Under article 31 CPIL, the authorities responsible for registering a parenthood are requested to mention, transcribe or use as a basis for registration a foreign act or decision after verifying that specific conditions are met. In case they entertain serious doubts as to whether or not the conditions are met, these authorities will transfer the foreign act or decision to the Public Prosecutor, who will carry out additional checks before rendering advice.[483]

The offense is difficult to detect by the authorities, but there are certain elements that may warn the Belgian authorities that they are confronted with a filiation of complacency. This elements are the factor linked to the relationship between the declaring person and the child, as well as between the declaring person and the mother/father of the child, the precarious or illegal residence status of the mother/father, the number of children recognized, among others. All these elements may indicate that the recognition is being used with a view to obtaining or extending a residence permit.[484] All these elements may prevent a Belgian authority from registering a filiation.

CASE 4.4: CROSS-BORDER COOPERATION BETWEEN REGISTRY OFFICES.

Burgerlijk Wetboek, de wet van 31 december 1851 met betrekking tot de consulaten en de consulaire rechtsmacht, het Strafwetboek, het Gerechtelijk Wetboek en de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, met het oog op de strijd tegen de schijnhuwelijken en de schijnwettelijke samenwoningen, *Moniteur Belge / Belgisch Staatsblad* 23 September 2013. This law came into force on the 23 of September 2013.

[481] CARRÉ, op. cit. (n. 136), p. 73.

[482] CARRÉ, op. cit. (n. 136), p. 53.

[483] 'Misuse of the Right to Family Reunification: Marriages of Convenience and false declaration of parenthood. Belgian contribution', *Focused Study of the Belgian National Contact Point for the European Migration Network* (EMN), p. 13. The full text is available on <http://www.emnbelgium.be/publication/misuse-right-family-reunification-marriages-convenience-and-false-declarations-parenth-0>.

[484] Ibid., p. 14.

4.4.1. Are there any specific instruments in your country for cross-border cooperation among Registry Offices?

Model Case: A national of a State seeks to celebrate their marriage in another State (State B), whose authorities requested a certificate of no impediment marriage. Requested the certificate, the registrar of Registry Office of State A refuse to give that document because such a document is unknown in its law.

Under Belgian Law, a foreigner is not required to hold a certificate of matrimonial capacity, only the documents enumerated in article 64 CC. However, the civil status' officers will register any event that affect the civil status of a Belgium citizen or a foreign legally resident person in Belgian territory.

In any event, Belgium is party to a number of international conventions concluded under the sponsorship of the International Commission of Civil Status. These tend to favour the international scope of actions and exchange of information between authorities or different Member States.[485] In fact, Belgium has participated in a great range of International Conventions in order to enhance the international cooperation between civil registration authorities.

An example of this cooperation between registries is the fact that the birth certificate of a foreign child will not only be registered in Belgium, but transmitted to the authorities of his/her is nationality with which Belgium has conclude an agreement of cooperation. The transmission will be immediate. Countries with which Belgium has concluded such agreement are Luxembourg, Suisse, Bulgaria and Italy.[486]

4.4.2. Is there any mean for the communication of registry data when they may affect the nationals of other States?

Model Case: A French national got marriage in Spain. The marriage is registered at the Spanish civil register but not in France. To return to France, the French national wants to marry before a French authority. It raises the question of proof of the capacity of the spouse.

Belgian legislation does not prevent this kind of data communication between registries. However, in case where the foreign authority called upon to celebrate a marriage requires a proof of capacity of the spouse, the Belgian diplomatic or consular post abroad can deliver a certificate of non-impediment to a marriage to the Belgian national.[487]

4.4.3. In the issuance of civil status certificates are language requirements or other formal conditions of other States considered?

Model Case: It is requested a birth certificate of a French national who is register in the Spanish Civil Registry. The certificate is requested to provide it to a French authority. Is it possible that the certificate be issued in French?

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[485] RIGAUX and M. FALLON, op. cit. (n. 110), p. 507.

[486] *Guide pratique international de l'etat civil* , op. cit. (n. 8), p. 18.

[487] *Guide pratique international de l'etat civil* , op. cit. (n. 8), p. 39.

In Belgium, pursuant to the Vienna Convention of 8 September 1976,[488] an international or multilingual birth certificate can be requested and provided. This certificate is issued in the official language of all the signatories of the agreement, i.e., Spain, Germany, Austria, Belgium, Bosnia, Croatia, Slovenia, France, Italy, Luxembourg, Macedonia, Netherlands, Portugal, Switzerland, Turkey, Serbia and Montenegro.

CASE 4.5: EVIDENTIARY VALUE OF CIVIL STATUS CERTIFICATES.

4.5.1. What evidentiary value has in your country the certificate of a foreign Registry?

Model Case: A citizen brings a birth certificate to prove their age. The Registry Office of the State of origin base their records solely on the strength of a declaration made by the person concerned thereby, without additional control of legality by the registrar. This certificate is provided in a judicial procedure before the Spanish court.

Here Article 27 CPIL covers a gap in Belgian legislation by explicating the validity, and thus the recognition and evidential value of a foreign registry act. In this regard, the article states that a foreign authentic instrument is recognised in Belgium by any authority without the necessity of any additional procedure aiming to establish its validity. The foreign authentic act must satisfy the necessary conditions to its authenticity according to the law of the state in which it was established.

4.5.2. Do you have the foreign registration certificate the same evidentiary value in the judicial sphere that at the administrative level?

Model Case: It is provided before an administrative authority a certificate of marriage to apply for a visa for family reunification.

Under Belgian law, no distinction is made to the destiny of the certificate; thus, if it is valid in Belgium and meets all the conditions for its authenticity, it will be accepted by the administrative authority. This is establish in the article 27 CPIL.

4.5.3. In what cases it may be rejected the evidentiary value of the foreign certificate?

Model Case: It is provided a certificate of a marriage, issued b by a foreign registry, without translating nor legalize. In addition, there are contradictory data in the registry of origin.

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[488] Circulaire de 25 mai 1998 relative à l'entrée en vigueur et à l'application de la Convention relative à la délivrance d'extraits plurilingues d'actes de l'état civil, et Annexes, faites à Vienne le 8 septembre 1976, et du Protocole additionnel à la Convention concernant l'échange international d'informations en matière d'état civil, signée à Istanbul le 4 septembre 1958, et Annexe, faits à Patras le 6 septembre 1989 / Circulaire betreffende de inwerkingtreding en de toepassing van de Overeenkomst betreffende de afgifte van meertalige uittreksels uit akten van de burgerlijke stand, en Bijlagen, gedaan te Wenen op 8 september 1976, en van het aanvullend Protocol bij de Overeenkomst inzake de internationale uitwisseling van gegevens op het gebied van de burgerlijke stand, ondertekend te Istanbul op 4 september 1958, en Bijlage, gedaan te Patras op 6 september 1989, *Moniteur Belge / Belgisch Staatsblad* 12 June 1998.

As it is indicated in article 30 CPIL, a foreign judgment or authentic act must be legalised in order to produce legal effect in Belgium. The legalisation certifies the authenticity of the signature, the capacity in which the person is signing the document has acted, and where appropriate, the identity of the person to which the document pertains.

In the same vein, article 31 indicates that a foreign authentic instrument concerning the civil status cannot be mentioned in the margin of an act of civil status or be transcribed in a Belgian register of civil status or provide the basis for an entry in a population register, a register of foreigners or waiting register before the verification that the conditions referred to in article 27 CPIL are met.

The verification will be done by the depositary of the act or the register officer, and the Minister of Justice may establish guidelines to ensure a uniform application of the conditions. In case the depositary of the act or the officer has serious doubt concerning its validity, (s)he can transfer the instrument to the prosecutor who will, if necessary conduct further checks.

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2.DENMARK

UNIVERSITY OF COPENHAGEN
RAPPORTEUR: SILVIA ADAMO

INDEX

1. PARENTAGE

CASE 1.1: TYPES OF PARENTAGE

Background: One of the most important differences among Member States law is derived from the different conceptions about the parent-child relationships. The European Union Member States have different solutions as regards the attribution of custody rights based on the existence (or absence) of a marital relationship between the parents. There may be legal distinctions on the basis of the different criteria: depending on matrimonial or no matrimonial parentage; natural or adoptive. The national laws could establish differences on the content of parental responsibility or on the children's rights concerning their parents as regards their rights of inheritance or maintenance. Other legal systems are based on the principle of equality between children and the prohibition of discrimination among them children based on the child's or his or her parents' birth or other status. In such cases, there is possible to refuse the application of foreign law on the ground of public policy.

1.1.1. What types of parentage exists in your law?

-*Model Case*: A couple has a child born out of wedlock. After marriage, they have another child born in wedlock and they adopt a third child. Do these children deserve the equal treatment?

The children in the model case described deserve equal treatment according to Danish law. Danish legislation recognizes filiation in and out of wedlock, and adopted children have the same legal rights as biological children.

Since the 1960's there has been a legal approximation between the statuses of children born in and out of wedlock.[489] The modalities of family life in Denmark have evolved through the years, and legislation has followed up on new trends. Among these trends, cohabitation of partners without being married has prominently increased, and consequently the society has witnessed an increase in children born out of wedlock. Scholars reported that up to 46% of all children born in 2007 were born out of wedlock.[490] The Children Act was majorly revised in 2001 in order to better reflect family life in Denmark, stating *inter alia* the principle that married and unmarried couples are treated equally as regards the determination of paternity.[491]

1.1.2. Does the type of parentage have consequences on its content?

[489] Lund-Andersen, I. (2012), Retsforholdet mellem forældre og børn, in Lund-Andersen, I. and Nørgaard, I., *Familieret*, Jurist-og Økonomforbundets Forlag, p. 27-28.

[490] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), *Family Law in Denmark.* DJØF Publishing, p. 82.

[491] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid.p. 82.

-*Model Case*: Caused the death of the deceased, arises the distribution of the estate among his three sons, two of them are biological children and the third is an adopted child.

The type of parentage does not have consequences in the cases of succession where the deceased had both biological and adopted children: 'Children inherit in an equal manner'.[492] Adoption creates a legal tie between the adopted child and the adopters, putting the adopted child on an equal footing as any other biological children.

1.1.3. Is it a principle of public policy in your country the equal treatment of children?

-*Model Case:* A deceased leaves two sons, one biological and one adopted. The law of the competent court for the succession states the equality between children. The law applicable to the succession only recognizes inheritance rights to biological child.

The equal treatment of children is indeed a principle of public policy in Danish law. As regards inheritance the Danish Inheritance Ac states that the intestate's closest relatives are his or her children, and that children in principle inherit in an equal manner.[493] Moreover, according to the Adoption Act, an adoption gives the same legal position to adopted children as regards inheritance, unless other rules in the adoption legislation state otherwise:[494] These exception rules are connected to older adoptions (before 01.01.1957), which took place before the passing of the current set of rules.

CASE 1.2: WAYS TO ASCERTAIN PARENTHOOD

Background: The differences between the European States laws are shown different ways to ascertain the biological parenthood. The rules concerning when the competent State authorities will have jurisdiction to accept a voluntary acknowledgement of legal parentage vary considerably between States. There were problems with the acknowledgement natural children before different authorities at the State of the register. Some national laws could regard as a matter of public policy the practice of biological test (DNA analysis) to prove paternity, allowed in some States. It should also be assessed when it is possible to register parentage established in a certificate obtained of a foreign Registry Office.

1.2.1. What effects has the acknowledgement natural children before a foreign authority?

[492] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid.p. 148.
[493] Danish Inheritance Act, Lov no. 515 of 06.06.2007, *Arveloven*, section 1.
[494] Adoption Act, LBK no. 1084 of 07.10.2014, *Bekendtgørelse af adoptionsloven*, section 4.

-*Model Case:* The birth record of a natural child only named a person as the mother in the Registry Office of State A. The child is acknowledged at a later date by the biological father. This acknowledgement is made before a notary of State B. The father provides this document to the Registry Office of A to register paternal parenthood.

Registration of acknowledgement of a natural child abroad can be recognised in Denmark also. As regards paternity, Danish authorities do normally not require a particular kind of documentation for the authenticity of documents stemming from Europe, USA, Canada, Australia, New Zealand and Turkey.[495] In other cases than these, a 'legalisation' or an Apostille Certificate has to be provided in order to admit the validity of a certificate from abroad.[496]

1.2.2. How is regulated in your law the biological test of fatherhood?

-*Model Case:* The alleged father refuses to practice a DNA test to prove the paternity of a child. The State where the test shall be performed allows the coercive practice of the test. Nevertheless, the court where the fatherhood procedure was raised rejects this practice on the ground of public policy.

In Denmark it is possible to carry out a DNA test in paternity cases. The Children Act gives the possibility to raise a paternity case within six month from the birth of a child, also in the cases where the paternity has already been established.[497] A man who has had sexual relations with a woman at the time of conception can also request a DNA test.[498] The regional state administration (*Statsforvaltning*) can invite the parts in a paternity case to deliver genetic material in order to determine paternity, and it can also bring the case to court if one of the parties requires it or in a series of cases by its own motion.[499]

[495] Guidelines on the documentation for authenticity of family law documents from abroad, VEJ no. 9245 of 20.05.2009, *Vejledning om dokumentation for ægtheden af familieretlige dokumenter fra udlandet*. The following countries are also included in as belonging to Europe for the purpose of the circular: Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Georgia, Kazakhstan, Kirgizstan, Kosovo, Croatia, Russia, Tajikistan, Ukraine and Uzbekistan.

[496] See also Executive Order on the registration of paternity and co-motherhood in relation to the notification of a child's birth, BEK no. 1205 of 13.11.2014, *Bekendtgørelse om registrering af faderskab og medmoderskab i forbindelse med anmeldelse af barnets fødsel*; Executive Order on regional state administration's handling of cases on paternity and co-motherhood, BEK no. 1206 of 13.11.2014, *Bekendtgørelse om statsforvaltningens behandling af sager om faderskab og medmoderskab*; and Guidelines on the registration of paternity and co-motherhood in relation to the notification of a child's birth, VEJ no. 9919 of 13.11.2014, *Vejledning om registrering af faderskab og medmoderskab i forbindelse med anmeldelse af barnets fødsel*.

[497] Children Act, LBK no. 1097 of 07.10.2014, *Bekendtgørelse af børneloven*, section 5.

[498] Children Act, section 6.

[499] Children Act, sections 11 and 13.

1.2.3. It is possible to register the parenthood in your State on the basis of a certificate of civil status issued by a foreign Registry Office?

-Model Case: The record of birth of a child is in the Registry Office of the State where he is born (State A). Then, it is applied the recognition of the certificate of the Registry Office of A to record the child in the Registry Office of their nationality (State B).

Certificates of civil status issued by a foreign Registry Office are recognized in the same manner as acknowledgement of paternity in front of foreign authorities (refer to answer 1.2.1 above).

CASE 1.3: SURROGACY ARRANGEMENT

Background: The different approaches among States in the field of surrogacy arrangements caused the phenomenon of reproductive tourism. In these cases, the prohibitions in the domestic law are trying to avoid by going to more permissive States in which the intending parents obtain the legal parentage of the child. The problem arises when the receiving States do not recognize this parentage and, consequently, the situation of the child becomes uncertain. It should also be assessed the impact of the case law of the European Court of Human Rights with the Mennesson and Labasse cases.

1.3.1. Are surrogacy arrangements allowed or prohibited in your country?

-Model Case: A couple signs a surrogacy arrangement in their home country. When they applied for registration the child birth, the problem of the parenthood of the child arises: has the parenthood be established to the intending parents or to the gestational carrier (surrogate mother)?

The surrogacy agreement described in the model case is not punishable, but it is invalid according to Danish law. The gestational carrier will be considered the legal mother of the child, entailing that she will have the duty to look after the child and there will be a reciprocal right of inheritance between the mother and the child. The intended mother has only a possibility to apply to step-adopt the child. If the child is born in Denmark, and the father does not share custody/parental rights, the surrogate mother can transfer custody of the child to the couple as a whole.

There is not a complete set of rules prohibiting surrogacy in Denmark. However, scattered in several legal texts in Danish legislation one can find several provisions that concern the issue of surrogacy. The logics behind the rules point to two directions: on the one hand to limiting the instances of surrogacy agreements between strangers, and on the other hand, to avoiding children to be rendered a commodity.

Thus it is not unlawful to act as a surrogate mother, but no money must be exchanged as a result of the surrogacy (*prohibition against remuneration for the surrogacy*). The Adoption Act states that an adoption cannot be granted if someone who has to give their consent to the adoption gives or receives remuneration or other form of compensation for it.[500] Also, an agreement on transfer of parental rights and custody (*forældremyndighed*) cannot be granted by the authorities if remuneration or compensation for lost income is paid to the custody holder.[501]

Moreover, *provision of arrangements concerning surrogacy is also prohibited.* According to the Adoption Act, 'No assistance may be given or received in order to create a connection between a woman and another, who wants the woman to bear a child for her. Advertising in this sense must not be performed.'[502] A breach of this rule can be punished with a fine or a jail sentence up to 4 months.[503] The motive beyond this rule is to limit the cases of surrogacy to instances of altruistic surrogacy, where the persons involved have a close relationship (typically a family relationship) that does not necessitate a third/connecting party in the arrangement.

Health personnel *cannot perform artificial insemination on a surrogate mother*. The Act on Assisted Reproduction expressly forbids surrogacy, and it also states that assisted reproduction cannot be performed if there is an agreement that the woman who is seeking to be pregnant, will give birth to a child for another woman.[504] In addition to that, another section in the Act establishes that assisted reproduction cannot be performed unless the egg cell derives from the woman, who is going to give birth to the child, or the semen derives from her partner.[505] In other words, assisted reproductive techniques cannot be performed if both the egg cell and the semen are not 'related' to the woman who is seeking to be inseminated.
The law limits clearly the possibility to enter into *surrogacy agreements*, which are invalid according to Danish law. The Children Act states that any agreement that a woman after the birth of her child shall hand over the child to another woman is invalid.[506] Therefore the authorities will not help in case the surrogate mother regrets a surrogacy agreement. To consider is also the principle in the Children Act regarding motherhood in cases of artificial insemination, which states that the one who gives birth to the child is to be considered the mother of the child.[507] This principle was also at the basis of a decision from the Social Appeal Board which in December 2013 found that a Danish woman could not be regarded as the legal mother of a child born abroad by a surrogate mother.[508]

In practice these legal rules mean that no one can pay a woman to give a child away, there cannot be advertisement on surrogacy, and a fertility doctor cannot inseminate a woman who is going to be a

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[500] Adoption Act, section 15.
[501] Ministerial Order on Parental Custody, the Child's Residence and Parent Visitation, BEK no. 1023 of 28.08.2015, *Bekendtgørelse om forældremyndighed, barnets bopæl og samvær m.v.*, section 3 (2).
[502] Adoption Act, section 33.
[503] Adoption Act, section 34.
[504] Act on Assisted Reproduction, LBK no. 93 of 19.01.2015, *Bekendtgørelse af lov om assisteret reproduktion i forbindelse med behandling, diagnostik og forskning m.v.*, section 13.
[505] Act on Assisted Reproduction, section 5.
[506] Children Act, section 31.
[507] Children Act, section 30.
[508] FS2013.2012-7119-00097, TFA2014.96.

surrogate mother. Therefore, surrogacy agreements so far have taken place abroad, involving foreign surrogate mothers.

The Danish Social Appeals Board informs that in cases of surrogacy abroad, Danish authorities will not recognize agreements taken place abroad even when the Danish couple is mentioned in the birth certificate as the parents of the child. The Danish authorities cannot provide declarations in order to facilitate the exit from the country where the surrogacy has taken place.[509]

The Danish Social Appeal Board has issued a guiding statement which declares that it is the woman who gives birth to the child who is to be regarded as the legal mother, regardless of surrogacy arrangements, questions of donation of ovules, or whether the Danish mother is lawfully registered abroad as the mother of the child.[510]

This statement was issued under reference to the rule in the Children Act mentioned above (section 30), stating that the one that gives birth to the child is to be considered the mother of the child. The rule in section 30 is especially applied in the cases where the child is born with assisted reproductive technologies, for example with help of the donation of another woman's egg cells. Analogously, the same rule has then been applied to surrogacy. This conclusion puts especially women at risk, since the father may be recognized as being the biological father while the woman would not be regarded as the legal mother. In extreme cases of disagreement, a divorced biological father could bypass any former agreement and let a new wife step-adopt the child born via surrogacy.

1.3.2. It is recognized in your country the legal parenthood acquired abroad by a surrogacy arrangement?

-*Model Case:* The intending parents register in an USA Registry Office the legal parenthood of a child established by a USA judge. Then, they applied to register this parenthood in their home country (receiving State). Is it possible that registration if the law of the receiving State prohibits the surrogacy arrangements?

A similar case to the model case was at the centre of a custody dispute in case OE2013.B-687-13/TFA 2013.750. This was a decision by the Eastern Appeal Court, and the circumstances of the case were also reported in the Danish media.[511] The surrogacy had taken place in India, and the father was recognized as the biological father. However the mother, who was supposed to adopt the child, was not recognized as the legal mother, and also the couple divorced after bringing the child (not without many administrative difficulties) to Denmark.

[509] <https://ast.dk/born-familie/faderskab/surrogatmoderskab>.
[510] Kofoed Nielsen, R. (2014), Surrogatmoderskab – en usikker affære, *Nyt fra Ankestyrelsen nr. 1*, Marts 2014.
[511] The story is presented in the Danish newspaper information: <http://www.information.dk/482388>.

When a child is born abroad, it is the legal system of the country where she is born that determines if the father can share custody over the child. A transfer of the custody from the surrogate mother to the Danish father has to take place in the country of birth. Denmark will recognize a transfer of custody unless money has been exchanged for a surrogacy agreement.

1.3.3. In the case of no recognition of the legal parentage established abroad, what will be the future status of minors?

-*Model Case:* The record of birth of a child named the intending mother as the mother in the Registry Office of State A. Nevertheless, the receiving State B does not recognize and establishes the motherhood to the gestational carrier (surrogate mother). Then, who should take charge of this child?

In the case reported in the previous question, which corresponds quite well to the model case in the question, the gestational mother was determined to be the legal mother of the child. The Danish father who donated the sperm was recognized as the biological father of a child born abroad via surrogacy. The Danish mother was supposed to make a step-adoption upon return to Denmark: unfortunately, as the couple later divorced, a battle over the custody of the child ensued.

The Danish Social Board stated that it is easier to recognize the legal status of the father, than that of the mother of a child born abroad by a surrogate mother.[512] In a statement the Danish Social Board affirms that it is against general Danish legal principles (*ordre public, almindelig dansk retsopfattelse*) to let a Danish authority recognize that a Danish woman is the legal mother of a child born abroad via surrogacy. It is the woman who gives birth, who is recognized as the legal custodian.

The Danish mother of a child born with a surrogate mother abroad can apply to step-adopt the child, having regard to the condition of domicile, cohabitation of mother and child for 2½ years, and declaration regarding the adoptability by the foreign surrogate mother.[513] These conditions would normally not be met in cases of surrogacy abroad, where typically an application for step-adoption is filed when the child is still a new-born.

1.3.4. What shall the impact be on your country of the case law of the European Court of Human Rights in the *Mennesson* and *Labassee* cases?

-*Model Case:* According to *Mennesson* and *Labassee* cases, the non-recognition of a legal parenthood already registered in another State infringes the right of the child to respect for their private life

[512] Kofoed Nielsen, R. (2014), ibid.
[513] Kofoed Nielsen, R. (2014), ibid.

according to article 8 of the European Convention of Human Rights.

The Danish Social Appeal Board (*Ankestyrelsen*) has informed that they have not taken a stand on the specific judgment in the *Mennesson* and *Labasseee* cases. Generally it is not a problem for a child who has been born by surrogacy agreement to get Danish citizenship. As a starting point, paternity is recognised and thus also Danish citizenship; moreover, it is the Citizenship Office (*Indfødsretskontor*) in the Ministry of Immigration, Integration and Housing, which decides on citizenship issues in these cases.

Recent legal developments have revolved around the acquisition of citizenship by a child born abroad via surrogacy. Danish citizenship is obtained at birth, if the mother, co-mother[514] or father of the child is Danish.[515] However, in a case like surrogacy abroad, where the father is usually not married to the foreign surrogate mother, children born abroad did not obtain Danish citizenship at birth until July 2014.

The previous rule in the Citizenship Consolidation Act stated that when a child's parents were not married, and only the father was Danish, the child could obtain Danish citizenship at birth only if the child was born in Denmark.[516] The background for the rule, which was introduced in 1998 to create equal treatment for children born in and out of wedlock, was to ensure that paternity would be ascertained according to Danish legislation.[517] Therefore, since the citizenship of the child born abroad was derived by the (surrogate) mother's citizenship, the child had to enter Denmark with a residence permit given on family reunification grounds. This happened e.g.in the case law mentioned above.

However, following the European Court of Human Rights Judgement in the case *Genovese v. Malta*[518] this specific rule of automatic acquisition of citizenship at birth was changed as of 1 July 2014.[519] In the future, children born abroad by Danish fathers or co-mothers will also be able to automatically acquire Danish citizenship at birth, thus no longer admitting limitations to the children's right to social identity.[520]

CASE 1.4: FILIATION AND ADOPTION

Background: There are differences in the rules governing the adoption: adoptions simple or full adoption, revocable or irrevocable adoptions, adoptions that create a permanent parent-child relationship and adoptions that do not create it. They are also different regulations on the requirements for the

[514] For the notion of co-mother (*medmoder*) refer to the Children Act, setions 27 and 27a, introduced by Act no. 652 of 12 June 2013: A co-mother is the registered partner or spouse of a woman who has been treated with assisted reproductive technologies.

[515] Citizenship Consolidation Act, LBK no. 422 of 07.06.2004 with later amendments, *Bekendtgørelse af lov om dansk indfødsret*, section 1 (1).

[516] The rules was contained in the now abrogated Citizenship Consolidation Act, section 1 (2).

[517] See answer to Parliamentary question S 1305 to bill L 162/2014 of 14 March 2011

[518] Genovese v. Malta - 53124/09 Judgment 11.10.2011 [Section IV].

[519] The amending Act was *Lov no. 729 of 25.06.2014 om ændring af lov om dansk indfødsret*, based on Bill L 162/2014, *Forslag til lov om ændring af lov om dansk indfødsret. (Dansk indfødsret til unge født og opvokset i Danmark m.v).*

[520] See also notes to Bill L 162/2014, Bemærkninger til lovforslaget, at 3.1.1.

constitution of the adoption, depending on the adopting parents are single parent families or same sex couples. In addition, adoptions may have consequences on th acquisition of the nationality of the adopted child. The ECHR Wagner case (Judgment of 28 Juin 2007) has revealed the incidence of the right to family life of the article 8 European Convention of Human Rights related to the recognition of adoptions legally created in another State.

1.4.1. Are allowed in your country the simple or revocable adoptions?

-*Model Case:* A child is adopted in a country A by a simple or revocable adoption. Later, the adoptive parents aim the recognition of such adoption in the State B.

Danish law on adoption creates an 'artificial' (*kunstig*) kinship between a child and the adopters.[521] The current adoption system (in force since 1956) is based on a 'single-family principle' which determines that the relationship with the family origin of the adopted child elapses, and that the child will be regarded as a natural child in the new family.[522] There are provisions for the annulment of permissions to adopt in the Adoption Act,[523] see more below under 1.4.3.

1.4.2. Is it allowed in your country the adoption by single-parent families or by couples of the same sex?

-*Model Case:* A single person adopts a child in a State A and applies for its recognition in his home State (receiving State B).

In Denmark spouses, registered partners and single parents can be approved as adopters according to the rules and procedures set up in the Adoption Act. Cohabitating partners can also adopt if their cohabitation is stable (normally, 2½ years of cohabitation are required) and they plan to get married before final approval of the adoption is granted. Joint adoption is only granted to married couples and registered partners.[524]

1.4.3. Is it allowed in your country the recognition of foreign adoptions which do not create a permanent parent-child relationship?

[521] Lund-Andersen, I. (2012), ibid., p.36.
[522] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid., p. 90.
[523] Adoption Act, chapter 3, sections 18-24.
[524] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid., p. 91.

-*Model Case:* A couple adopts a child in a State A, which does not create a permanent parent-child relationship. How is recognized that adoption in the receiving State B?

In Danish law, by means of adoption it is sought to create a permanent kinship between the adopted child and the adopters. However, the Danish rules also allow annulment of the adoption in a series of circumstances.[525] For example it is possible to annul an adoption administratively if both the adopters and the adopted child consent to the annulment.[526] Moreover, an adoption may be annulled by court order if the adopters have neglected their duties towards the adopted child or if the annulment is intended to be in the child's best interest.[527] Only the child can seek annulment by court order.[528] By means of annulment the legal relationship between the adopted child and the adopters elapses, and in some cases the relationship with the child's family of origin can be re-established.[529]

1.4.4. Is a consequence of the adoption the acquisition of nationality?

-*Model Case:* A Spanish citizen adopts a child of 10 years old and another for 18 years old. It raises the question if the children acquire the Spanish nationality as a result of the adoption.

The Danish Citizenship Consolidation Act[530] states that a foreign child under 12 years old who is adopted by means of Danish adoption order becomes a Danish citizen at the time of the adoption, if the child is adopted by a married couple or a cohabitating couple, where at least one of the spouses or partners is a Danish citizen, or if the child is adopted by a single Danish citizen. The same effect is given to a foreign adoption order that has been recognized after the rules in the Adoption Act.[531]

[525] Lund-Andersen, I. (2012), ibid., p.38-39.
[526] Adoption Act, section 18.
[527] Adoption Act, section 19 (1).
[528] Adoption Act, section 19 (2).
[529] Adoption Act, section 23.
[530] Section 2A.
[531] Adoption Act section 28 (2).

2. FORENAMES AND SURNAMES

CASE 2.1: DISPARITIES AMONG LEGAL SYSTEMS

Background: due to the several differences among legal systems and their impact in the free movement of persons and the principle of unique identity, please provide explanation and indication of leading/model cases about your national legislation concerning forenames and surnames

The applicable law in Denmark is the Names Act (*Navnelov*)[532] and the Names Executive Order (*Bekendtgørelse om Navne*).[533] The Names Guidelines (*Vejledning om Navne*) contains procedural rules as well as material rules.[534] The area covered by the Names Act falls under the Ministry of Justice, and the Danish Department of Family Affairs (*Familiestyrelsen*) is responsible for the administration of the rules. The Act was revised and modernised in 2004, entailing a liberalisation of the rules and simplification of the procedure. The Act builds on a principle that a person's name is first and foremost a private affair, and only secondarily a matter that the society has an interest in regulating.[535] Therefore the starting point is that everyone is free to determine their name, particularly their first name, unless there are heavy reasons against it. Exceptions to the main rule are, e.g. considerations for kinship relations that others bearing a particular last name may have, and considerations about ensuring that the name taken in use are suitable to identify a person in the daily life and communication.

Denmark can enter into agreement with other countries with regard to the relationship between the Danish and foreign rules on names. These agreements can cover the protection of names, the naming legislation applicable to foreigners living in Denmark, and the rules applicable to Danish nationals living abroad (Names Act, section 25 (1)). No agreement in this sense has though yet been entered into.

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[532] Names Act, Lovbekendtgørelse no. 1098 of 07.10.2014, *Navnelov*.

[533] Names Executive Order, BEK no. 1324 of 27.11.2013, *Bekendtgørelse om navne*.

[534] Names Guidelines, VEJ no. 9651 of 28.11.2013, *Navnevejledningen*.

[535] Estrup, H. and Aarø-Hansen, N. (2006), *Navneloven med kommentarer*, Jurist-og Økonomforbundets Forlag, p. 158.

2.1.1. Explain your conflicts of law rules, highlighting the cases in which your national legislation is applicable

-*Model Case 1*: a child was born in a third country, where his parents (national of your Member State) reside.

-*Model Case 2*: a child was born in your Member State, where his foreign parents reside.

Case 1: if a child is born abroad by Danish nationals, the Danish legislation is applicable if the stay abroad is temporary. This is e.g. the case if the parents of the child are posted abroad by their employer or during a stay abroad because of study. The elements to consider are: the objective with the stay abroad; the working and tax-relationship to the country; the length of the stay; the extension of the work or study permit; and whether the applicant owns property in the country.[536] In the cases of temporary stay abroad, the application for registering the name of the child can be given at the registrar office in the parish where the parents had residence before moving (section 1 in the Names Executive Order).[537]

Case 2: if a child is born in Denmark, where his foreign parents reside, the Danish legislation is applicable if Denmark is their permanent state of domicile/residence. The authorities use the aforementioned same elements of evaluation to determine whether the parents are established on a temporary or permanent basis in Denmark. It is therefore not enough to determine that a permanent residence has been established by the parents only by ascertaining that they are in possession of a Danish national identification number (CPR-number) and a Danish address.[538]

2.1.2. Explain briefly the main rules concerning forenames and surnames, especially focusing on number, limits, civil acts which affect to forenames and surnames, admission of foreign forenames and surnames, and translations of them.

-*Model Case*: a child born in your State whose parents are nationals and resident in your State.

[536] See Names Guidelines, at 2.3.3.1. *Vurdering af domicil.*

[537] See also Names Guidelines, at 2.3.2. *Stedlig competence* and 2.3.3. *International kompetence og ansøgerens domicilforhold.*

[538] Names Guidelines at 2.3.3. *International kompetence og ansøgerens domicilforhold.*

In Danish legislation we find three different notions concerning names, i.e.: last name (or surname), first name, and middle name. The parents or person with custody over the child must choose a first name and a last name for a new-born within six month from birth.[539] If that does not happen, the child will automatically take on the last name of the mother (whether the child is born in or out of wedlock).[540] However there is no automatic acquisition of a first name: if the six months period has elapsed and the ones who have custody have not chosen a first name for the child, they will be punished administratively (incurring a fine).[541] The child can be given a name by christening in a recognized church, by adoption, or by application to the civil registrar (via an on-line application form since 2013).

Normally the child will carry the last name of the father or the mother when the child was born, or, if one of the parents carries the last name of a former spouse, the parents may choose the last name the parent had before the marriage.[542]

Moreover, last names which are carried by more than 2.000 individuals are 'free' to be adopted as last names by anyone, as they are not considered protected surnames. The Danish Social Appeal Board publishes the list of non-protected surnames on its website.[543]

CASE 2.2: GENDER EQUALITY

Background: some legislations establishes gender equality between the surnames of men and women as a matter of public policy and the marriage does not alter the surnames of the spouses and the children receive surnames of both parents. In this context, please provide explanation and indication of leading/model cases concerning gender equality at the moment of attribution of the forenames and surnames, particularly:

2.2.1. Which are the main issues with the surnames of the wife?

-*Model Case*: a wife with maiden surname Ms. Smith and married name Ms. Fernández. How is she referred in your Civil Register?

The Names Act was amended in 1961 in order to create equality of treatment between men and women and children born within and outside of wedlock as regards the name-giving.[544] There is no automatic change of the last name of the wife to the husband's surname after marriage in Danish legislation. According to the Names Act, if a married couple wants to bear the same last name, the wife or the

[539] Names Act, sections 1 and 12.
[540] Names Act, section 1 (2).
[541] Names Act, section 12 (2) in conjunction with section 26 (2). From case law see Ugeskrift for Retsvæsen 1998, p. 1288, mentioned in Estrup, H. and Aarø-Hansen, N. (2006), ibid., p. 162.
[542] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid., p. 53.
[543] < https://ast.dk/born-familie/navne/navnelister/frie-efternavne>

husband may adopt the other's last name with his/her consent.[545] Otherwise, after the marriage the spouses will continue to carry the last names that they held before they got married.

Individuals who are not married but who declare that they live together as a married couple, and have done so for at least two years, or have children together under the age of 18, may also adopt the same last name.[546]

It is also possible to combine two last names into a single last name by joining the two into one last name with a hyphen between them (e.g.: Smith-Fernández).[547]

The rules concerning change of last name after marriage are also applicable to registered partnerships.

2.2.2. Which are the main issues with the surnames of mothers?

-*Model Case*: a husband and a wife (maiden name: Ms. Smith; married name: Ms. Fernández) has a child. Which are his surnames?

[544] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid. p. 53.
[545] Names Act, section 5 (1).
[546] Names Act, section 5 (2).
[547] According to the Names Act section 8 (1).

In the case presented the child's name could be Smith, or Fernández, or Smith-Fernández, or Fernandéz-Smith, or another last name included in the 'free last names' list, or a last name determined following the conditions listed below.

According to the Danish regulation as presented above, and following the principle of freedom to choose one's name, it is up to the parents of the child to decide, which name the child will bear. As stated in the Names Act[548], a name may be adopted as a last name if one of the following conditions is met:

- The name has previously been the applicant's last name.
- The name is, or has been, borne as a last name by one of the applicant's parents, grandparents, great-grandparents or great-great-parents.
- The name is, or has been, the applicant's middle name.
- The name is the last name of the applicant's mother's or father's current or former spouse provided the consent of the stepfather or stepmother concerned is obtained.
- The name is the last name of the applicant's current or former foster mother or foster father provided the consent of the party concerned is obtained.
- The name is the last name which the applicant is entitled to adopt pursuant to the other provisions in the Names Act (patronym and matronym names[549]), with a modification of the gender-determined ending of last names, if the name is rooted in a culture that allows it (for example in Greece, Lithuania, Poland, and the Czech Republic[550]).
- The applicant knows and has obtained the consent of the individuals who bear the name as their last name.

CASE 2.3: PUBLIC POLICY

Background: Judgment of the Court of 22 December 2010 (Case C-208/09, Sayn Wittgenstein) ruled that the no recognition of the surnames from other Member State is only based on public policy grounds. Please, provide for cases of public policy which prevents the application of a foreign law concerning forenames and surnames by the authorities of your Member State (dignity of persons, superior interests of minor, gender grounds, rules abolishing the nobility). In this context, please highlight if the public policy clause can play in a total or attenuated form, depending on the foreign law is not admitted in any case or if exceptions are observed.

2.3.1. Explain cases of absolute application of public policy, in which foreign law is not applied in any situation without exceptions.

-Model Case: A foreign law of a child permits names which affect dignity of the persons.

[548] Names Act, section 4. The following list, with a few adaptations, is taken *verbatim* from Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), *Family Law in Denmark,* p. 53-54.

[549] Names Act, section 7.

[550] A non-exhaustive list of the cultures that admit gender-determined endings of last names is available at <https://ast.dk/born-familie/navne/navnelister/konsbestemte-endelser-pa-efternavne>.

The Danish Social Appeal Board publishes online a list of approved first names for boys and girls, and every child has to bear a name taken from this list.[551] It is not possible to give a girl a boy's name and vice versa.[552]

It is possible though to apply for admitting a new name to the list of approved first names. Following the authorities' consideration, authorization will be provided if the name: 1) is a proper first name; 2) is not unsuitable to be used as a name in Denmark; and 3) if it is not improper (*upassende*) or likely to cause offence/shock.[553]

Nobility titles (countess, baron etc.) and numbers (I, II, III) are not admitted as first names. Some pet names which are first names outside of Denmark have been approved (e.g. *Mulle* – mullet), while others have not been admitted (e.g. *Potte* – pot).[554]

As regards the condition of not being improper or likely to cause offence, the evaluation will revolve around the sentiment that the name will provoke in others than the one that wishes to take up the name. For example racist names, names relating to lavatories or other vulgar associations will be considered as improper first names.[555] To evaluate whether a name is proper or not the authorities will also consider whether the name can be used in other settings than as a first name. This would entail that they are not suitable to be used as a first name. As examples the Names Circular mentions: interjection words (*øj! puh! ha!*); certain nouns (*dulle*, *pølse* – bimbo, sausage – and similar); verbs (*forsvind* - disappear); adjectives (*dum*, *lyseblå*, *skæv* – stupid, light blue, wry); certain fictive persons (e.g. Batman and Superwoman), and known trademarks.

The civil registrar will consider every application by first checking if the name is an protected last name in the national civil registry (CPR-number); afterwards if the name is currently being used as a first name, and finally if the name appears in foreign databases on first names.[556]

2.3.2. Explain cases of attenuated public policy, in which foreign law is applied in a "soft" way (material attenuation) or in which public policy is only applied when the case is connected with the territory or nationals of your Member State (spatial attenuation):

-*Model Case:* "foreign wife" who is mother with the legal surname of the husband.

Some examples of attenuated public policy could be the recognition of the gender-determined ending of last names, if the name is rooted in a culture that permits it (as mentioned above, Greece, Lithuania, Poland, and the Czech Republic); the possibility to adopt patronym and matronym names, which allows to create a last name by adding either '–søn' or '–datter' to the first name of one of the parents (a reintroduction of a Danish tradition that is also allowed for citizens of the Faroe Islands and Iceland);

[551] List available at <https://ast.dk/born-familie/navne/navnelister/godkendte-fornavne>.
[552] Names Act section 13 (2).
[553] Names Act section 14 (3).
[554] Names Circular, at 5.4. *Ikke-godkendte fornavne.*
[555] Names Circular, at 5.4. *Ikke-godkendte fornavne.*
[556] Names Guidelines, at 5.4, *Ansøgninger om fornavne, som sognet kan behandle*.

and the possibility to take up as a last name a first name of a parent, grandparent or spouse's first name, if the name has a tradition in a culture, that does not differentiate between first name and last name (namely, the Muslim and Tamil traditions).[557]

CASE 2.4: DIVERSITY OF SURNAMES BY NATIONALITY AND PLACE OF BIRTH

Background: the record of a birth in several Registries, in the Registry of the nationality and in the Registry of the place of birth, can provoke diversity of surnames and affect to the free movement of persons and the principle of unique identity. Thus, Judgment of the Court of 14 October 2008 (Case C-353/06, Grunkin Paul) ruled that the surname acquired in the Member State of birth and residence shall be recognized in the Member State of which the applicant is national in order to protect the right to move and reside freely within the territory of the Member States.

2.4.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in a third country:

-*Model Case:* nationals from your Member State born and resident in third countries.

As a starting point Danish legislation recognises that a child shall be named according to the legislation of the country where the parents are permanently residing. An exception to this rule is when the parents (Danish nationals) are only temporarily living abroad, and are therefore to be considered as still having their domicile in the country.[558]

In order to evaluate whether a Danish national has in fact established a permanent residence abroad, the authorities will carry out an overall evaluation of the concrete circumstances in the case.[559] The Names Executive Order provides the fictional example of a Danish national who has been posted by a Danish company in China for ten years: notwithstanding the length of the stay abroad, the applicable law would be the Danish law.[560] Please refer also to answer to question 2.1.1 above.

The authorities will register a Danish child born abroad according to the birth certificate issued by the authorities in the country where the child is born and the parents are temporarily living (e.g. according to a German birth certificate). A possible problem may arise if the said authorities, in order to issue a birth certificate, require the registration of name and surname. In these cases, if the parents want to register the name of the child according to Danish rules (for example if they want to give the child a middle name, or two surnames connected by a hyphen), they will first have to register the name of the child as stated in the foreign birth certificate, and later apply for a name change upon returning to Denmark.

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[557] Section 7 of the Names Act.

[558] Names Guidelines, at 2.3.3.5, *Særligt vedrørende børn*.

[559] Names Guidelines, at 2.3.3, *International kompetence og ansøgerens domicilforhold* and 2.3.3.1, *Vurderingen af domicil*.

[560] Names Guidelines, at 2.3.3.1, *Vurderingen af domicil*.

2.4.2. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in other Member State

-*Model Case:* nationals from your Member State born and resident in a Member State of the EU

There is no difference in the legislation concerning "diversity of surnames" in relation to Danish nationals living in third countries or a Member State of the EU, respectively. Therefore, the answer to question 2.4.1 above will also be applicable in this latter case.

CASE 2.5: DIVERSITY OF SURNAMES BY DOUBLE NATIONALITY

Background: the double nationality of the applicant can also provoke "diversity of surnames" and this one affects free movement of persons and the principle of unique identity. Judgment of the Court of Justice of European Union of 2 October 2003 (Case-148/02, García Avello) ruled that nationals from two Member States could choose the identity in according with one of these Member States and this identity should be recognized in the other Member State in order to respect the EU citizen and the free movement of persons.

2.5.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals from your Member State who are also nationals from third countries:

-*Model Case:* nationals from your Member State who are also nationals from third countries

According to the Names Act (section 24), a foreign national can apply for having a name changed in accordance with a name giving or name change with has been carried out according to the rules in their country of citizenship. This is a modification of the principle of domicile as explained above. This rule also is applied for Danish nationals who are also nationals of another country.[561]

It is a condition that the name giving or name changing has been carried out in the country of nationality, for example an Italian citizen can have a name giving or name change recognized in accordance to Danish rules only if the name change has been carried out in Italy. Moreover, it is a condition that the right to the name giving or name change has been realised. The Danish Authorities will therefore require that the applicant will provide documentation for a name giving or name change in the form of e.g. name certificate, birth certificate, a transcript/print-out of the country's official person register, or similar.[562]

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[561] See Names Guidelines, at 3.17, *Navneændringer i overensstemmelse med udenlandske navngivninger og navneændringer for herboende udenlandske statsborgere*.

[562] Names Guidelines, at 3.17.

As regards surnames, according to the Danish Names Act[563], a person can only have one surname. If a couple wishes that their child bears both parents surnames, the Names Act provides the option to combine the two surnames with a hyphen, making the two surnames into one surname (see above under question 2.2.1).[564] However, if a person has two last name according to another country's legislation, for example as it can be the case with Spanish surnames, the two surnames will be considered as one surname even though they are not connected with an hyphen. Therefore, it is allowed that parents carrying a double surname with no hyphen can pass it on to their child.[565]

2.5.2. Explanation and indication of leading/model cases concerning "diversity of surnames", particularly, in relation with nationals from your Member State who are also nationals from other Member States:

-*Model Case*: nationals from your Member State who are nationals from other Member State.

There is no difference in the legislation concerning "diversity of surnames by double nationality" in relation to Danish nationals who are also third countries nationals or a Member State's nationals, respectively. Therefore, the answer to question 2.5.1 above will also be applicable in this latter case.

[563] Names Act, section 10.
[564] Names Act, section 8.
[565] Names Guidelines, at 3.15, *Flerleddet efternavn (f.eks. bindestregsefternavn)*.

3. MARRIAGE

CASE 3.1: DISPARITIES AMONG LEGAL SYSTEMS

Background: The disparities among legal systems affect the right to marry of EU Citizens, concerning questions as the age, consent, religious or civil form. These disparities can block the civil right to marry and, on the other hand, have increased "matrimonial tourism" with the aim of conclusion of the marriage which is not admitted in the origin country of the spouses.

Short explanation and indication of leading/model cases about the main requirements of the national legislation, concerning matrimonial capacity, legal impediments, gender requirements and issues of the marriage of the same sex, matrimonial consent and religious and civil forms:

-Model Case: spouses nationals and residents of your Member State

Marriage in Denmark is defined as being a legal relationship between a man and a woman or two persons of the same sex. Before 2012, persons of the same sex could not be married; they only could register as a partnership.[566] The conditions of validity for a marriage are various and stated in the first chapter of the Formation and Dissolution of Marriage Act.[567] Among the conditions, a marriage has to be voluntary (i.e. prohibition against forced marriages) and between two persons of over 18 years of age. Nonetheless persons under the legal age can marry if the regional state administration allows it and the parents of the youngsters consent to the marriage.[568] Also, two persons that are closely related cannot be married, as to say persons in the direct ascending or descending family line, and brothers and sisters.[569] Marriage between persons of which one has been married to the other person's relatives in the ascending or descending line has to be approved by the Ministry of Social Affairs, while an adopted child cannot be married to an adoptive parent, as long as the adoption subsists.[570] Bigamy is not allowed according to Danish law, so a person cannot marry until an existing marriage or registered partnership is dissolved.[571] Moreover, if a marriage or registered partnership has elapsed on grounds of death of one of the partners, a new marriage cannot be celebrated until the family assets and property have been divided.[572]

CASE 3.2: CROSS-BORDER CONCLUSION OF MARRIAGE

[566] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid.p. 65.
[567] Formation and Dissolution Act, LBK no. 1096 of 07.10.2014, *Lovbekendtgørelse om ægteskabs indgåelse og opløsning*.
[568] Formation and Dissolution Act, sections 1a-4.
[569] Formation and Dissolution Act, section 6.
[570] Formation and Dissolution Act, sections 7-8.
[571] Formation and Dissolution Act, section 9.
[572] Formation and Dissolution Act, section 10.

Background: as aforementioned, due to the differences among the many legal systems, a hypothetical cross-border civil right to marry can be difficult. But in the other hand, this cross-border civil right can produce the practice of matrimonial tourism in order to elude the requirements of the Law of a Member State applicable to its nationals or residents. This fact is particularly visible in the cases of marriage of persons of the same sex. In this context, it is very important to know the conflict of law rules concerning the conclusion of marriage by the authorities of your Member State.

3.2.1. Explanation and indication of leading/model cases concerning the conclusion of marriage to foreigners in your Member State.

-*Model Case 1:* Marriage between a national of your Member State and national of other Member State.

-*Model Case 2:* Marriage between spouses of a Member State other than your Member State

In 2002, two additional requirements have been added to the existing marriage conditions.[573] Following these requirements, marriage in Denmark can only be contracted when each of the parts is either a Danish national or a foreigner with legal residence in the country. The regional state administration can grant an exemption in special circumstances, among these taking into consideration the foreigners' length of stay in the country.[574]

3.2.2. Can the Consular Officers from your Member State conclude marriage? If so, which are the requirements?

-*Model Case*: the Consular Officer of your Member State concludes a marriage in other Member State.

The Ministry of Foreign Affairs informs that there is not a general access to conclude a marriage in a Danish diplomatic or consular representation abroad. This follows from the fact that concluding marriages is not one of the typical tasks of Danish Foreign services. Danes living or travelling abroad are directed to take contact to the competent authorities in the State where they intend to get married in order to clear all the administrative formalities. The few instances where a marriage is concluded in

[573] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid.p. 67.
[574] Formation and Dissolution Act, section 11.

front of a Danish consular offices have been in the case of foreign trade sailors, who are prevented from getting married in Denmark because of lasting absence from the country, and only in those countries where it is not possible to conclude a marriage in front of the local marriage authorities, whether a church or a civil marriage office.[575]

3.2.3. Has your Member State adopted some legal measures to prevent the conclusion of marriage by its authorities when this one can be considered matrimonial tourism? If so, are they applied by Consular Officers too?

-Model Case: marriage of spouses of same sex and the origin country of one of them does not admit marriage of the same sex.

Denmark has not adopted legal measures to prevent the conclusion of marriage by its authorities in cases of so-called matrimonial tourism. On the contrary, the country has promoted its culture of openness towards gay marriages by allowing three Russian couples to marry in Denmark, as a form of tacit protest against the Russian policy of discrimination of homosexuals.[576]

CASE 3.3: RECOGNITION OF MARRIAGES CONCLUDED ABROAD

Background: in the previous case, we could analyze the balance between a cross-border civil right to marry and prevention of matrimonial tourism (abuse of this right) from the point of view of the authorities of marriage conclusion. But, obviously, if the marriage is finally concluded, other States can refuse the recognition of that marriage balancing this civil right to marry and the prevention of matrimonial tourism or even its public policy.

3.3.1. Conditions of the recognition in your Member State of marriages concluded by authorities of other Member States or by religious form:

-*Model Case*: marriage between a national of your Member State and a foreign spouse, concluded by the authorities of other Member State or by religious form within the territory of other Member State.

[575] Information provided by the Ministry of Foreign Affairs of Denmark, available at < http://um.dk/da/rejse-og-ophold/legalisering/indgaaelse-af-aegteskab-i-udlandet/>.

[576] See <http://www.bbc.com/news/world-europe-27315288>.

Recognition of a marriage between a Danish national and a foreign spouse concluded abroad will normally take place if the following conditions are verified:

- The marriage ceremony has been celebrated by an authority or person which has been authorized to conduct a marriage in the country where the marriage took place;
- The marriage ceremony fulfils the formal requirements in the country, where the marriage took place;
- The marriage ceremony does not contradict fundamental Danish legal principles (*ordre public*). This entails, that especially two requirements must be met: both parts must be present at the marriage ceremony and both parts must be over 15 years of age at the time of the marriage.
- The marriage ceremony must be valid in the country, where the marriage took place.

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- The Ministry of Children and Social Affairs has issued a set of guidelines for the recognition of the validity of foreign marriage documents.[577]

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3.3.2. Cases of public policy which imply the refusal of recognition of marriages.

-*Model Case:* a polygamous marriage concluded abroad between a third country national and a EU citizen.

Polygamous marriages are not recognized in Danish law. Bigamous or polygamous marriages go against fundamental Danish legal principles or *ordre public*, as stated by the Formation and Dissolution of Marriage Act, section 9: 'The person who has previously been married or in a registered partnership cannot conclude a new marriage as long as the previous marriage or registered partnership exists'. Bigamy/polygamy is punishable according to the Danish Criminal Code with up to three years prison sentence, or six years if the other part had not known about the previous marriage or registered partnership.[578]

In 2008 there has been a notorious case of an Iraqi interpreter who wanted his bigamous marriage recognised in Denmark. He had been acting as an interpreter for four years for the Danish troops in Basra, Iraq and was given asylum in Denmark, along with his two wives and three children, because his work had endangered their life in his home country. However, he did not accept to be divorced from one of his two wives, as the Department of Family Affairs (*Familiestyrelsen*) had requested after their arrival to the country. The translator risked a court case for infringement of Danish family law and did eventually choose to move back to Iraq with his family.

CASE 3.4: ACQUISITION OF NATIONALITY OF THE SPOUSE

[577] Guidelines on the documentation for authenticity of family law documents from abroad, VEJ no. 9245 of 20.05.2009, *Vejledning om dokumentation for ægtheden af familieretlige dokumenter fra udlandet*.

[578] Danish Criminal Code, Lovbekendtgørelse no. 873 of 09.07.2015, *Straffeloven*, section 208.

Background: Marriage is one of the life event that has legal consequences in relation with acquisition of the nationality of a Member State and, by this way, the acquisition of the EU Citizenship. Explanation and indication of leading/model cases concerning the acquisition of nationality of Member State by marriage:

3.4.1. Which are the general requirements for acquisition of nationality of the spouse?

-*Model Case*: a foreigner is married to a national of your Member State.

The Naturalisation Circular is the framework providing the general requirements for acquisition of Danish nationality, in accordance with the Citizenship Consolidation Act.[579]

As regards applicants living in a marriage with a Danish national, they can apply for naturalisation after 6 years of continued stay in the country, when the marriage is still valid and the spouse has been a Danish national for at least 3 years. If the marriage's duration is 2 years, the requirement will be 7 years of residence, and for a 1 year marriage the residence requirement will be 8 years of residence.[580]

If the couple has lived together without being married up to one year, the period can count as marriage. If the married couple has different addresses, or if in any other way it is doubtful whether the couple lives together, the Parliamentary Naturalisation Committee (*Indfødsretsudvalg*) will have to consider the application after the administrative procedure in the Ministry of Justice.[581]

3.4.2. If your national legislation requires a period of residence in the spouse, shall the residence meet some specific requirements?

-*Model Case 1:* a third national country person who is not legal resident has been married to a national of your Member State for the required period and he has illegally resided in your Member State for one year.

-*Model Case 2:* a foreigner has been married to a national of your Member State for the legal period and he has resided in your Member State for the legal period, but, at the moment of the application, he is residing in other State.

[579] Naturalisation circular, CIS no. 9253 of 06.06.2013, *Cirkulæreskrivelse om naturalisation*.

[580] Naturalisation circular, section 8. The standard requirement for residence is 9 years of uninterrupted residence.

[581] Naturalisation circular, section 8 (3). The naturalisation procedure in Denmark foresees a fist administrative handling of the application in the Ministry of Justice but also a parliamentary procedure. This follows from the Danish Constitutional Act (section 44, 1) which establishes that 'No alien shall be naturalized except by statute'.

Case 1: The requirements for naturalisation in Danish law do not admit periods of illegal residence as counting towards fulfilling the residence requirement.

Case 2: The general requirements for naturalisation state that the applicant must reside in Denmark at the time of the application in order to be naturalised.[582] However, if an applicant is residing abroad because their Danish spouse is posted abroad to work for Danish interests, the application can be admitted if the residence requirement of 6 years has been met.[583]

3.4.3. Does the national legislation contain provisions in cases of separation or divorce of the spouses?

-*Model Case*: a foreigner has habitual residence in your Member State for the legal required period, which is ongoing and immediately prior to the application. He has been married to a national for more of required period, but at the moment of the application, they are legally separated.

The national legislation does not provide explicit provisions in cases of separation or divorce of the spouses. However, it is possible to conclude by the letter of the law of the other provisions, that if an applicant for naturalisation does not live in a married relationship with a Danish national, they will have to satisfy the main rule regarding the residence requirement, i.e. 9 years of continued residence in the country, without significant periods of absence (i.e. periods of absence longer than one year, or two years on grounds of study or work for a Danish company abroad).

CASE 3.5: SPOUSE REUNIFICATION

Background: although Council Directive 2003/86/EC of 22 September 2003, in relation with third countries national-sponsors and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, in relation with EU citizens sponsors, some aspects of family reunification have not harmonized or can be regulated by the Member States of different ways [see for more details Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification (COM/2008/0610 final) and Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members (COM/2009/0313 final)].*

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[582] Naturalisation circular, section 5 (1).

[583] Naturalisation circular, section 5 (1), cf. section 8 (4).

* Take into account that this question is formulated in a different style and short answers are appropriate due to the wide harmonization of the EU Law.

3.5.1. Can the spouse be reunified under Council Directive 2003/86/EC and Directive 2004/38/EC although the marriage is not recognized in your Member State? If necessary, distinguish between the particular case of polygamous marriage (which is harmonized in relation with Directive 2003/86 but not in relation with Directive 2004/38/EC) and other cases without any harmonization (for instance, persons of the same sex, "forced marriage"…).

-*Model Case*: application for reunification of spouse, although the marriage cannot be recognized in your Member State

Following its opt-out[584] on Justice and Home Affairs, Denmark is not bound by Directive 2003/86/EC on the right to family reunification. As stated in the Preamble to the Directive, point 18: 'In accordance with Article 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive, and is not bound by it or subject to its application.'

Not taking into consideration the Directive, the Danish legislation on family reunification is very strict and the procedures are often long-lasting and convoluted.[585] Forced marriages and polygamous marriages are not considered valid marriages according to the Danish legal system, thus also impacting the possibility of family reunification.

3.5.2. In accordance with Article 16 Council Directive 2003/86/EC about family reunification, has your Member State adopted some provision for refusal entry and residence of the spouse regarding that marriage does not live in a real marital relationship?

-*Model case*: a third country national legally resides in your Member State and applies for the reunification of his foreign spouse, but authorities observe that they do not live in a real marital relationship.

As stated above in answer 3.5.1, Denmark is not obliged to implement and observe Directive 2003/86/EC.

According to Danish law, a third country national does not have the right to family reunification if they do not live in a real marital relationship.[586] The evaluation will be carried out on concrete elements, but

[584] For a thorough description of the opt-out system and its implications, see Contribution towards Deliverable 7.2: Mechanisms for enforcing civil rights, Country Report: Denmark pp. 6-7.

[585] On family reunification with third country nationals and the protection of family life in Denmark, see Contribution towards Deliverable 7.2: Mechanisms for enforcing civil rights, Country Report: Denmark p. 22 f.

[586] Aliens Consolidation Act, LBK no 1021 of 19.09.2014, *Bekendtgørelse af udlændingeloven*, section 9.

in general a cohabitation of 1½-2 years will suffice, else the authorities will evaluate the contact between the two, if there are children in the relationships, etc.[587]

3.5.3. In accordance with Article 15 Council Directive 2003/86/EC about family reunification, has your Member State limit the granting of autonomous residence permit to the spouse in cases of breakdown of the family relationship (widowhood, divorce or separation)?

-*Model Case:* a third country national legally resides in your Member State and is died, after two years of residence with his foreign spouse.

As stated above in answer 3.5.1, Denmark is not obliged to implement and observe Directive 2003/86/EC.

According to Danish law, a residence permit issued on grounds of family reunification cannot be extended if the spouses no longer live together. Nevertheless, in cases of death, or if the cohabitation ends on grounds of violence in the relationship, the authorities can decide to extend the residence permit if the foreigner has shown a willingness to integrate in the Danish society, if there are children in the marriage going to school, if the foreigner is enrolled in a study program or is working in a Danish company, etc.[588]

3.5.4. In accordance with Article 4.5 Council Directive 2003/86/EC about family reunification of third countries nationals, has your Member State required the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her, in order to ensure better integration and to prevent forced marriages?

-*Model Case:* a third country national legally resides in your Member State apply for the reunification of his foreign spouse. Both of them are 18 years old.

As stated above in answer 3.5.1, Denmark is not obliged to implement and observe Directive 2003/86/EC.

In Denmark, third country nationals who want to be family reunited with a foreign spouse must be over 24 years of age (both spouses). The age limit was introduced in 2002 in a double effort to promote the integration of foreigners already living in the country and to avoid pro-forma, forced and arranged marriages. The age limit is supposed to give especially girls a possibility to say no to these illiberal types of marriages. In the preparatory works to the act, the age requirement has been motivated in the effort

[587] Starup, P. (2012), *Grundlæggende Udlændingeret I.* Jurist og Økonomforbundets Forlag, p. 122-123.
[588] Aliens Consolidation Act, section 19 (7-8).

to discourage especially forced marriages, as it is expected that the youngster will be better equipped with age to resist the pressures from parents and family members.[589] It has not been ascertained once and for all whether the age-limit rule has worked as intended and eradicated the practice of pro-forma, forced and arranged marriages[590], and opinions on the matter are split.[591] Only anecdotal evidence has indicated that the rule has in few cases prevented single individuals to enter into a marriage they did not independently agreed to.

3.5.5. In accordance with Article 4.3 Council Directive 2003/86/EC, has your Member State decide that registered partners are to be treated equally as spouses with respect to family reunification?

-*Model Case*: a third country national resident in your Member State applies for the reunification of is registered partner

As stated above in answer 3.5.1, Denmark is not obliged to implement and observe Directive 2003/86/EC.

According to the Danish Aliens Act, a permanent resident can apply for family reunification with their spouses but also registered partners. It is thus a condition that the marriage or the registered partnership can be recognized in Danish law.[592]

3.5.6. In accordance with Article 26 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members, does your Member State carry out checks on compliance with carry their registration certificate or residence card?

-*Model Case*: the residence card of a spouse of the EU citizens is required by the police.

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[589] Preparatory works L 152/2001-02 2.samling, mentioned in Jørgensen, S. (2007), *Etniske minoritetskvinders sociale rettigheder*, Jurist-og Økonomforbundets Forlag, p. 230.

[590] The National Research Center did not reach an unambiguous result in its 2009 report, *Ændrede familiesammenføringsregler. Hvad har de nye regler betydet for pardannelsesmønstret blandt etniske minoriteter*? SFI - Det Nationale Forskningscenter for Velfærd, 09:28

[591] See e.g. former Minister of Integration Affairs Birthe Rønn Hornbech in 2008, 'The 24 years rule works', news available on the Ministry's website at <http://www.nyidanmark.dk/da-dk/nyheder/pressemeddelelser/integrationsministeriet/2008/september/24-aarsreglen_virker.htm>; and commentary going in a different direction, conveying uncertainty in the patterns of marriage among youngsters since the new rules entered into force: <http://www.b.dk/kommentarer/vi-ved-ikke-om-24-aarsreglen-virker>

[592] Aliens Consolidation Act, section 9 (1,1), and Starup (2012), p. 123.

As stated above in answer 3.5.1, Denmark is not obliged to implement and observe Directive 2003/86/EC.

According to the Danish Administration of Justice Act, a person is obliged to inform of their name, address, and date of birth upon request of the Police. The obligation does not extend to the CPR-number (Danish national identification number).[593]

CASE 3.6: MARRIAGE OF CONVENIENCE

Background: EU has adopted complementary texts in relation with the marriage of convenience. See, mainly: Resolution of the Council of 4 December 1997 (OJ C 382, 16 December 1997) on marriage of convenience; Communication of the Commission to the European Parliament and to the Council [COM(2014) 604 final] and a Commission Staff Working Document as handbook about marriage of convenience [SWD(2014) 284 final]. EU is concerned in order to prevent "marriage of convenience" for acquisition of nationality or for family reunification.

3.6.1. Does the law of your Member State forbid "marriage of convenience"? If so, which are the concept and effects of this kind of marriage?

-*Model Case:* a third country national marries to a national from your Member State in order to obtain residence permit or even nationality.

Marriages of convenience, or pro-forma marriages, are defined as marriages that are concluded in order to obtain a residence permit in Denmark. As such, they are not allowed in Danish law, as stated in the requirement in the Aliens Act for family reunification at section 9 (9). In cases where the authorities have various elements to assume that the marriage is a marriage of convenience, the residence permit on the basis of family reunification will be denied.

3.6.2. How do the authorities of your Member State control if the marriage before them is of convenience? (See also question 4.3.2.)

-*Model Case:* see previous case and assess if, for instance, the authorities of your State can/shall interview the spouses.

After a written application, the authorities will interview the spouses and/or request further documentation in order to ascertain if the marriage is a marriage of convenience. This will happen if the

[593] Administration of Justice Act, LBK no. 1308 of 09.12.2014, *Bekendtgørelse af lov om rettens pleje* (*Retsplejeloven*), section 750.

information provided for in the application gives rise to concerns on the 'reality' of the marriage. For elements that can alert the authorities, see below at answer 3.6.4.

3.6.3. What happens with the control of the convenience when the marriage is concluded before a foreign authority but it provokes effects in your Member State?

-*Model Case:* a national from your Member State and a third country national marry abroad in order to obtain residence permit in your Member State or even nationality. The marriage wishes the recognition of this foreign act by the authorities of your Member State.

The Danish Immigration Service will check that the marriage concluded abroad can be recognised in Danish law, and in order to be able to obtain family reunification with a third country national in Denmark, the Danish national will have to meet the strict requirements in the Aliens Act. Among these, the requirements of a 'definite' common life could have a decisive character, limiting the scope of the rule against marriage of convenience in section 9 (9).[594]

3.6.4. Which are the main proofs and presumptions concerning convenience and are they in accordance with EU recommendations?

-*Model Case:* the authorities of your Member State observe that marriage formed by a national of your Member State and a foreigner ignore basic personal and family data of each other, although previous relations in presence or by mail, post mail, telephone, internet are proven.

From the *travaux préparatoires* to the act that introduced the rule against marriages of convenience (in 1998), we can evince that the elements that the authorities will consider are: lack of cohabitation; lack of the partners' capability to communicate in the same language; a wide age gap/difference between the partners; a lack or limited knowledge of the partners before marriage was concluded; and any previous marriage entered into by the spouses.[595]

[594] Starup (2012), ibid., p. 156.
[595] Starup (2012), ibid., p. 156-157.

4. LIFE EVENTS AND REGISTRY OFFICES

CASE 4.1: CIVIL REGISTRATION SYSTEMS

Background: The different registration models existing in Europe are based in event-based systems, in person-based systems or population register. An event based registration system records all relevant changes to the civil status of a person occurring in the respective country at the place, where the event occurred. A person-based registration system records all relevant changes to the civil status of a person occurring in the respective country at a central place. Population registers are based on an inventory of the inhabitants and their characteristics such as for example sex and the facts of birth, death and marriage, and the continuous updating of this information. Each one of them poses different difficulties. For example, the event-based systems promote the register tourism and can generate problems for accessing the Registry Offices of other States (for instance, the Registry of their nationality). The person-based systems allow a single record of the person but always requires a recognition of civil status acts created in other States.

4.1.1. What kind of registration system exists in your country?

-*Model Case:* While on vacation in France, a child of a Spanish citizen couple is born in that country. The child's birth was recorded in a French Registry Office. Later, the birth has to be recorded also in the Spanish Registry Office.

Denmark has long had a national registry and acts dealing with the issue of registration, the first act dating from 1924. The system before the current one included a local registry and a national registry, introduced in 1965. The two systems were merged into one single electronic registry, called the CPR-registry (Central Person Registry) which was first introduced in 1968 and is nowadays the national registry for the whole country.[596]

The CPR-registry is regulated by the Central Persons Register Act, whose most updated version is from 2013.[597] The objective of the legislation is to set up a system that registers important information about everyone living in Denmark. This objective is attained by assigning a 10-digit number to every person that is born in, or moves to Denmark.[598]

4.1.2. Have fundamental rights any consequence on the content of the civil registration?

[596] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid., p. 42-44.

[597] Central Persons Register Act, LBK no. 5 of 09.01.2013, *Lovbekendtgørelse om Det Centrale Personregister*, *CPR-loven*.

[598] Central Person Register Act, section 1.

-*Model Case:* The parenthood of an adopted child is recorded in a Registry Office. The question is whether there should be or should not be included in the Registry Office that the parentage derived from an adoption.

The data that are registered in the CPR-register are listed under an annex to the Act, and include full name, address, marital status, nationality status, etc.[599] In the case of adopted children, only the relationship to the adoptive parents is registered in the CPR-register, not the relationship to the family of origin of the adopted child. Included is also information about who holds custody of the child. At the same time the register does not have information on the parent who gave up a child for adoption.

Access to the CPR register can, under certain conditions, also be given to private persons. Therefore, everyone listed in the register has the right to ask the CPR-register for a so-called protection of data, in order not to have one's information passed on to private persons. The protection is only valid for a year. Moreover, the registered person can ask their local authority not to be included in directories, and can ask not to be contacted for statistical, scientific, business, and marketing purposes. [600]

[599] *Bilag 1, Dataindholdet i Det Centrale Personregister (CPR).*

[600] Godsk Pedersen, H. V. and Lund-Andersen, I. (2011), ibid., p. 43.

CASE 4.2: DOCUMENTS TO REGISTRY OFFICES

Background: The register of the acts performed in other States can be practiced on the basis of different documents (judgments, notarized documents, civil status certificates). The requirements for the effectiveness of the documents depend on the document in question and also of the State of which come from. It becomes important the control of equivalence between the authorities involved in the State of origin and the role of the authorities of the requested State. In the case of foreign judgments, it may be necessary to go prior to a procedure of the exequatur. It must be established the requirements of documents to access to the registry of each State.

4.2.1. Civil status certificates of foreign Registry Offices

-*Model Case:* A marriage between a Spanish citizen and an Italian citizen is celebrated and recorded in an Italian Registry Office. The couple provides the certificate of the Italian civil register to apply for register in the Spanish Registry Office.

Civil status certificates, such as marriage certificates, also foreign, have to be presented to the Danish municipal authority where the foreigners live or have lived before they moved abroad. The municipality will then send the information about the civil status to the CPR-register. The couple seeking to have a marriage certificate from abroad registered in Denmark will also have to fill a form answering question such as: which authority performed the marriage; if both spouses were present at the ceremony (a full description is requested); if witnesses were present at the ceremony; if the marriage was registered by the authority that performed the marriage; and permission to contact local authorities (Police, Immigration Service, Social Appeal Board, municipality of residence, and regional state administration) and Danish embassies and authorities in the country were the marriage took place.[601]

[601] The form is available at <http://ast.dk/filer/born-og-familie/blanketter/oplysninger_om_udenlandsk_vielse.pdf>.

4.2.2. Foreign notarized documents

-*Model Case:* A marriage applies for the record of the matrimonial agreement in the Registry Office. The agreement is included in a public document provided by a German Notary.

Only civil status information are included in the CPR-register, such as: single status; married status; divorced status; widow or widower status; information about a registered partnership or about the dissolution of a registered partnership; surviving partner or death; information on the CPR-number of the spouse, registered partner and on separation. Previous civil status information is also kept in the CPR-register (historic register).[602]

4.2.3. Foreign judgments

-*Model Case:* A judgment issued in France establishes that a Spanish citizen is the biological father of a child. The father provides this judgment to the Spanish Registry Office to register the fatherhood in the birth record of the child.

Foreign judgements as such are not registered in the CPR-register, which only contains personal information. However, a judgement can be used in order to register the paternity of a child in the CPR-register.

CASE 4.3: CONTROL OF EQUIVALENCE BETWEEN EU REGISTRY OFFICES

Background: According some European laws, the registrar has to control the legality of the act before recording it in the Registry. This control is made according to family law and international private law rules in force in each State. These rules differ significantly among the States. The registrar has also to refuse the entry if the act violates the public policy. Due to the fact that this control could be an obstacle to the free movement of persons, the scope of this control of legality might be affect by the mutual recognition principle.

4.3.1. Are registrars compelled to do a control of legality of the civil act?

-*Model Case:* The parenthood of a child, born by a surrogacy arrangement, is established by a foreign

[602] *Bilag 1, Dataindholdet i Det Centrale Personregister (CPR)*, at 8.

judgment. The intending parents provide this judgment to the register officer in order to register the filiation of the child. Accordance with the law, the officer of the register may refuse to register if he is obliged to control the on the ground of public policy.

Foreign documents that have impact on family life in Denmark are controlled in as far their authenticity is concerned. A circular is in force on the recognition of foreign documents such as: marriage (marriage certificates, civil status certificates etc.); divorce and separation; documentation for death abroad; parental custody; name; and paternity.[603] The municipality where the foreigners live is the first instance where the documents are delivered in order to be ascertained as authentic and afterwards registered.

4.3.2. How do registrars control the marriages of convenience? (see also question 3.6.2.)

-*Model Case:* Before the registration of a marriage between a Spanish citizen and an Ecuadorian citizen, the register officer refuses to record it on the grounds that it is a marriage of convenience.

In cases where the marriage is concluded in Denmark, the municipal authority where the marriage is supposed to take place has a duty to report to the Immigration Service if there is a suspicion that the marriage may be a marriage of convenience. The question is of relevance in case the marriage is supposed to constitute the basis for an application for family reunification in Denmark. Suspicion may arise if the two parts seem not to know each other or if they do not speak the same language. A mere suspicion however does not give the municipal authorities the right to deny a marriage certificate.[604]

4.3.3. How do registrars control the filiations of complacency?

-*Model Case:* After the acknowledgement of fatherhood of a child, the registrar rejects the registration on the grounds that it is a recognition of filiation by complacency

Filiation by complacency is not a legal notion which is used in Danish legislation.

CASE 4.4: CROSS-BORDER COOPERATION BETWEEN REGISTRY OFFICES

[603] Guidelines on the documentation for authenticity of family law documents from abroad.

[604] Guidelines on the handling of marriage cases, VEJ no. 9399 of 04.06.2014, *Vejledning om behandling af ægteskabssager*, at 6.2.

Background: The different registration systems among States and the lack of harmonization of the registry law cause different obstacles to the free movement of persons. Particularly important, in order to guarantee the right to the unique identity, is the ability to communicate the data of the civil status that may affect the nationals of other States. It is also important to facilitate the performance the events that affects the civil status in other States. However, there could be problems due to the requirement in a State of the event of documents that were unknown to the State of the register.

4.4.1. Are there any specific instruments in your country for cross-border cooperation among Registry Offices?

-*Model Case:* A national of a State seeks to celebrate their marriage in another State (State B), whose authorities requested a certificate of no impediment marriage. Requested the certificate, the registrar of Registry Office of State A refuse to give that document because such a document is unknown in its law.

Only cooperation between the CPR-registers of the Nordic countries (Denmark, Sweden, Finland, and Norway) exists.[605]

4.4.2. Is there any mean for the communication of registry data when they may affect the nationals of other States?

-*Model Case:* A French national got marriage in Spain. The marriage is registered at the Spanish civil register but not in France. To return to France, the French national wants to marry before a French authority. It raises the question of proof of the capacity of the spouse.

As referred in the question above, cooperation between registries is in place only as far as the Nordic countries are concerned. In all other cases, the Danish authorities will have to evaluate the foreign certificates provided in order to process a particular application.[606]

4.4.3. In the issuance of civil status certificates, are language requirements or other formal conditions of other States considered?

[605] See e.g. Executive Order on Nordic Agreement on National Registry, BKI no. 8 of 01.02.2007, *Bekendtgørelse af nordisk overenskomst af 1. november 2004 om folkeregistrering*.

[606] See references at notes 116 and 117 above.

-*Model Case:* It is requested a birth certificate of a French national who is register in the Spanish Civil Registry. The certificate is requested to provide it to a French authority. Is it possible that the certificate be issued in French?

The Names Executive Order (at section 3) states that the documents to be provided to the civil registration officer have to be the original documents and translated to Danish, although an official translation is typically not required. If the document is written in Norwegian, Swedish, Finish, Icelandic, English, or German a translation is not required. Also, the Social Appeal Board informs that a document in a foreign language will not need to be translated if the personnel in the municipality treating the document have a good command of the language involved.[607]

CASE 4.5: EVIDENTIARY VALUE OF CIVIL STATUS CERTIFICATES

Background: The diversity among the national registries affects the value of the certificates issued and in its evidentiary value in other States. Moreover, this evidentiary value is affected by the different rules of evidence established in the States. There could be also differences depending on the type of authority (judicial or administrative) which the certificate is provided to.

4.5.1. What evidentiary value has in your country the certificate of a foreign Registry?

-*Model Case:* A citizen brings a birth certificate to prove their age. The Registry Office of the State of origin based their records solely on the strength of a declaration made by the person concerned thereby, without additional control of legality by the registrar. This certificate is provided in a judicial procedure before a Spanish court.

- As mentioned above under question 3.3.1, the Ministry of Children and Social Affairs has issued a set of guidelines for the recognition of the validity of foreign marriage documents.[608]

Danish authorities normally do not require a particular kind of documentation for the authenticity of documents stemming from Europe, USA, Canada, Australia, New Zealand, Turkey, and several other countries. However, if the authorities find a concrete need for it, they can require further documentation to be provided in order to ascertain the authenticity of the documents at stake. In other cases where the foreign Registry is located outside of these countries, a 'legalisation' has to be provided in order to admit a certificate from abroad (please refer to answer to question 1.2.1. above). Also,

[607] Information available at <http://ast.dk/born-familie/aegteskab-og-skilsmisse/aegteskab/anerkendelse-af-udenlandsk-vielse-skilsmisse-eller-dodsattest>.

[608] Guidelines on the documentation for authenticity of family law documents from abroad.

Denmark has ratified the Apostille Convention[609]; thus, if a document has an Apostille Certificate, which has been issued by a public authority in the country where the document was originated, and the authority is on the list provided by The Hague Conference on Private International Law[610] the authenticity of the foreign document will automatically be confirmed.

4.5.2. Do you have the foreign registration certificate the same evidentiary value in the judicial sphere that at the administrative level?

-*Model Case:* It is provided before an administrative authority a certificate of marriage to apply for a visa for family reunification.

A foreign registration certificate has the same evidentiary value in the judicial sphere as well as at the administrative level.

4.5.3. In what cases it may be rejected the evidentiary value of the foreign certificate?

-*Model Case:* It is provided a certificate of a marriage, issued by a foreign registry, without translating nor legalize. In addition, there are contradictory data in the registry of origin.

The evidentiary value of a foreign certificate can be rejected if it stems from a country which is not a European Member State (or USA, Canada, Australia, New Zealand, Turkey, or other selected countries), and has not been legalised (also called 'chain certification'), or does not present an Apostille Certificate.[611]

For certificates that according to Danish rules have to be legalised, the Danish Social Appeal Board notifies the procedures required according to the countries concerned on its website.[612]

ANNEXES

NATIONAL PROVISIONS

[609] Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("Apostille Convention").

[610] <www.hcch.net>.

[611] See Guidelines on the documentation for authenticity of family law documents from abroad, at 5–6.

[612] See <http://ast.dk/born-familie/aegteskab-og-skilsmisse/aegteskab/anerkendelse-af-udenlandsk-vielse-skilsmisse-eller-dodsattest>.

- Act on Assisted Reproduction, LBK no. 93 of 19.01.2015, *Bekendtgørelse af lov om assisteret reproduktion i forbindelse med behandling, diagnostik og forskning m.v*.
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3. HUNGARY

RAPPORTEUR: TAMAS DEZSO ZIEGLER

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SHORT PRESENTATION OF THE MOST IMPORTANT LEGAL SOURCES AND LEGAL FRAMEWORK IN HUNGARY

In Hungary, the constitutional background of family relationships can be found in the relatively new constitution called Fundamental Law (adopted on April 18 2011), which replaced the former constitution (Act XX of 1949 on the Constitution of the Republic of Hungary).

The substantive family law issues are mainly set in the Hungarian civil code, called Act V on the Hungarian civil code, which entered into force in 2014. The new civil code contains the updated provisions of the former law on family issues (Act IV of 1952 on marriage, family and guardianship, out of force as of 1 March 2014). The Civil Code is made up by seven books, Book IV is the book on family law. Even though some other laws can be important as well, this book contains the basics of family law in the country. Hungary also joined the 1989 New York Convention on the rights of the child. There exists a special law on (same sex) registered partnerships (***Act XXIX of 2009***). The existence of a separate law instead of building it into the Civil Code was heavily criticized in Hungarian legal literature.

At the private international law level, the most important domestic rules can be found in Government decree No 13 of 1979 on private international law ("PIL Code"). Since the country is a member of the EU, Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility must also be applied. Even though it was not mandatory requirement, the country joined the enhanced cooperation and participates in the application of Council regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. The judgements of CJEU also had a strong effect on domestic law, eg. the rules of the PIL Code were amended to be conform with the EU rules on names, the findings of Garcia Avello case were implemented into the text. However, regarding the Grunkin Paul case, new modifications are necessary. The Hungarian Parliament adopted a decision in June 2015 on the creation of a new Private International Law Code, and appointed a commission to do the job. Consequently, in a couple of years, the rules will be subject to change.

The country is a member of several important agreements of the Hague Conference on Private International Law including the three most important conventions on family law issues: the 1980 Agreement ***on the Civil Aspects of International Child Abduction***, the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and the 1993 Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. Moreover, Hungary is also member of the Hague apostille agreement of 1961.

The most important rules on the entry and stay of foreign citizens is governed by two laws, namely ***Act I of 2007*** on the entry and residence of persons with the right of free movement and residence (regarding EU citizens) and Act II of 2007 on the entry and right of residence of third-country nationals (regarding third state citizens). Some other, lower level legal sources can also have some relevance.

The provisions on citizenship can be found in Act LV of 1993 on citizenship, which regulates how citizenship can be obtained.

The main legal source of registering family relationships is Act I of 2010 on birth, marriage and death registration. However, additional sources like Justice Ministry (KIM) Decree 32 of 2014 on registries also apply.

1. PARENTAGE

CASE 1.1: TYPES OF PARENTAGE

Background: One of the most important differences among Member States law is derived from the different conceptions about the parent-child relationships. The European Union Member States have different solutions as regards the attribution of custody rights based on the existence (or absence) of a marital relationship between the parents. There may be legal distinctions on the basis of the different criteria: depending on matrimonial or no matrimonial parentage; natural or adoptive. The national laws could establish differences on the content of parental responsibility or on the children's rights concerning their parents as regards their rights of inheritance or maintenance. Other legal systems are based on the principle of equality between children and the prohibition of discrimination among them children based

on the child's or his or her parents' birth or other status. In such cases, there is possible to refuse the application of foreign law on the ground of public policy.

1.1.3. What types of parentage exists in your law?

-*Model Case*: A couple has a child born out of wedlock. After marriage, they have another child born in wedlock and they adopt a third child. Do these children deserve the equal treatment?

According to Article XV of the Basic Law of Hungary, Hungary shall guarantee the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of birth or any other status. This means that there is no option to discriminate a child because he was not born in a marriage. This approach is in line with Article 2 (1) of the UN Convention on the Right of the Child. This protection is also extended to adopted children: they are handled the same way as biological children.

1.1.4. Does the type of parentage have consequences on its content?

-*Model Case*: Caused the death of the deceased, arises the distribution of the estate among his three sons, two of them are biological children and the third is an adopted child.

No, Hungarian law handles all the children similarly, and no difference is made between them. This applies to parent-child relationship, maintenance obligations or inheritance rights as well.

1.1.3. Is it a principle of public policy in your country the equal treatment of children?

-*Model Case:* A deceased leaves two sons, one biological and one adopted. The law of the competent court for the succession states the equality between children. The law applicable to the succession only recognizes inheritance rights to biological child.

The recognition of any foreign judgment which contains discriminative measure towards a child would not be recognized and enforced in Hungary. The reason for this is that it would violate the constitution, which contains the framework of public policy.

The general framework of the refusal of recognition is set in a judgment of the Supreme Court. The judgment (BH 2003.127.) was made in a case regarding arbitration. The court emphasized that the most

important aspect of public policy is the society's general decision in values, and as such, in a relatively broad interpretation, any decision which hurts the country's general values can be refused.

CASE 1.2: WAYS TO ASCERTAIN PARENTHOOD

Background: The differences between the European States laws are shown different ways to ascertain the biological parenthood. The rules concerning when the competent State authorities will have jurisdiction to accept a voluntary acknowledgement of legal parentage vary considerably between States. There were problems with the acknowledgement natural children before different authorities at the State of the register. Some national laws could regard as a matter of public policy the practice of biological test (DNA analysis) to prove paternity, allowed in some States. It should also be assessed when it is possible to register parentage established in a certificate obtained of a foreign Registry Office.

1.2.1. What effects has the acknowledgement of natural children made before a foreign authority?

-*Model Case:* The birth record of a natural child only named a person as the mother in the Registry Office of State A. The child is acknowledged at a later date by the biological father. This acknowledgement is made before a notary of State B. The father provides this document to the Registry Office of A to register paternal parenthood.

The PIL Code (Section 42) says that the personal law of the child prevailing at the time of his birth shall apply to the establishment of fatherhood or motherhood, as well as in the matter of overcoming the presumption of fatherhood. It also says that the recognition of a child by the father shall be adjudged according to the personal law of the child prevailing at the time of recognition, while the recognition of a child already conceived but not yet born shall be adjudged according to the personal law of the mother prevailing at the time of recognition. Recognition may not be regarded as invalid because of formal reasons if it is formally valid either according to the Hungarian law or according to the law in force at the place and date of recognition.

It is important to stress that regarding a Hungarian citizen, the father must make a statement (at the Hungarian Consulate or in Hungary in front of government authorities) on the recognition of fatherhood (this must be made personally, and both parents must be present). This statement must always be made if a Hungarian citizen is involved, and the simple fact that a foreign document was made on the recognition of fatherhood is not relevant for Hungarian law. Section 4:102 of the Civil Code says that acknowledgement and consent shall be executed in a statement made before the registrar, the court, the guardian authority or a consulate officer. Once the statement or the document is signed, the acknowledgement of paternity may not be withdrawn.

If no Hungarian citizen is involved, the foreign authority must issue an international certificate on the recognition of fatherhood, which must be recognized according to the general rules on recognition of foreign public documents.

1.2.2. How is regulated in your law the biological test of fatherhood?

-Model Case: The alleged father refuses to practice a DNA test to prove the paternity of a child. The State where the test shall be performed allows the coercive practice of the test. Nevertheless, the court where the fatherhood procedure was raised rejects this practice on the ground of public policy.

In Hungary, in case of disputes, the cooperation during the DNA test can be mandatory for the father. Consequently, regarding domestic disputes, such tests are used even if the consent of the father was not given to use them. Section 4: 104 of the Civil Code says that the action for establishing paternity by way of judicial process may be brought by the mother, the child, the child's descendant or by the father.

1.2.3. It is possible to register the parenthood in your State on the basis of a certificate of civil status issued by a foreign Registry Office?

-Model Case: The record of birth of a child is in the Registry Office of the State where he is born (State A). Then, it is applied the recognition of the certificate of the Registry Office of A to record the child in the Registry Office of their nationality (State B).

Yes, there exists a process in Hungarian law for such cases: the foreign birth certificate of the child must be submitted to Hungarian authorities. If the child has Hungarian citizenship (one of the parents is Hungarian citizen), Hungarian law shall apply on his/her status.

CASE 1.3: SURROGACY ARRANGEMENTS

Background: The different approaches among States in the field of surrogacy arrangements caused the phenomenon of reproductive tourism. In these cases, the prohibitions in the domestic law are trying to avoid by going to more permissive States in which the intending parents obtain the legal parentage of the child. The problem arises when the receiving States do not recognize this parentage and, consequently, the situation of the child becomes uncertain. It should also be assessed the impact of the case law of the European Court of Human Rights with the Mennesson and Labasse cases.

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1.3.1. Are surrogacy arrangements allowed or prohibited in your country?

-Model Case: A couple signs a surrogacy arrangement in their home country. When they applied for registration the child birth, the problem of the parenthood of the child arises: has the parenthood be established to the intending parents or to the gestational carrier (surrogate mother)?

The conclusion of surrogacy arrangements is not allowed in Hungary since 2002 (however, they are not criminalized either). In 2002, the section which earlier made them available were erased by ***Act*** No ***CLIV***

of 1997 on health care. Consequently, such agreements are considered to be null and void, and such agreements concluded abroad cannot be recognized in Hungary.

Section 4:115 of the Civil Code says that the woman giving birth to the child shall be considered the mother of the child. The ban causes serious problems for those who are unable to give birth to a child otherwise. However, the rules were not changed after the adoption of the new Civil Code in 2013 either.

1.3.2. It is recognized in your country the legal parenthood acquired abroad by a surrogacy arrangement?

-*Model Case:* The intending parents register in an USA Registry Office the legal parenthood of a child established by a USA judge. Then, they applied to register this parenthood in their home country (receiving State). Is it possible that registration if the law of the receiving State prohibits the surrogacy arrangements?

No. Even though such cases may occasionally occur, Hungarian courts would probably say such agreements are against public policy (even if no financial element was present).

There are ongoing court cases regarding this problem. Some Hungarian citizens concluded surrogacy agreements in Ukraine, the mothers gave birth in Ukraine, their names (i.e. the biological parents' names) were signed in the registry in Ukraine. On the other hand, Hungary's consulate in Ukraine refused to register them as parents, and they turned to Hungarian courts to reach the registration of their status. In case of refusal, the courts could get into violation of related Strasbourg case law.

1.3.3. In the case of no recognition of the legal parentage established abroad, what will be the future status of minors?

-*Model Case:* The record of birth of a child named the intending mother as the mother in the Registry Office of State A. Nevertheless, the receiving State B does not recognize and establishes the motherhood to the gestational carrier (surrogate mother). Then, who should take charge of this child?

As mentioned before, in Hungary, generally, the woman giving birth to the child is considered to be the mother. However, in countries where surrogacy is allowed, in certain cases the biological mother is signed as mother in the birth certificates (this causes serious problems and uncertainty e.g. in Ukrainian-Hungarian family relations). Since the Hungarian authorities normally do not know anything about the background of the birth, they must accept the biological mother as mother, who is signed in the birth certificate as mother. If they come to know that the mother did not give birth to the child, there is a high chance the parentage will not be recognized by the authorities.

This could be slightly different it the related persons are foreign citizens. According to Section 42 of the PIL Code, the family law status of a child is set by the personal law (citizenship) of the child prevailing at

the time of his birth. This applies to the establishment of fatherhood or motherhood, as well as in the matter of overcoming the presumption of fatherhood. Thus, for a foreign person, in theory, a surrogacy agreement may have the effect of the biological mother becoming the mother of the child, especially, if the foreign authority issues a document (birth certificate) on this fact. However, we cannot presume whether the public policy argument would not be used by courts in this case as well.

1.3.4. What shall the impact be on your country of the case law of the European Court of Human Rights in the *Mennesson* and *Labassee* cases?

-*Model Case:* According to *Mennesson* and *Labassee* cases, the non-recognition of a legal parenthood already registered in another State infringes the right of the child to respect for their private life according to article 8 of the European Convention of Human Rights.

There is no case law yet as regards how the Hungarian judicial system would react to these cases. We can presume that they break through the Hungarian resistance regarding the recognition of foreign surrogacy agreements, and they may be in conflict with the relevant provisions of the Civil Code as well. There are ongoing cases on surrogacy agreement, but no judgments are delivered yet.

CASE 1.4. FILIATION AND ADOPTION

Background: There are differences in the rules governing the adoption: adoptions simple or full adoption, revocable or irrevocable adoptions, adoptions that create a permanent parent-child relationship and adoptions that do not create it. They are also different regulations on the requirements for the constitution of the adoption, depending on the adopting parents are single parent families or same sex couples. In addition, adoptions may have consequences on th acquisition of the nationality of the adopted child. The ECHR Wagner case (Judgment of 28 Juin 2007) has revealed the incidence of the right to family life of the article 8 European Convention of Human Rights related to the recognition of adoptions legally created in another State.

1.4.1. Are allowed in your country the simple or revocable adoptions?

-*Model Case:* A child is adopted in a country A by a simple or revocable adoption. Later, the adoptive parents aim the recognition of such adoption in the State B.

According to Section 4:119 of the Civil Code, adoption shall be considered to establish a family relationship between the adoptive parent, his/her relatives and the adopted child in the interest of allowing the child to grow up in a family. As regards the adoptive parent and his/her relatives, the adoptee receives the legal status as the adoptive parent's child (4:132).

Adoption is revocable in a set framework (dissolution is possible). There are two distinct ways of dissolution of adoptions: dissolution of adoption upon mutual request (Section 4:138 Civil Coce) and in some special circumstances, dissolution of adoption upon unilateral request (Section 4:139 Civil Code). Dissolution upon unilateral request can be made if either the adoptive parent or the adopted person get engaged in conduct which made life under adoption unbearable for the other party. If the adopted child is a minor, adoption may be dissolved on an exceptional and duly justified basis upon the adoptive parent's request.

1.4.2. Is it allowed in your country the adoption by single-parent families or by couples of the same sex?

-*Model Case:* A single person adopts a child in a State A and applies for its recognition in his home State (receiving State B).

Same sex couples can live in registered partnership in Hungary, according to Act XXIX of 2009 on registered partnership (registered partnerships are only available for them). However, same sex couples may only adopt children as single parents, since only married couples may adopt children together (Section 4:132. § of the Civil Code). Consequently, joint adoption is excluded for heterosexual couples living in civil (unregistered) partnership either.

1.4.3. Is it allowed in your country the recognition of foreign adoptions which do not create a permanent parent-child relationship?

-*Model Case:* A couple adopts a child in a State A, which does not create a permanent parent-child relationship. How is recognized that adoption in the receiving State B?

According to Section 43 of the PIL Code, the conditions of adoption shall be adjudged with regard to the personal laws (in most of the cases: the citizenships) of the adoptive parent and the person intended to be adopted at the time of adoption.

In case a Hungarian citizen is involved, special permissions (approvals) are needed. A Hungarian citizen may only adopt a non-Hungarian citizen, and a non-Hungarian citizen may only adopt a Hungarian citizen with the authorization of the Hungarian guardian authority, or with the authorization of the relevant foreign authority subject to approval by the Hungarian guardian authority.

However, it is very important to stress that the guardian authority may only approve an adoption if it satisfies the requirements of Hungarian law [Section 43 (3) PIL Code]. Section 4:129 of the Civil code sets an extra barrier. It says that (unless the child is adopted by a relative or by the parent's spouse), a child may only be adopted internationally if he/she was declared eligible for adoption, or if he/she was placed

under foster care, provided that the child was not adopted in Hungary because the measures taken had failed.

In Hungary adoptions which do not create parent-child relationship are not allowed. The above mentioned rules mean that recognition of such relationships would be problematic: there is a high chance they would be refused. Hungary also joined the 1993 Hague Convention of adoptions, which regulates the framework of permanent adoptions.

Finally, Section 70 of the Code on private international law (Law Decree 13 of 1979) says that a definitive foreign decision authorizing the adoption of a minor who is a Hungarian citizen by a Hungarian citizen shall be recognized if so requested by the adopted person of Hungarian citizenship upon having reached the age of legal majority. This means that regarding Hungarian persons until they are minors mostly Hungarian authorities must proceed.

1.4.4. Is a consequence of the adoption the acquisition of nationality?

-*Model Case:* A Spanish citizen adopts a child of 10 years old and another for 18 years old. It raises the question if the children acquire the Spanish nationality as a result of the adoption.

No, the child will not receive the Hungarian nationality automatically if a Hungarian citizen adopts him/her. However, in such cases, the habitual residence of the child is unimportant. This means that children may receive citizenship easier than adults, who generally must reside in the country for a longer term.

2. FORENAMES AND SURNAMES

CASE 2.1: DISPARITIES AMONG LEGAL SYSTEMS

Background: due to the several differences among legal systems and their impact in the free movement of persons and the principle of unique identity, please provide explanation and indication of leading/model cases about your national legislation concerning forenames and surnames

2.1.1. Explain your conflicts of law rules, highlighting the cases in which your national legislation is applicable

-*Model Case 1*: a child was born in a third country, where his parents (national of your Member State) reside.

-*Model Case 2*: a child was born in your Member State, where his foreign parents reside.

The Garcia Avello case had an effect on the Hungary legislation as well. Act IX of 2009 amended the Private international law code (Law decree 13 off 1979), adding special rules to the code. The newly inserted Section 10 (2) says that to a person's name, the personal law of the person (in most of the cases: his/her citizenship) shall apply. Upon request, the registration of a birth name shall be effected by the second citizenship, which can also be asked to get used.

On the other hand, interestingly, the changes did not implement the findings of the Grunkin Paul case or later cases on names. This means that the recognition of (and not the law applicable to) a name already registered in a country was not codified. Several domestic scholars criticized this technique. However, courts must still apply these rules of EU law, based on the supremacy of EU law.

2.1.2. Explain briefly the main rules concerning forenames and surnames, especially focusing on number, limits, civil acts which affect to forenames and surnames, admission of foreign forenames and surnames, and translations of them.

-*Model Case*: a child born in your Sate whose parents are nationals and resident in your State.

As an exception in Europe, Hungarians place the surname before the given name. Hungary neither joined the 1980 Munich Convention on surnames and fornames nor the 1973 Bern Convention on the recording of surnames and forenames in civil status registers.

The basic rules on names can be found in the Civil Code, especially in Section 4:27 (which contains the rules on names of the parties in a marriage) and in Section 4:150 (the rules on children). Even the Constitutional Court dealt with some questions of names. In Decision 58 of 2001 the Constitutional Court stressed that every man has got the inalienable right to have and bear his own name representing his (self)- identity, and this right may not be restricted by the state. Thus, the right to a name is interpreted as a fundamental right of the person. In the same decision, the Court found several provisions of the former constitution unconstitutional (eg. the solution that husbands could not bear the wife's name after marriage). In its Decision 988/B/2009 (X. 25.), the Constitutional Court dismissed claims on noble titles. It stressed that such titles can be used in private life, but not in official documents.

The more specific rules of names can be found in Act I of 2010 on birth, marriage and death registration. The rules must only get applied to Hungarian citizens (persons with two citizenship may use their foreign names), who register their names in Hungary. If a name is registered outside Hungary, the name registered abroad must get registered in Hungary as well (with certain differences, see later).

A family names may be made up by one or two parts. If it is made up by two parts, hyphen (-) must be used between them. This rule will change as of 1 August 2015. From that time, the usage of hyphen will not be necessary. A person may have a maximum of two forenames. Only forenames published in the forename registry can be given freely in Hungary, otherwise a permission from the Research Institute for Linguistics of the Hungarian Academy of Sciences (or, in case of minority names, of the nationality self-government) must be attached to the application.

If the person belongs to a minority (nationality), his/her names may be registered even if it cannot be found in the registry of the Hungarian Academy of Sciences. However, the name (except the signature) must be written with the usage of the Latin alphabet (i.e. in fact a translation is registered), which may be in conflict with the findings of the Konstantinidis case. According to Section 68 of the law on registries, if the Hungarian citizen gives birth to a child abroad, the name registered abroad must get registered in Hungary as well. On the other hand, he/she may only have two first names registered (must select two if he/she was registered with more first names).

Foreign citizens may register their names in Hungary as they wish (according to the law of their citizenship). On the other hand, apart from registration, in several documents they must select two first names and not more because of the formula of the documents, which may cause problems in practice, and is also not fully conform with EU rules.

CASE 2.2: GENDER EQUALITY

Background: some legislations establishes gender equality between the surnames of men and women as a matter of public policy and the marriage does not alter the surnames of the spouses and the children receive surnames of both parents. In this context, please provide explanation and indication of leading/model cases concerning gender equality at the moment of attribution of the forenames and surnames, particularly:

2.2.1. Which are the main issues with the surnames of the wife?

-*Model Case*: a wife with maiden surname Ms. Smith and married name Ms. Fernández. How is she referred in your Civil Register?

The Hungarian rules are relatively liberal: it is up to the wife how she decides: she may wear the surname of his husband (Maria Fernandez) keep her own name (Smith) or completely use her husband's name (Hugo Fernandez).

Thus, upon marriage, the wife has the option to keep her birth name (Maria Smith), or her name immediately before the time of marriage; to bear her husband’s full name with an indication of marital status ("-né" in Hungarian, like Fernandez Hugoné), possibly with her name immediately before the time of marriage attached (Fernandezné Smith Maria); to bear her husband’s surname with an indication of marital status and with her name immediately before the time of marriage attached (Fernandezné Mária; or to bear her husband’s surname with her own forename (Fernandez Mária).

The husband also has the option to keep his birth name, or his name immediately before the time of marriage; or to bear his wife’s surname with his own forename (Hugo Smith).

The parties may also choose to merge the two names: the husband and the wife may choose to use both of their surnames merged together as their married name, with their own forename attached

(Hugo Fernandez-Smith, Maria Fernandez-Smith). As of 1 August 2015, they can merge the two names without a string between them (Fernandez Maria Smith).

If the wife is a foreign citizen, the conflict of laws rules must get applied, and her citizenship will have relevance.

2.2.2. Which are the main issues with the surnames of mothers?

-*Model Case*: a husband and a wife (maiden name: Ms. Smith; married name: Ms. Fernández) has a child. Which are his surnames?

In the case of foreign nationals, their personal law (law of citizenship) must get applied to their names. In the case of children with Hungarian citizenship, in Hungary, the parents must give the birth name or the married surname of his/her mother or father (it is up to their decision which name they choose).

CASE 2.3: PUBLIC POLICY

Background: Judgment of the Court of 22 December 2010 (Case C-208/09, Sayn Wittgenstein) ruled that the no recognition of the surnames from other Member State is only based on public policy grounds. Please, provide for cases of public policy which prevents the application of a foreign law concerning forenames and surnames by the authorities of your Member State (dignity of persons, superior interests of minor, gender grounds, rules abolishing the nobility). In this context, please highlight if the public policy clause can play in a total or attenuated form, depending on the foreign law is not admitted in any case or if exceptions are observed.

2.3.1. Explain cases of absolute application of public policy, in which foreign law is not applied in any situation without exceptions.

-*Model Case:* A foreign law of a child permits names which affect dignity of the persons.

In such cases, if registered abroad, the foreign name will be registered in Hungary as well. The same is true to foreign nationals. However, if not registered abroad, the name of a Hungarian citizen must be conform to Hungarian rules, and parents must select a name from the Database of Registered Forenames of the Hungarian Academy of Sciences.

2.3.2. Explain cases of attenuated public policy, in which foreign law is applied in a "soft" way (material attenuation) or in which public policy is only applied when the case is connected with the territory or nationals of your Member State (spatial attenuation):

-*Model Case:* "foreign wife" who is mother with the legal surname of the husband.

According to Section 68 of Act I of 2010 on registries, regarding the birth of a child of a Hungarian citizen, the name registered abroad must be registered by the Hungarian authorities as well (only two first names are allowed, if there are more, he/she must choose which should be registered). Otherwise the name should be the same as in the foreign document. A Hungarian citizen may ask for a translation of the name.

There exists a serious problem in Hungarian law: names, which are not conform with Hungarian law (like –ová names from Slowakia, in which case –ová serves as a sign that she is the wife) are registered as birth name, even if they are not one. Moreover, in a number of cases the parties do not know about this change, which may cause problems in the internatioal recognition of a person's name, because this process is not logical.

Moreover, this practice is contrary to Constitutional Court decision 58 of 2001, which stressed that a person's name canot be changed without his/her consent. In a number of cases, the parties do not know that their birth name is changed, instead of the names they use. The same was true of family names (Smith-Fernandez) registered abroad before 2004, if the parties opted to use both of their family names after marriage (before 2004 the usage of such names was not allowed in Hungary).

CASE 2.4: DIVERSITY OF SURNAMES BY NATIONALITY AND PLACE OF BIRTH

Background: the record of a birth in several Registries, in the Registry of the nationality and in the Registry of the place of birth, can provoke diversity of surnames and affect to the free movement of persons and the principle of unique identity. Thus, Judgment of the Court of 14 October 2008 (Case C-353/06, Grunkin Paul) ruled that the surname acquired in the Member State of birth and residence shall be recognized in the Member State of which the applicant is national in order to protect the right to move and reside freely within the territory of the Member States.

2.4.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in a third country:

-*Model Case:* nationals from your Member State born and resident in third countries.

There are no special rules: the foreign registration is accepted, apart of problems mentioned before (translation, two first name selection, registration as birth name).

In a problematic way, registered names in same-sex marriages are also registered as birth names (they must ask the Hungarian registry to do so, it is not automatic). This rule can cause issues if the persons want to conclude e.g. contracts and their birth name is not the same as it was.

2.4.2. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in other Member State

-*Model Case:* nationals from your Member State born and resident in a Member State of the EU

No domestic leading case is available.

CASE 2.5: DIVERSITY OF SURNAMES BY DOUBLE NATIONALITY

Background: the double nationality of the applicant can also provoke "diversity of surnames" and this one affects free movement of persons and the principle of unique identity. Judgment of the Court of Justice of European Union of 2 October 2003 (Case-148/02, García Avello) ruled that nationals from two Member States could choose the identity in according with one of these Member States and this identity should be recognized in the other Member State in order to respect the EU citizen and the free movement of persons.

2.5.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals from your Member State who are also nationals from third countries:

-*Model Case:* nationals from your Member State who are also nationals from third countries

In this case the rules of the third country can also get applied, see Section 10 (2) of Law Decree 1979 on private international law. In practice this means the law of the foreign country may get applied in case the applicant asks for it.

2.5.2. Explanation and indication of leading/model cases concerning "diversity of surnames", particularly, in relation with nationals from your Member State who are also nationals from other Member States:

-*Model Case*: nationals from your Member State who are nationals from other Member State.

There are no problems in this regard: such names are registered just like abroad. Public policy arguments are set aside and are not used, not even for the purpose of defending the child's interests. The spelling and translation of such names could cause problems, but such problems did not occur until now. Registering unknown names as birth names is also problematic, as mentioned before.

3. MARRIAGE

CASE 3.1. DISPARITIES AMONG LEGAL SYSTEMS

Background: The disparities among legal systems affect the right to marry of EU Citizens, concerning questions as the age, consent, religious or civil form. These disparities can block the civil right to marry

and, on the other hand, have increased "matrimonial tourism" with the aim of conclusion of the marriage which is not admitted in the origin country of the spouses.

Short explanation and indication of leading/model cases about the main requirements of the national legislation, concerning matrimonial capacity, legal impediments, gender requirements and issues of the marriage of the same sex, matrimonial consent and religious and civil forms:

-Model Case: spouses nationals and residents of your Member State

Men and women are entitled to marry in the same conditions and effects, irrespective of their gender. Two witnesses are needed, and if one of the spouses is below 18 years, he/she needs permission from the Guardianship Authority.

According to Article L of the Fundamental Law, "Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation." This means that the marriage can only take place between spouses of the opposite sex, and this rule is also expressed in the constitution. Moreover, in a strange way, the Fundamental Law also stresses that "family ties shall be based on marriage and/or the relationship between parents and children". Commentators criticized this rule, because it unnecessarily narrows down the concept of family, and excludes several forms of family relations like same-sex partnership, but also some more traditional forms like uncle-nephew relationships. Moreover, it mainly focuses on family as a "tool" for having children. The Constitutional Court struck down some related, lower level laws earlier which had similar content, but they got re-codified - this is the reason why the rule can be found in the Constitution itself [see Constitutional Court decision 43 of 2012. (XII. 20.]. Thus, an amendment of the Fundamental Law (the fourth amendment) narrowed down the earlier, general concept of family.

Religious forms of marriage are not recognized by the state. Thus, marriage is concluded if a man and a woman together appears before the registrar in person and declare their intention to marry. Such a declaration cannot be made subject to a condition or time limit. If the spouses want to marry, the marriage cannot take place before 30 days passed after filing the notification of their intent at the authority.

Marriage shall be invalid if it takes place between relatives in direct lineage or siblings, a person and the descendant of his/her sibling, or between the adoptive parent and the adopted person during the existence of the adoption. The marriage of any person under guardianship invoking fully limited legal competency at the time of marriage is invalid. The marriage of a person under guardianship (not fully limited legal competency) is valid after six months following the termination or guardianship, with retroactive effect, if the spouse or any another person does not challenge the existence of marriage.

CASE 3.2. CROSS-BORDER CONCLUSION OF MARRIAGE

Background: as aforementioned, due to the differences among the many legal systems, a hypothetical cross-border civil right to marry can be difficult. But in the other hand, this cross-border civil right can

produce the practice of matrimonial tourism in order to elude the requirements of the Law of a Member State applicable to its nationals or residents. This fact is particularly visible in the cases of marriage of persons of the same sex. In this context, it is very important to know the conflict of law rules concerning the conclusion of marriage by the authorities of your Member State.

3.2.1. Explanation and indication of leading/model cases concerning the conclusion of marriage to foreigners in your Member State.

-*Model Case 1:* Marriage between a national of your Member State and national of other Member State.

-*Model Case 2:* Marriage between spouses of a Member State other than your Member State

Concluding marriage for the Hungarian spouse is simple: the Hungarian party must prove his/her citizenship and the marriage can take place. If one or both parties have a citizenship different than Hungarian, he/she must bring a certificate from the foreign authority issued by the authorities in the country of his/her citizenship that he may conclude a marriage (has the capacity to marry) and must also prove his/her family status. On the other hand, in a highly problematic way, Hungarian authorities do not provide Hungarians with such status certificates, since they cannot prove the Hungarian person did not married abroad. Consequently, they only issue a statement that the person is not married in Hungary.

3.2.2. Can the Consular Officers from your Member State conclude marriage? If so, which are the requirements?

-*Model Case*: the Consular Officer of your Member State concludes a marriage in other Member State.

No, officers of consulates do not have such rights, they may not (cannot) conclude marriages. Only the process of recognition of foreign marriage can be started at the consulate.

3.2.3. Has your Member State adopted some legal measures to prevent the conclusion of marriage by its authorities when this one can be considered matrimonial tourism? If so, are they applied by Consular Officers too?

-Model Case: marriage of spouses of same sex and the origin country of one of them does not admit marriage of the same sex.

The Criminal Code says in Section 355 on abuse of family ties that „any person over the age of eighteen years who enters into a family relationship for financial gain for the sole purpose of obtaining a document verifying the right of residence, or consents to a statement of paternity of full effect is guilty

of a misdemeanor punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offense".

However, no specific obligation exists which would force authorities to check the background of marriages, and they may not check the motivation of parties. In case of a suspicious marriage, the Office of Nationality and Immigration checks the background of marriage by asking the persons involved.

CASE 3.3. RECOGNITION OF MARRIAGES CONCLUDED ABROAD

Background: in the previous case, we could analyze the balance between a cross-border civil right to marry and prevention of matrimonial tourism (abuse of this right) from the point of view of the authorities of marriage conclusion. But, obviously, if the marriage is finally concluded, other States can refuse the recognition of that marriage balancing this civil right to marry and the prevention of matrimonial tourism or even its public policy.

3.3.1. Conditions of the recognition in your Member State of marriages concluded by authorities of other Member States or by religious form:

-*Model Case*: marriage between a national of your Member State and a foreign spouse, concluded by the authorities of other Member State or by religious form within the territory of other Member State.

The recognition (or, to be more precise, registration) of such marriages can either take place at the Hungarian consulate in a foreign country or in Hungary. In both cases, several documents must get submitted (birth certificate with approved translation, the foreign documents certifying the marriage (must include the mother's maiden name), a document certifying that the spouse had the right to marry with the person concerned, copy of personal ID or passport, certification of the residence of the person concerned (official translations needed). Family status must also be certified by a public document. Regarding all the public documents issued by the foreign authority the general rules of public documents must get applied.

3.3.2. Cases of public policy which imply the refusal of recognition of marriages.

-*Model Case:* a polygamous marriage concluded abroad between a third country national and a EU citizen.

Polygamy would possibly hurt Hungarian public order and as such, the recognition of such marriages would be refused. Regarding Hungarian citizens and those residing in Hungary polygamy is even penalized by the Criminal code. Section 214 says that „any person who enters into a new marriage while engaged in a previous marriage, or who enters into marriage with a married person is guilty of a felony

punishable by imprisonment not exceeding three years". Consequently, avoiding polygamy is a notion of public policy in Hungarian law.

A very similar situation would occur regarding forced marriages. Even though we do not have case law yet, we could presume recognition of such marriages would also hurt public policy.

CASE 3.4. ACQUISTION OF NATIONALITY OF THE SPOUSE

Background: Marriage is one of the life event that has legal consequences in relation with acquisition of the nationality of a Member State and, by this way, the acquisition of the EU Citizenship. Explanation and indication of leading/model cases concerning the acquisition of nationality of Member State by marriage:

3.4.1. Which are the general requirements for acquisition of nationality of the spouse?

-*Model Case*: a foreigner is married to a national of your Member State.

Marriage in itself does not result into receiving citizenship automatically by the spouse. However, according to Section 4 (2) a) of Act LV of 1993 on citizenship, after three years of marriage the non-Hungarian citizen spouse may ask for a citizenship under preferential terms. The conditions to reach this are the following: (i) the person has been lawfully married to a Hungarian citizen for at least three years (must be married at the time of application as well), or such a marriage was terminated by the death of his or spouse, (ii) the person had been resided continuously over at least three years prior to the submission of the application in Hungary or the person's minor child is a Hungarian citizen, (iii) the applicant does not have a criminal record according to Hungarian law and no criminal proceedings are in progress against him or her before a Hungarian court, (iv) the applicant's livelihood and residence are assured in Hungary, (v) receiving the citizenship does not harm the interests of Hungary, (vi) the applicant provides proof that he/she passed the examination regarding basic constitutional issues (in Hungarian) or provides proof that he/she is exempted from the examination.

There is another option, in case (i) the spouse has been married for over ten years with a Hungarian citizen (Hungarian spouse must be a citizen at the time of application), or married since 5 years and have common child/children (the necessity of Hungarian residence is not mentioned in the law) (ii) can prove his/her language knowledge (iii) has no criminal record (same as above) (iv) receiving of the citizenship does not hurt the interests of Hungary.

3.4.2. If your national legislation requires a period of residence of the spouse, shall the residence meet some specific requirements?

-*Model Case 1:* a third national country person who is not legal resident has been married to a national of your Member State for the required period and he has illegally resided in your Member State for one year.

-*Model Case 2:* a foreigner has been married to a national of your Member State for the legal period and he has resided in your Member State for the legal period, but, at the moment of the application, he

is residing in other State.

Residence must be legal, otherwise no special rule exists.

3.4.3. Does the national legislation contain provisions in cases of separation or divorce of the spouses?

-*Model Case*: a foreigner has habitual residence in your Member State for the legal required period, which is ongoing and immediately prior to the application. He has been married to a national for more of required period, but at the moment of the application, they are legally separated.

The law does not talk expressis verbis about separation or divorce. Divorce itself does not have an effect on citizenship received earlier. If they are separated at the time of application, the person cannot apply for a citizenship in the preferential procedures as explained above.

CASE 3.5. SPOUSE REUNIFICATION

Background: although Council Directive 2003/86/EC of 22 September 2003, in relation with third countries national-sponsors and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, in relation with EU citizens sponsors, some aspects of family reunification have not harmonized or can be regulated by the Member States of different ways [see for more details Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification (COM/2008/0610 final) and Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members (COM/2009/0313 final)].*

3.5.1. Can the spouse be reunified under Council Directive 2003/86/EC and Directive 2004/38/EC although the marriage is not recognized in your Member State? If necessary, distinguish between the particular case of polygamous marriage (which is harmonized in relation with Directive 2003/86 but not in relation with Directive 2004/38/EC) and other cases without any harmonization (for instance, persons of the same sex, "forced marriage"…).

-*Model Case*: application for reunification of spouse, although the marriage cannot be recognized in your Member State

[*] Take into account that this question is formulated in a different style and short answers are appropriate due to the wide harmonization of the EU Law.

A Hungarian person cannot conclude polygamous marriage legally (it is a crime, even if committed abroad). This means that in this case e.g. the second wife may not unite with her Hungarian spouse.

Otherwise, Section 19 (6) of Act II. of 2007 on the entry and right of residence of third-country nationals says that the spouse in a polygamous marriage may not ask for a re-unification if another spouse already received permission to stay in the country.

Same sex marriages are not recognised as marriages in Hungary. On the other hand, there is a chance such would be recognised as registered partnerships and family unification would be available for them.

The recognition of forced marriages depends on the general rules: in case of a Hungarian citizen and a foreign citizen, as a general rule, a marriage is deemed to be valid if it is valid according to the (personal) laws (in most of the cases, the law of citizenship) of both parties (ie. according to Hungarian and the foreign law as well). According to Hungarian law, a forced marriage is not valid, since the parties' consent is missing. Even though it is not expressis verbis mentioned in the text, there is a high chance in case of forced marriages the court would use the same approach if both spouses were third country nationals as well. There were a few cases in which refugees asked for refugee status partly because they were fleeing of forced marriage.

3.5.2. In accordance with Article 16 Council Directive 2003/86/EC about family reunification, has your Member State adopted some provision for refusal entry and residence of the spouse regarding that marriage does not live in a real marital relationship?

-*Model case*: a third country national legally resides in your Member State and applies for the reunification of his foreign spouse, but authorities observe that they do not live in a real marital relationship.

Even though marriage usually leads to the formation of a new household, this is not a founding element of marriage in Hungary. Post-marital residence is common, but the marriage is valid without it.

Regarding the spouse of an EEA citizens no special rules exist (neither for the entry, nor for a longer stay). Regarding the spouse of a Hungarian citizen the law (on ***Act I of 2007*** on the entry and residence of persons with the right of free movement and residence) does not contain any provisions which would prohibit the married spouse to enter the country. On the other hand, for a long term residence of the spouse of a Hungarian citizen, the marriage has to be concluded at least two years before the application and their cohabitation must be continuously ongoing since then until the time of application (Section 16 2) b).

Regarding the spouse of a third country national couple (Act II of 2007 on the Entry and Stay of Third-Country Nationals) no special rule exists.

3.5.3. In accordance with Article 15 Council Directive 2003/86/EC about family reunification, has your Member State limit the granting of autonomous residence permit to the spouse in cases of breakdown of the family relationship (widowhood, divorce or separation)?

-*Model Case:* a third country national legally resides in your Member State and is died, after two years

of residence with his foreign spouse.

According to Section 19 (7) of Act II of 2007, in case the family member did not receive permission to stay otherwise, s/he may continue to reside in two cases. Firstly, s/he may stay in the country if five years have passed after s/he first received permission to family unification (this rule is line with Section 25 of Directive 2003/86/EC). In the second case, s/he may stay after the death of the husband or wife, if the conditions of residence are otherwise available.

According to Section 33, to be eligible for a permanent stay, the person must prove that s/he has enough financial capacity to stay, has social insurance and is able to pay it, and no special cause exists which would make him/her otherwise prohibited to stay. In sum, this means that in this second case there are no special rules for such persons.

3.5.4. In accordance with Article 4.5 Council Directive 2003/86/EC about family reunification of third countries nationals, has your Member State required the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her, in order to ensure better integration and to prevent forced marriages?

-*Model Case:* a third country national legally resides in your Member State apply for the reunification of his foreign spouse. Both of them are 18 years old.

Expressis verbis no such rule exists. We can ascertain that the marriage of a minor would not be recognized in the country, since it seriously violates public policy.

3.5.5. In accordance with Article 4.3 Council Directive 2003/86/EC, has your Member State decide that registered partners are to be treated equally as spouses with respect to family reunification?

-*Model Case*: a third country national resident in your Member State applies for the reunification of is registered partner

The regulations on registered partners are slightly problematic. Registered partners are not mentioned among members of the family, and as such, in theory, could not receive the same status as spouses in a marriage in the law on immigration. Section 2d of Act II of 2007 only mentions the following family members: (i) wife/husband (heterosexual marriage, because of public policy reasons), (ii) their joint child or children (may be adopted children as well) (iii) supported minor child or children (including adopted children or children who were placed at him/her by the guardianship authority) in case parental responsibility exists, (iv) the minor child or children of his/her spouse maintained by the spouse.

However, registered partners receive the same protection as they would live in marriage. The reason for this is that the law on registered partnerships (Section 3 of Act XXIX of 2009. on registered partnerships) says that the rules of marriage can be used for registered partnerships unless the law makes a difference between these two forms. The commentary of the law especially mentions the rules on immigration as one of those areas in which they receive the same treatment as marriages.

This means that persons living in registered partnerships may unite their families. However, the fact that registered partnerships of third-country nationals are not mentioned in the text of the law on immigration itself is problematic, especially, because registered partners are expressis verbis mentioned as family members by another law if they belong to Hungarian/EEA citizens (Act I of 2007).

Finally, unregistered partnerships are not recognised as family relationships in the law on the residence of third country nationals (Act II of 2007), but regarding Hungarian/EEA citizens they could be interpreted as "quasi family members".

3.5.6. In accordance with Article 26 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members, does your Member State carry out checks on compliance with carry their registration certificate or residence card?

-*Model Case*: the residence card of a spouse of the EU citizens is required by the police.

The authorities (including police) may ask for the documents serving as basis of residence, such as visas, passports, residence permits, residence cards in order to check the identity of the person. Moreover, the immigration office may check the habitual residence of the persons to prove whether they are in a family relationship, and may also ask the parties to attend interviews about their relationship.

The existence of family relationship can be proved in various ways by the applicant (there is no obligatory form for such actions). Showing birth or marriage certificate is preferred, documents on adoption are also accepted. The question whether a DNA test conducted outside Hungary can be accepted or the test must be taken again in Hungary are delegated to the Hungarian Institute for Forensic Sciences (if conducted again in Hungary, all related costs must be paid by the applicant).

CASE 3.6. MARRIAGE OF CONVENIENCE

Background: EU has adopted complementary texts in relation with the marriage of convenience. See, mainly: Resolution of the Council of 4 December 1997 (OJ C 382, 16 December 1997) on marriage of convenience; Communication of the Commission to the European Parliament and to the Council [COM(2014) 604 final] and a Commission Staff Working Document as handbook about marriage of convenience [SWD(2014) 284 final]. EU is concerned in order to prevent "marriage of convenience" for acquisition of nationality or for family reunification.

3.6.1. Does the law of your Member State forbid "marriage of convenience"? If so, which are the concept and effects of this kind of marriage?

-*Model Case:* a third country national marries to a national from your Member State in order to obtain residence permit or even nationality.

Marriage of convenience as such is not defined by the civil law of Hungary. This means that such marriages are deemed to be valid. Authorities may not check the background notions of the parties involved.

On the other hand, according to Section 14 2) of Act I of 2007, the permission of the third country national to stay in the country expires in case the family relationship was created for the acquisition of residence permit.

Furthermore, concluding such marriages is even criminalised in Hungary, but only from the side of Hungarian citizens. Section 355 of the Criminal code (Act C. of 2012) says that any person over the age of eighteen years who enters into a family relationship for financial gain (this is the case in most of the cases if the Hungarian spouse enters into such a marriage) for the sole purpose of obtaining a document verifying the right of residence is guilty of a misdemeanour punishable by imprisonment not exceeding two years.

The acquisition of citizenship (eg. after three years of marriage) is also excluded. Even though it is not mentioned separately in the criminal code, such a stay would be considered illegal based on the rules on residence if it was based on a marriage of convenience. Since acquiring citizenship presupposes legal residence in the country, citizenship could be revoked (can be done in ten years after acquiring it).

3.6.2. How do the authorities of your Member State control if the marriage before them is of convenience? (See also question 4.3.2.)

-*Model Case:* see previous case and assess if, for instance, the authorities of your State can/shall interview the spouses.

No concrete tool (apart of a standard questionnaire) is mentioned by the law to control marriages, and no concrete legal framework exists to prove whether a marriage is of convenience. Moreover, no previous special process (apart of general actions as written below) is obligatory to use for authorities who conduct marriages, and no statistics are kept on marriages of convenience. The reason for this could be that the usage of fake documents are more common regarding the relationships of third country nationals and seems to be a bigger problem in Hungary. Some registrars concluding marriages signal problems to the Office of Immigration and Nationality.

As mentioned before, immigration authorities have the right to visit the habitual residence of the parties as well as to ask them questions on their relationship (this is also done if they ask for visas). During interviews in several cases the spouses seem not to know each other and full proof can be gained on the

lack of their relationship. In practice this means that the authorities ask the same questions of the parties separately and check their convergence. Their family members may also be asked.

In a number of cases a detailed core assessment is made with all the relevant information surrounding the couple. In this case, authorities visit the residence of the couple to prove whether they live together or not.

3.6.3. What happens with the control of the convenience when the marriage is concluded before a foreign authority but it provokes effects in your Member State?

-*Model Case:* a national from your Member State and a third country national marry abroad in order to obtain residence permit in your Member State or even nationality. The marriage wishes the recognition of this foreign act by the authorities of your Member State.

No special proofs exists for such cases, apart from the above mentioned ones.

3.6.4. Which are the main proofs and presumptions concerning convenience and are they in accordance with EU recommendations?

-*Model Case:* the authorities of your Member State observe that marriage formed by a national of your Member State and a foreigner ignore basic personal and family data of each other, although previous relations in presence or by mail, post mail, telephone, internet are proven.

The most important proof is that the parties do not know each other at all. The most typical solution for such marriages in Hungary is to meet and chat with a foreign person through the internet, typically on a website like Badoo. In other cases, the Hungarian party travels to the foreign country for holiday and meet at the hotel with the third country national (typically to North-African countries like Tunesia or Egypt) to meet the person, and in a number of cases they also marry there, while in other cases they marry in the nearby Austria or in Hungary. Based on the number of marriages, a report suggests that there is organizational background behind these journeys.[613] Other circumstances could also be important, like the lack of mutually spoken language, differences in age, poor financial situation and/or no proper education of the third country national, or the lack of prior travel references of the Hungarian party.

613 Http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/family-reunification/hu_20120606_familyreunification_en_version_final_en.pdf

In several cases Serbian authorities received information of Hungarians stemming from the same small Hungarian city/village conducting marriages in high number. After proving the parties do not know each other deeply enough, the marriage of convenience nature of such relationships could be proven.

It is important to highlight that immigration officers do not have the right to check emails or non-public facebook accounts of the parties.

4. LIFE EVENTS AND REGISTRY OFFICES

CASE 4.1: CIVIL REGISTRATION SYSTEMS

Background: The different registration models existing in Europe are based in event-based systems, in person-based systems or population register. An event based registration system records all relevant changes to the civil status of a person occurring in the respective country at the place, where the event occurred. A person-based registration system records all relevant changes to the civil status of a person occurring in the respective country at a central place. Population registers are based on an inventory of the inhabitants and their characteristics such as for example sex and the facts of birth, death and marriage, and the continuous updating of this information. Each one of them poses different difficulties. For example, the event-based systems promote the register tourism and can generate problems for accessing the Registry Offices of other States (for instance, the Registry of their nationality). The person-based systems allow a single record of the person but always requires a recognition of civil status acts created in other States.

4.1.1. What kind of registration system exists in your country?

-*Model Case:* While on vacation in France, a child of a Spanish citizen couple is born in that country. The child's birth was recorded in a French Registry Office. Later, the birth has to be recorded also in the Spanish Registry Office.

The Hungarian system mixes event based and person based solutions. Firstly, regarding domestic matters, according to Section 7 of Act I of 2010 on registry procedure, Hungarian authorities register the births, marriages, deaths and registered partnerships in Hungary.

Moreover, according to Section 10, Hungarian registry authority registers (i) the birth, marriage, registered partnership or death of a Hungarian citizen abroad, (ii) the birth of a foreign citizen person abroad if s/he was adopted by a Hungarian citizen, (iii) death of a Hungarian citizen, if his/her place of birth is outside Hungary or unknown, (iv) the death of a non-Hungarian citizen if Hungarian courts ruled about the death, (v) the birth, marriage, registered partnership of a stateless person residing or the death of a stateless person resided in Hungary.

Some other actions like the adoption conducted abroad must also get registered, see Section 39 of Ministry of Justice (KIM) Decree 37 of 2014.

4.1.2. Have fundamental rights any consequence on the content of the civil registration?

-*Model Case:* The parenthood of an adopted child is recorded in a Registry Office. The question is whether there should be or should not be included in the Registry Office that the parentage derived from an adoption.

In such cases, the adoption is signed in the registry. In Hungary, same-sex marriages are not allowed, and there is no human rights framework in the law system on adoptions by same-sex couples. Registered partners may not adopt children jointly.

In closed adoption processes, the name and data of biological parents are not signed in the registry, but the child may receive information of them unless it is not against his/her interest (in case of minors, the Guardianship Authority and the persons having parental responsibility must also support the child's demand).

CASE 4.2: DOCUMENTS TO REGISTRY OFFICES

Background: The register of the acts performed in other States can be practiced on the basis of different documents (judgments, notarized documents, civil status certificates). The requirements for the effectiveness of the documents depend on the document in question and also of the State of which come from. It becomes important the control of equivalence between the authorities involved in the State of origin and the role of the authorities of the requested State. In the case of foreign judgments, it may be necessary to go prior to a procedure of the exequatur. It must be established the requirements of documents to access to the registry of each State.

4.2.1. Civil status certificates of foreign Registry Offices

-*Model Case:* A marriage between a Spanish citizen and an Italian citizen is celebrated and recorded in an Italian Registry Office. The couple provides the certificate of the Italian civil register to apply for register in the Spanish Registry Office.

In Hungarian law, the validity of foreign actions like marriage must be supported by document(s) issued by the foreign authority. According to Section 14 (3) of Act I of 2010 on registries, if the document was issued by a foreign authority outside Hungary, in general, diplomatic legalization of the document is necessary by Hungarian consulates (or by the Chamber of Public Notaries in Hungary). Moreover, in case the documents were written in a language other than Hungarian, official translation is also required. Legalization is not required if an international agreements exist with the country (eg. apostille can be used), or regarding certain documents issued by the consulates of the foreign country in Hungary.

The scope of authority of the issuers of the document are generally not examined by Hungarian authorities: it is a foreign law related question which is not checked by them. In case Hungarian authorities receive a foreign document, in most of the cases they only check whether the rules on legalization or apostille are met.

4.2.2. Foreign notarized documents

-*Model Case:* A marriage applies for the record of the matrimonial agreement in the Registry Office. The agreement is included in a public document provided by a German Notary.

Generally, in such cases, the following steps are followed:

- In general, diplomatic legalization by the Hungarian is necessary.
- However, if the country is a member of the 1961 Hague apostille agreement, apostille can be used on the documents.
- Finally, if correlation exists with the related country (ie. Hungarian judgments/public documents are recognised without apostille or legalization), Hungarian authorities also accept such documents without any special procedure (of course, translation is necessary). According to Section 27 of Act CXL of 2004 on the general rules of administrative proceeding, the existence of such relations is presumed regarding countries belonging to the EEA.

Hungary does not have any bilateral agreements with Germany on legal aid in such matters. On the other hand, the German system on public notaries is very similar to the Hungarian one. As a result, the documents issued by them are not questioned and would be accepted without legalisation.

In case of the USA, the situation would be basically different. There, the authority and system of public notaries is different state-by-state, and this difference could cause problems. The solution in that case is the usage of apostilles for such documents.

There are also some issues, which could make the recognition of a marriage problematic. According to Section 23 (3) of Act I of 2010, marriages can be concluded at the Consulate of the foreign country in Hungary, in case neither of the parties holds Hungarian citizenship. In case eg. a Hungarian-Polish national holding double citizenship and a Polish national conclude marriage in Hungary at the Consulate of Poland, the marriage will be valid according to Polish law, but invalid according to Hungarian law. According to Hungarian law, such marriages cannot be concluded in Hungary, only in front of domestic authorities.

4.2.3. Foreign judgments

-*Model Case:* A judgment issued in France establishes that a Spanish citizen is the biological father of a child. The father provides this judgment to the Spanish Registry Office to register the fatherhood in the birth record of the child.

The basic rules on recognition and enforcement of judgments can be found in the Code of private international law (Law decree 13 of 1979), According to them (Section 70-74 of the Code), the decision of a foreign court or another foreign authority shall be recognized, if it pertains to a matter in which the Hungarian court has no jurisdiction. Consequently, if Hungarian courts have exclusive jurisdiction, the judgment cannot be recognized.

There are also other circumstances which must be fulfilled: (i) the decision is construed as definitive by the law of the state in which it was made, (ii) there is reciprocity between Hungary and the state of the court or authority in question: ie. the foreign country would also accept (recognize and enforce) a Hungarian judgment in its territory, and (iii) neither of the grounds for denial prevail (see below).

An official foreign decision shall not be recognized, if (i) doing so would violate public order in Hungary; (ii) the party against whom the decision was made did not attend the proceeding either in person or by proxy because the subpoena, statement of claim, or other document on the basis of which the proceeding was initiated was not served at his domicile or residence properly or in a timely fashion in order to allow adequate time to prepare his defense, or (iii) the findings of the procedure were based on processes that seriously violate the basic principles of Hungarian law (like basic rules on human rights), (iv) the prerequisites for litigation for the same right from the same factual basis between the same parties in front of a Hungarian court or another Hungarian authority have already took place before the foreign proceeding, or (v) a Hungarian court or another Hungarian authority has already resolved a case by definitive decision concerning the same right from the same factual basis between the same parties.

No special procedure is necessary for recognition of an official foreign decision, but the parties have the right to ask for a decision on recognition by the courts. Of course, translation of the judgment is necessary.

CASE 4.3: CONTROL OF EQUIVALENCE BETWEEN EU REGISTRY OFFICES

Background: According some European laws, the registrar has to control the legality of the act before recording it in the Registry. This control is made according to family law and international private law rules in force in each State. These rules differ significantly among the States. The registrar has also to refuse the entry if the act violates the public policy. Due to the fact that this control could be an obstacle to the free movement of persons, the scope of this control of legality might be affect by the mutual recognition principle.

4.3.1. Are registrars compelled to do a control of legality of the civil act?

-*Model Case:* The parenthood of a child, born by a surrogacy arrangement, is established by a foreign judgment. The intending parents provide this judgment to the register officer in order to register the filiation of the child. Accordance with the law, the officer of the register may refuse to register if he is obliged to control the on the ground of public policy.

There is a high chance the authorities and courts would use the public policy argument and not recognize such a judgment. There are some ongoing court cases, in which the Ukrainian consulate of Hungary noticed such agreements were concluded and did not recognize the biological mother of the child as mother. That was conform with the letter of Hungarian law, but contrary to Ukrainian and Strasbourg law and also violated the content of public documents produced in Ukraine. The final court judgment in these cases is not yet adopted.

4.3.2. How do registrars control the marriages of convenience? (see also question 3.6.2.)

-*Model Case:* Before the registration of a marriage between a Spanish citizen and an Ecuadorian citizen, the register officer refuses to record it on the grounds that it is a marriage of convenience.

Under Hungarian law, such marriages are valid: even if in certain cases they have criminal law consequences (like in case the Hungarian person wants to support the stay of a foreign person in Hungary for financial benefits), they have similar effects as any their marriages, and must be registered as well.

It is a different question that the registering authority may ask the Immigration Office to check the background of the parties.

4.3.3. How do registrars control the filiations of complacency?

-*Model Case:* After the acknowledgement of fatherhood of a child, the registrar rejects the registration on the grounds that it is a recognition of filiation by complacency

According to the Civil Code (Section 4:101) "if the mother was not married between the beginning of the time of conception and the date when the child was born, and did not participate in a reproduction procedure invoking the presumption of paternity, or if the presumption of paternity was rebutted, the man who admitted in a fully enforceable acknowledgement of paternity that he is the father of the child shall be considered the father of that child". This means that the acknowledgement (statement) is a full proof in itself.

Such a statement can be made if someone else is not recognized as the father of the child and if at least 16 years of difference exists between the age of the child and the prospective father. The approval of the mother is also necessary. The statement can be challenged at the court if the father was not in connection with the mother in the related time, or if the statement was based on failure, misrepresentation or duress (Section 4:107 of the Civil Code). The presumption of paternity may only be challenged by the presumed father, the mother, the child, or by the child's descendants after his/her death.

Section 35-38 of the related Ministry of Justice decree [(32/2014. (V. 19.) KIM decree)] contains general provisions on the statement of fatherhood. The authorities only try to prove whether the father of the child was not someone else's, based on the general rules (like, eg. in case the mother was married to someone else in the time of birth).

CASE 4.4: CROSS-BORDER COOPERATION BETWEEN REGISTRY OFFICES

Background: The different registration systems among States and the lack of harmonization of the registry law cause different obstacles to the free movement of persons. Particularly important, in order to guarantee the right to the unique identity, is the ability to communicate the data of the civil status that may affect the nationals of other States. It is also important to facilitate the performance the events that affects the civil status in other States. However, there could be problems due to the requirement in a State of the event of documents that were unknown to the State of the register.

4.4.1. Are there any specific instruments in your country for cross-border cooperation among Registry Offices?

-*Model Case:* A national of a State seeks to celebrate their marriage in another State (State B), whose authorities requested a certificate of no impediment marriage. Requested the certificate, the registrar of Registry Office of State A refuse to give that document because such a document is unknown in its law.

Hungary has some international, bilateral agreements concluded with certain states. These are the following: Albania, Algeria, Bulgaria**,** Cypress, Check Republic and Slovakia (concluded as Czechoslovakia), Egypt, Finland, France, Greece, Iraq, Yugoslavia, China, Korea, Cuba, Poland, Mongolia, Italy, Austria, Romania, Syria, former Soviet Union, Turkey, Tunisia, Ukraine, Vietnam and Moldova.

According to some of the agreements, certain data (the data on civil status) is automatically transmitted to other authorities.

4.4.2. Is there any mean for the communication of registry data when they may affect the nationals of other States?

-*Model Case:* A French national got marriage in Spain. The marriage is registered at the Spanish civil register but not in France. To return to France, the French national wants to marry before a French authority. It raises the question of proof of the capacity of the spouse.

Yes, Hungarian authorities transfer data registered in Hungary in the above mentioned cases automatically. Regarding other cases, according to Section 27 of Act CXL of 2004 on the general rules of administrative proceedings, the registry offices may communicate with each other, if necessary. Moreover, if the foreign authority is unknown to Hungarian authorities, the Foreign Minister must be addressed.

4.4.3. In the issuance of civil status certificates, are language requirements or other formal conditions of other States considered?

-*Model Case:* It is requested a birth certificate of a French national who is register in the Spanish Civil Registry. The certificate is requested to provide it to a French authority. Is it possible that the certificate be issued in French?

No, all the documents in Hungary are issued in Hungarian language by the Hungarian authorities.

CASE 4.5: EVIDENTIARY VALUE OF CIVIL STATUS CERTIFICATES

Background: The diversity among the national registries affects the value of the certificates issued and in its evidentiary value in other States. Moreover, this evidentiary value is affected by the different rules of evidence established in the States. There could be also differences depending on the type of authority (judicial or administrative) which the certificate is provided to.

4.5.1. What evidentiary value has in your country the certificate of a foreign Registry?

-*Model Case:* A citizen brings a birth certificate to prove their age. The Registry Office of the State of origin based their records solely on the strength of a declaration made by the person concerned thereby, without additional control of legality by the registrar. This certificate is provided in a judicial procedure before a Spanish court.

Generally, public documents are accepted as full proof of data they contain in case the other formal requirements are fulfilled [see Section 195 (8) of Act III of 1952 on civil procedure, which says that foreign public documents must be handled the same as those issued in Hungarian]. This means that until the opposite is proven, they are accepted as valid documents with full proof.

4.5.2. Do you have the foreign registration certificate the same evidentiary value in the judicial sphere that at the administrative level?

-*Model Case:* It is provided before an administrative authority a certificate of marriage to apply for a visa for family reunification.

Yes, both levels are the same. Regarding immigration, family relationship can be proven numerous ways (see above). If acquiring proper documents would cause difficulties (eg. the person stems from a war zone), the existence of public documents maybe replaced by the statement of the person involved on their content.

4.5.3. In what cases it may be rejected the evidentiary value of the foreign certificate?

-*Model Case:* It is provided a certificate of a marriage, issued by a foreign registry, without translating nor legalize. In addition, there are contradictory data in the registry of origin.

The validity of a foreign document is presumed. In case concerns are raised, the Office of Immigration and Nationality has an expert group which gives advices on the validity of the document. However, the final decision on the document must be made by the proceeding authority.

4.THE NETHERLANDS

UTRECHT UNIVERSITY

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Introduction

The concept of EU citizenship was for the first time introduced in the Maastricht Treaty of 1992, granting all citizens of EU Member States a secondary citizenship status at supranational level.[614] In the case of *Grzelczyk* in 2001, the CJEU stated that EU citizenship is destined to be the fundamental status of each EU citizen.[615] EU citizenship grants nationals of EU Member States the right to move and reside freely in another Member State and, more generally, the right to be treated like nationals in the host State. Under certain circumstances, their family members can travel with them to another Member State. This derived right for family members is regulated under Directive 2004/38/EC. Empirical evidence shows that about 12 million EU citizens work, live or study in a EU Member State other than their country of origin. As things stand, EU citizens crossing borders are confronted with many obstacles when exercising their free movement rights in the host State. One reason for these obstacles is that EU mobile citizens need to present public records to the authorities of the host State in order to provide the proof needed to benefit from a right or to comply with an obligation. Although citizens need to prove their civil status every day, getting official documents recognized in another EU Member State still remains a stumbling block for the majority of citizens that cross borders in the EU.[616]

The diversity of private law rules in Member States with regard to life-events affects the daily lives of EU citizens significantly.[617] In cases involving cross border dimensions, international private law rules come into play. As things stand, conflict of law rules differ increasingly per state and the legal relationships of EU citizens and their civil status recognition are in most cases subject to different national rules. In addition, Member States apply a different regime with regard to the recognition of foreign documents. Consequently, documents that are relevant to civil status matters of EU citizens may have different effects in different Member States.[618] These legal uncertainties may in the end restrict the free movement of persons, a consequence that runs counter to a European legal framework that regards EU citizenship as the fundamental status of EU citizens. Up until this point, there is no common European legal instrument that meets up to these concerns; the European Commission has so far only launched

[614] D. Kochenov and R. Plender," EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text", *European Law Review* 37 (2012), pp. 369-370.

[615] CJEU Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

[616] Commission Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records /* COM/2010/0747 final */

[617] The Commission proposed a Green Paper with the title "Less bureaucracy for citizens" for the purpose of launching a discussion on promoting free movement of public documents and recognition of the effects of civil status records in the European Union". Moreover, it proposed in this field two other proposals: a 'Legislative proposal on mutual recognition of the effects of certain civil status documents (e.g. relating to birth, filiation, adoption, name)' and a 'Legislative proposal for dispensing with the formalities for the legalisation of documents between the Member States'. These initiatives have been welcomed by the European Parliament.

[618] Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM(2010) 747 final of 14 December 2010.

proposals in matters relating to freedom of movement of public documents and recognition of the effects of civil status records.[619]

The objective of this report is to give an overview of the regulation of life-events of EU citizens in the Netherlands in the context of Dutch family law and Dutch international private law rules.[620] In this report, life events refer to events that change an individual's status or circumstance. The report draws on the following life-events in order to examine how the Netherlands deals with complications that are created by the lack of EU harmonization in this matter: filiation, forenames and surnames, marriage, accompanied by a final and transversal topic relating to the circulation and recognition of civil status documents. Hence, this report presents the main challenges in Dutch law regarding life events of EU citizens that cross borders in the EU. The report is structured in the following way: firstly, a paragraph will be devoted to the procedure of parentage in Dutch law. Questions that will be answered in this section are the following: what types of parentage exist in the Netherlands; which ways exist to ascertain parenthood in Dutch law? How is surrogacy arranged in the Netherlands? How are filiation and adoption arranged in Dutch law? Secondly, the report examines the procedures with regard to forenames and surnames in the Netherlands. How does gender equality play a role in this matter and which public policy exceptions exist in the recognition of foreign names? Thirdly, the report analyses Dutch rules with regard to marriage in order to examine how Dutch law regulates foreign marriages, polygamous marriages, marriages of convenience and same-sex marriages. Finally, the report will shed a light on Dutch procedures with regard to civil registration systems, documents to registry offices, cross-border cooperation between registry offices and evidentiary value of foreign civil status certificates.

CASE 1.1: TYPES OF PARENTAGE

Background: one of the most important differences among Member States' law is derived from the different conceptions on the parent-child relationships. EU Member States have different solutions as regards the attribution of custody rights based on the existence (or absence) of a marital relationship between the parents. There may be legal distinctions on the basis of the different criteria: depending on matrimonial or no matrimonial parentage; natural or adoptive children. The national laws could establish differences on the content of parental responsibility or on the children's rights concerning their parents as regards their rights of inheritance or maintenance. Other legal systems are based on the principle of equality between children and the prohibition of discrimination among children based on the child's or his or her parents' birth or other status. In such cases, it is possible to refuse the application of foreign law on the ground of public policy.

1.1.5. What types of parentage exist in your law?

-*Model Case*: a couple has a child born out of wedlock. After marriage, they have another child born in wedlock and they adopt a third child. Do these children deserve equal treatment?

Different forms of parentage exist in the Netherlands; including legal parents, social parents, foster

[619] See *supra note* 4.

[620] This report is written by Legal Research Master student Barbara Safradin, Utrecht University, LL.M. I want to personally thank Prof. Mr. Wendy Schrama for her contributions and valuable comments as well as Dr. Hanneke van Eijken and Prof. Dr. Sybe de Vries for their valuable comments during the written phase of this report.

parents, biological parents (begetters) and genetic parents (donors).[621] Legal parentage is established in the Netherlands when the law attaches legal filiation links to certain biological (e.g. birth), or legal (e.g. recognition) facts. Legal parentage is enshrined in – for example – Articles 1:198 and 1:199 DCC. The most common form of legal parentage in the Netherlands is when a man and a woman enter into marriage or registered partnership (as of 2014) and get a child together. In this case, it is presumed that both parents will be the legal as well as biological parents of the child.[622]

The Dutch legislator distinguishes between a biological parent and a begetter of a child. Biological parentage only envisages the existence of a genetic link between a parent and a child, which can also arise by means of a donor donating genetic materials. Begetting assumes that a child is conceived in a natural way. Dutch law attaches no family ties to the sole fact of biological parentage of a father. Consequently, no legal claims are possible either against or by a donor. However, in case someone is a begetter of the child, Article 1:207 DCC for instance provides for the determination of paternity of a man by the District Court. Social parentage on the other hand is a family tie based on the education and nurturing of a child by adults who are not its biological parents.[623]

Duo-parenting

In the Netherlands, same-sex couples are able to adopt children. In 2001 a bill[624] entered into force that made it possible for same-sex couples to adopt each other's children and unrelated Dutch children.[625] On 21 October 2008 a bill entered into force that made is easier for same-sex couples to jointly adopt children from abroad.[626] However, two men and two women that are married or have concluded a registered partnership will not directly be the legal parents of the child. By means of recognition, a man can be the legal parent of the child, but his partner is not able to be the legal parent. This is the case due to the fact that a child by Dutch law can only have two parents and in every situation needs to have one legal mother. In some cases partner adoption can take place by the male duo-partner, but in principle the mother cannot be forced to give up her child. In case two female duo partners get a child this problem does not exist. One partner gives birth to the child and will automatically become the legal parent of the child. A new law entered into force in 2014 as a result of which the second mother can become a legal mother by operation of law, if a number of conditions are met. Consequently, a co-mother can become the legal mother of the child without having to go through difficult court procedures. Her motherhood can automatically result from the child's birth or recognition. The Registry Office hereby completes the recognition. A court order can be issued for mothers who do not want to

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[621] A. Bunthof, Wetten en regels: Ouderschap en Gezag binnen familiebanden. *Maatwerk,* 5, (2007), pp. 33-34.

[622] Ibid.

[623] See W. Schrama, "Family function over family form in the law on parentage? The legal position of children born in informal relationships", *Utrecht Law Review* 2 (2008), pp. 83-98.

[624] Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht, Staatsblad 2001, 9.

[5] Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek (Adoptie door personen van hetzelfde geslacht), Staatsblad 2001, 10.

[626] Wet van 24 oktober 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptieprocedure en wijziging van de Wet opneming buitenlandse kinderen ter adoptie in verband met adoptie door echtgenoten van gelijk geslacht tezamen, Staatsblad 2008/425

be a mother on the basis of Article 1:207 DCC.[627]

Equal rights for children(?)

As things stand, the legal status of children is to a great extent determined by the status of the relationship between the parents of the child.[628] Children born in wedlock automatically stand in familial relationship with their parents. A child born out of wedlock automatically has family ties with his/her mother, i.e. the woman that has given birth to the child. The child born out of wedlock does not automatically have a familial relationship with his/her father. The familial relationship can arise if the child is recognized by the father (Article 1:199 under c DCC) or parentage has been established in court proceedings (Article 1:207 DCC).

Before 1998, a clear distinction existed in the Netherlands between children born out of wedlock and children born in wedlock.[629] The position of the child born out of wedlock differed from the child born in wedlock by means of – for example – inheritance rights. This distinction originated from the traditional thinking that monogamous marriages should be protected and adulterate weddings should be discouraged by means of disadvantaging the children born out of these relationships.[630] Before 1998, a child born out of wedlock had no civil relations with the father and legalisation was not possible. The father could only recognize the child since 1982. In addition, the child had no parent with authority since in the case of adultery, custody was taken away from the mother. However, since 1998 the difference between children born in wedlock and out of wedlock has been reduced. At present, their legal status has been equalized as much as possible.[631] Since 1998 the Dutch Civil Code makes a distinction between children that do stand and children that do not stand in a familial relationship with (both) parents. The child born out of wedlock always stands in a familial relationship to the mother, but does not automatically have a familial relationship with his/her father. This will only arise after recognition by the father or after the parentage has been established in court proceedings.

With regard to the (difference in) treatment of adopted children and biological children, I refer to questions 1.1.2. and 1.1.3 hereafter.

1.1.2. Does the type of parentage have consequences on its content?

-*Model Case*: caused the death of the deceased arises the distribution of the estate among his three sons, two of them are biological children and the third is an adopted child.

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[627] See *Wet Lesbisch Ouderschap (Act on Lesbian parenting),* entered into force on 1 April 2014. See also Rijksoverheid, available at https://www.rijksoverheid.nl/onderwerpen/ouderlijk-gezag/vraag-en-antwoord/hoe-krijg-ik-als-duomoeder-het-ouderschap-over-het-kind-van-mijn-partner.

[628] W. Schrama, "Is het Nederlandse afstammingsrecht in strijd met het gelijkheidsbeginsel?, Over kinderen en badwater," *RM Themis* 2007-3, pp. 86-94. See also ECtHR case13 juni 1979, ECHR, Series A no. 31 Marckx t. België, NJ 1980, 462 m.nt. EAAL.P. 13.

[629] P. Vlaardingerbroek, K. Blankman, A. Heide, A.P. van der Linden, E.C.C. Punselie, J.A.E. van Raak- Kruiper, *Het Hederdaagse personen- en familierecht,* Deventer: Kluwer 2008, p. 201.

[630] A. Bunthof, "Ouderschap en gezag binnen familiebanden" Springer, p. 220.

[631] C.Asser, *Personen en Familierecht,* Kluwer 2012, p. 571.

Book 1 on Dutch family law provides that adopted children are the legal children of their parents; consequently, there is no difference in other legal areas. The child will acquire within his/her adopted family the same active and passive position as the other legal children. The adopted child hence has the possibility to inherit from his new family. Pursuant to Article 4:10 paragraph 1(a) of the Dutch Civil Code (hereafter DCC), the child has the right to inherit the lawful part (*legitieme portie*). With this provision, the Dutch legislator envisages to treat different children, regardless of their age, equally as much as possible. However, by obtaining this position, the adopted child automatically looses the possibility to inherit from his/her biological parents.[632]

1.1.3. Is the equal treatment of children a principle of public policy in your country?

-*Model Case:* a deceased leaves two sons, one biological and one adopted. The law of the competent court for the succession states the equality between children. The law applicable to the succession only recognizes inheritance rights to the biological child.

The basis rule in case somebody dies with regard to the estate is Article 4:13 DCC which provides that the (non legally separated) spouse inherits the estate of the deceased. This provision specifically regulates the division of the estate after death over the spouse and children.[633] In addition, Article 4:10 DCC explicitly stipulates that the estate of the deceased is *only* applicable to persons with whom one has a familial relationship. Children that are adopted by means of full adoption[634] are fully equalized with the biological children of the adopter. As already explained in the answer to question 1.1.2, this right is based upon the idea that the Dutch legislator envisages to treat different children (whether adopted or biological) as equally as possible.

CASE 1.2: WAYS TO ASCERTAIN PARENTHOOD

Background: the differences between the European States' laws show different ways to ascertain the biological parenthood. The rules concerning when the competent State authorities will have jurisdiction to accept a voluntary acknowledgement of legal parentage vary considerably between States. There were problems with the acknowledgement natural children before different authorities at the State of the register. Some national laws could regard as a matter of public policy the practice of biological test (DNA analysis) to prove paternity, allowed in some States. It should also be assessed when it is possible to register parentage established in a certificate obtained of a foreign Registry Office.

1.2.1. What effect does the acknowledgement of natural children have before a foreign authority?

- *Model Case:* the birth record of a natural child only named a person as the mother in the Registry Office of State A. The child is acknowledged at a later date by the biological father. This acknowledgement is made before a notary of State B. The father provides this document to the

[632] A.P. van der Linden, "Rechtsgevolgen van adoptie", Sdu Uitgevers BV Den Haag (2006), p. 46.

[633] With regard to the estate of children article 4:13(3) stipulates the following: "each of the children shall acquire, as heir, by operation of law a financial debt-claim against the spouse of which the value corresponds with the value of this child's share in the deceased's estate. This debt-claim will become due and demandable (exigible)."

[634] See for definition of full (*sterke*) adoptions, Article 1:229(1) and par. (2) DCC.

Registry Office of A to register paternal parenthood.

Foreign birth certificates are not always recognized in the Netherlands. In order to be recognized, authorities in the state from which the document originates have the duty to show its authenticity, in most cases this is done by the Foreign Ministry of that particular state. Once this process has been completed, the document should also be legalized by a Dutch mission located in that state. Nevertheless, legalization of a document does not automatically lead to acceptance by Dutch authorities of that document as a proof. An authority will sometimes first try to verify the content of the document or it may also ask the applicant to produce other documents. In addition, the Registrar may have the legalized document verified in the country where it originated from by asking the authorities in that state whether the information in their register confirms the information in the document.[635] Moreover, pursuant to Article 1:20b (1) DCC, a foreign certificate or foreign court order might not be recognized if it conflicts with Dutch public order.[636]

1.2.2. How is the biological test of fatherhood regulated in your law?

- *Model Case:* the alleged father refuses to practice a DNA test to prove the paternity of a child. The State where the test shall be performed allows the coercive practice of the test. Nevertheless, the court where the fatherhood procedure was raised rejects this practice on the ground of public policy.

In Dutch law, two categories of fatherhoods can be distinguished: biological fathers and non-biological fathers. Dutch parentage law recognizes two types of the latter category: biological fathers who have begotten their child in a natural way (i.e. begetters) and biological fathers who have *not* begotten their child in a natural way (i.e. sperm donors). This distinction is important in situations when a biological father wants to become the legal parent of the child, if this does not happen *ex lege.*[637] If the biological father wants to become the legal father, he is required to recognize the child after its birth with the birth mother's consent. In this specific situation, the birth mother and the biological father will be the child's legal parents.[638]

Pursuant to Article 1:199 DCC, the legal father of a child is the man:

- who is married to the mother of the child at the time of its birth, or who has died less than 306 days before the birth of the child (i.e. the presumed paternity of the husband of the child's mother);
- who has recognized the child;
- whose parentage has been established in court proceedings;
- who has adopted the child.

[635] See Rijksoverheid on legalising foreign documents, available at https://www.government.nl/topics/legalising-documents/contents/legalising-foreign-documents.

[636] Note that this question – concerning the recognition of foreign certificates issued by civil registry offices – is also answered in section 4.5.

[637] I. Curry-Sumner and M.J. Vonk, "It all depends on who you ask: Dutch parentage and adoption law in four facts", *The International Survey of Family Law* 2009 , p. 340.

[638] Ibid., p. 335.

Different from the establishment of the mother-child relationship, the establishment of the father-child relationship in Dutch law is primarily based on a number of legal presumptions instead of the biological reality. This is a consequence of the fact that paternity is not as easily discernible by the fact of birth as is the case with maternity.[639] The presumption of fatherhood that exists within marriage does not apply to opposite-sex registered partnerships or those that have entered an informal cohabiting union.[640] In such cases the man – who also needs to be the child's genetic father – can recognise the partner's child after the birth mother's consent.[641] In case the mother does not give her consent to the recognition, Article 1:204(3) DCC comes into play. Pursuant to this provision, the man can ask the court to substitute the mother's consent to recognition, provided that the recognition will not harm the mother's interests in an undisturbed relationship with her child or the interests of the child and on the condition that the man is the biological father of the child. In order to do so, the District Court needs to establish whether the alleged father is the biological father of the child. Only if the mother contests his fatherhood and if there are no facts making it likely that he is the father, a court may order – also at its own motion – a DNA test.[642] In situations in which the alleged father refuses to practice a DNA test, the court cannot enforce his cooperation. Therefore, Dutch civil law provides that in case of refusal of cooperation the judge itself may attach consequences to the situation at hand. That said, according to Dutch civil law, recognition of a foreign decision would be refused on the grounds of enforcing the DNA test.

1.2.3. Is it possible to register the parenthood in your State on the basis of a certificate of civil status issued by a foreign Registry Office?

-*Model Case:* the record of a birth of a child is in the Registry Office of the State where he is born (State A). Then, it is applied the recognition of the certificate of the Registry Office of A to record the child in the Registry Office of their nationality (State B).

With regard to foreign certificates, a Dutch authority may require somebody to produce a 'legalised' official foreign document, such as a birth certificate, marriage certificate, or death certificate. One can usually have this type of document legalised by an authority in the State where it originates from – in most cases the authority that will legalise this is the state's foreign ministry. Once the applicant has done so, he/she must also get the document legalised by the Dutch mission in that country. If the document is written in a language other than English, French or German, a translation must be provided by a sworn translator. In that case, the applicant must get both the original document and the translation legalised.[643]

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[639] Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e. mutual recognition of surrogacy agreements: What is the current situation in the MS? Need for EU action?, available at http://www.europarl.europa.eu/RegData/etudes/note/join/2010/432738/IPOL-JURI_NT(2010)432738_EN.pdf, p. 17

[640] This also applies to men who have entered another marriage, with another woman.

[641] M. Vonk, "Maternity for Another: A Double Dutch Approach", *Electronic Journal of Comparative Law,* vol. 14.3 (2010), p.4.

[642] Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e. mutual recognition of surrogacy agreements: What is the current situation in the MS? Need for EU action?, available at http://www.europarl.europa.eu/RegData/etudes/note/join/2010/432738/IPOL-JURI_NT(2010)432738_EN.pdf, p. 17

[643] See document Rijksoverheid on legalising documents, available at

CASE 1.3: SURROGACY ARRANGEMENTS

Background: different approaches among States in the field of surrogacy arrangements caused the phenomenon of reproductive tourism. In these cases, the prohibitions in the domestic law are trying to avoid by going to more permissive States in which the intending parents obtain the legal parentage of the child. The problem arises when the receiving States do not recognize this parentage and, consequently, the situation of the child becomes uncertain. Dutch rules on surrogacy will be assessed in the context of the ECtHR cases Mennesson and Labassee, in which the Court applied a relatively liberal approach to surrogacy arrangements.

1.3.1. Are surrogacy arrangements allowed or prohibited in your country?

-*Model Case:* a couple signs a surrogacy arrangement in their home country. When they applied for registration the child birth, the problem of the parenthood of the child arises: has the parenthood be established to the intending parents or to the gestational carrier (surrogate mother)?

Surrogacy (*draagmoederschap*) involves the situation where pre-birth agreements between the intending parents and the surrogate mother have been established on the conception of the child and the distance after birth of the child. In general terms, surrogacy can be divided into two categories; 1) commercial surrogacy, whereby payment for carrying and bearing the child is an essential feature and 2) altruistic surrogacy, a process whereby agreements can be made concerning reimbursement of costs, but the intending parents do not give financial compensation for carrying and giving birth to the child to the surrogate mother.[644] The Dutch government applies a restrictive policy with respect to surrogacy arrangements. In Dutch law, no special procedures exist towards transferring parental rights and duties from the surrogate mother (and her spouse) to the intending parents (*wensouders*).[645] Under Dutch law, the surrogate mother is automatically the legal mother of he child. If the intending parents want to become legal parents of the child, legal parentage has to be transferred to them. If the surrogate mother is married, her husband will automatically be the legal father of the child, which does not make the transfer of legal parentage to the intending parents easier.[646]

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https://www.government.nl/topics/legalising-documents/contents/legalising-foreign-documents.

[644] I. Curry-Sumner & M. Vonk, "Internationale afstamming en draagmoederschap", (2013), p. 2. See also M. Vonk, "Maternity for Another: A Double Dutch Approach", *Electronic Journal of Comparative Law*, vol. 14.3 (December 2010) , p. 1. See also, Boele-Woelki & Oderkerk 1999, p. 25-44. Certain borderline cases are imaginable where it comes to a qualification of the arrangements made to assess whether these cases can be categorized as commercial or non-commercial surrogacy agreements.

[645] M. Vonk, "Maternity for Another: A Double Dutch Approach", *Electronic Journal of Comparative Law,* vol. 14.3 (2010), p. 1.

[646] I. Curry-Sumner & M. Vonk, "Internationale afstamming en draagmoederschap", (2013), available at http://www.voorts.com/wp-content/uploads/Publicatie-B.12.pdf, p. 2. See also M. Vonk, De logeerbuik: draagmoederschap in Nederland', *UCERF, Actuele ontwikkelingen in het familierecht*, Nijmegen: Ars Aequi, 2011, pp. 63-72, available at http://igitur-archive.library.uu.nl/law/2011-0328- 200533/UUindex.html; K. Boele-Woelki, I. Curry-Sumner en W. Schrama en M. Vonk, *Draagmoederschap en illegale opneming van kinderen*, Den Haag: Boom Juridische uitgevers, 2012.: http://wodc.nl/onderzoeksdatabase/draagmoederschap.asp; K. Boele Woelki en M. Vonk, 'Surrogacy and same-sex couples in The Netherlands' in: K. Boele-Woelki and A Fuchs (eds.) *Legal recognition of same-sex Couples in Europe*, Intersentia, 2012.

Commercial surrogacy and the illegal ingestion of children are prohibited in the Netherlands.[647] After the introduction of IVF in the 1970's, the discussion arose in the Netherlands as to whether or not surrogacy should be permitted. Various measures have been established to combat surrogacy, both in the field of Dutch criminal law and immigration law. As a consequence, Article 151b was established in the Dutch Criminal Code which has made commercial surrogacy a criminal offence in the Netherlands.[648] The interest of the child plays a significant role in this matter. On the other hand, altruistic gestational surrogacy is allowed in the Netherlands, but required by law to comply with professional guidelines.[649]

1.3.2. Is the legal parenthood acquired abroad by a surrogacy arrangement recognized in your country?

-*Model Case:* the intending parents register in an USA Registry Office the legal parenthood of a child established by a USA judge. Then, they applied to register this parenthood in their home country (receiving State). Is that registration possible if the law of the receiving State prohibits the surrogacy arrangements?

In order to recognize a status of the child regarding parentage in the Netherlands, it is important to firstly examine how the surrogacy agreement has been established in a foreign country. Three situations can be distinguished here: 1) a judicial decision has been established upon which the relationship of descent has been declared between the intending parents and the child (Article 10:100 DCC);[650] 2) a foreign birth certificate has been issued that recognizes the intending parents (legal fact or legal act ex article 10:101 DCC); 3) an adoption has taken place. Different recognition regimes are applicable to this matter (see Articles 10:105-10:109 DCC), with reference to the Hague Adoption Convention and the law on placement of foreign adoption children.[651]

Article 10:101 DCC regulates the recognition of foreign legal facts and legal acts that have led to the adoption or modification of family relationships in the Netherlands. It stipulates that foreign legal facts and foreign judicial acts that on the basis of familial descendancy have established or changed familial relationships will be recognized provided that these facts or acts have been laid down in a certificate issued by a competent authority in accordance with local regulations. Article 10:101(2) DCC lists the grounds for refusal in cases in which the foreign legal fact conflicts with the Dutch public order[652]:

a. if the child has been recognized by a Dutch citizen who under Dutch law would not have been a person who is able to recognize the child;

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[647] K Boele-Woelki, I Curry-Sumner, W Schrama and M Vonk, Draagmoederschap en illegale opneming van kinderen The Hague, WODC, 2011, p. 17.

[648] Act of 16 September 1993, Stb. 486.

[649] European Parliament, "A comparative study on the regime of surrogacy in EU Member States", 2013, p. 15, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf.

[650] This can be the case if the parents have contacted a surrogacy mother in e.g. California and have been issued with a pre-birth order that recognizes them as the judicial parents. See I. Curry-Sumner, and M.Vonk "Internationale afstamming en draagmoederschap, Kwartaal Bericht Estate Planning, 2013, p. 6.

[651] I. Curry-Sumner, and M.Vonk "Internationale afstamming en draagmoederschap, Kwartaal Bericht Estate Planning, 2013, pp. 5-6.

[652] Rb 's-Gravenhage 23 november 2009, zaak nr: 328511/FA RK 09-317 (not published).

b. if, with regard to the approval of the mother or the child, the requirements that are set for this purpose by the law applicable pursuant to Article 4, paragraph 4, are not met, or;
c. if the certificate or document relates to a sham transaction.

To be recognized, the foreign legal fact or act must satisfy a number of conditions. Two situations can be distinguished here. Firstly, the child and his/her parents can return to the Netherlands with a birth certificate stating that they are the legal parents of the child. The birth certificate can be issued without specifying the underlying surrogacy construction (e.g. in Ukraine) or by specifying the arrangement (e.g. in Australia). In both cases, the prospective parents will try to enrol the child in the Dutch registers. The question arises whether this "legal fact" which is recorded on the birth certificate in the Netherlands can be recognized under Art. 10:101 DCC.

Secondly, Dutch case law has confirmed that improper use of recognition by the intending father can also be an opportunity to become a legal parent. In this case the recognition by the intended father is categorized as a “legal act”. It should be tested in this case whether the foreign recognition can qualify for recognition in the Netherlands pursuant to Article 10:101 DCC. As is generally accepted with regard to the recognition of foreign documents, the starting point which needs to be applied is that the Dutch registrar shows confidence that the registration of the legal fact or act that has taken place has been conducted correctly outside the Netherlands.[653]

1.3.3. In the case of non-recognition of the legal parentage established abroad, what will be the future status of minors?

-*Model Case:* the record of birth of a child named the intending mother as the mother in the Registry Office of State A. Nevertheless, the receiving State B does not recognize this and establishes the motherhood to the gestational carrier (surrogate mother). Then, who should take charge of this child?

It has to be stated from the outset that the answer to this question depends on the facts of each case. It is therefore impossible to give one answer which applies to all cases. That said, a specific example will be discussed hereafter.

Example: if Dutch intending parents have appointed a surrogate mother from a foreign country who gives birth in the Netherlands, it is important to determine the applicable law in this matter. Article 10:93 DCC checks whether the birth mother and her spouse have a common nationality. If this is answered in the affirmative, the law of their nationality is applicable. In case the birth mother and her spouse have – for example – the French nationality in common, French law will be applicable pursuant to Article 10:92 DCC. French law does not recognize the *mater certa semper est* principle and if the mother is obliged to also recognize the child, it could be possible that without amendment of this provision the child would not have a legal mother, unless the mother recognizes the child.[654] Dutch law on the other hand states that the woman who carries the child, i.e. the surrogate mother, is the legal mother of the child based upon the fact that she has given birth to the child (Article 1:198 DCC) and

[653] See Dutch Civil Code book 10 regulating Dutch International Private Law rules.
[654] I. Curry-Sumner, and M.Vonk “Internationale afstamming en draagmoederschap, Kwartaal Bericht Estate Planning, 2013, pp. 5-6.

hence it could be argued that the French policy could be contrary to the Dutch public order. [655] One could invoke an appeal on the basis of Article 10:6 DCC, upon which the birthmother – by applying Dutch law – would automatically be the legal mother of the child. In other words, under Dutch law the woman who gives birth to the child is the child's legal mother as enshrined in Article 1:198 DCC. This is a mandatory statutory provision from which it is not possible to deviate.[656]

If the parents of the child born in the Netherlands do not have a common nationality, the law of their common residence is applicable, as enshrined in Article 10:92 (1) DCC. If the parents do not have a common residence, then the law of the regular residence of the child is applicable. Due to the birth that has taken place in the Netherlands, the law applicable to the case at hand will be determined on the basis of Dutch International Private Law rules. A French surrogate mother that carries a child for a Dutch couple and gives birth in the Netherlands will – most likely – be the judicial mother of the child, even though French law does not apply this principle. Another consequence would be in conflict with the Dutch public order. This however does not apply to the legal status of the husband of the surrogate mother since in Dutch law a child does not always need to have a father. This leaves possibilities for the intending father to recognize the child of the surrogate mother.[657]

1.3.4. What shall the impact be on your country of the case law of the European Court of Human Rights (ECtHR) in the *Mennesson* and *Labassee* cases?

-*Model Case:* according to *Mennesson* and *Labassee* cases, the non-recognition of a legal parenthood already registered in another State infringes the right of the child to respect for their private life according to article 8 of the European Convention of Human Rights.

In the landmark cases *Mennesson* and *Labassee,* the ECtHR for the first time applied a liberal approach towards surrogacy agreements. In these cases the ECtHR ruled that non-recognition of a legal parenthood already recognized in another State violates the right of the child to respect for their private life under Article 8 ECHR. In stating that the violation of Article 8 occurred only in relation to the children, the Court emphasized the importance of the child's rights to family and private life. Its ruling is primarily based on the idea that the refusal to register the children meant the children's right to preserve their identity was not properly protected (as France is obliged to under Article 8 of the UN Convention on the Rights of the Child (CRC), and that identity is a key feature of the right to respect for family life under the ECHR. In refusing to recognise - under French law - the biological link between the children and their fathers and preventing the acquisition of French nationality, the ECtHR ruled that the children were left in a position that was not in their best interests (as required under Article 3 of the CRC).[658]

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[655] M. Vonk, "Maternity for Another: A Double Dutch Approach", Electronic Journal of Comparative Law, vol. 14.3 (December 2010) , p. 4.

[656] Rechtbank Den Haag, 11 December 2007, LJN BB9844.

[657] I. Curry-Sumner, and M.Vonk "Internationale afstamming en draagmoederschap, Kwartaal Bericht Estate Planning, 2013, pp. 3-4. In Germany for example, a child will automatically have two judicial parents. In this situation, the intending father is not able to recognize the child.

[658] ECtHR case *Mennesson v. France* (application no. 65192/11) and ECtHR case *Labassee v. France* (application no. 65941/11).

As things stand, many Contracting States of the Council of Europe (CoE) are dealing with problems in the context of international private laws due to increasing surrogacy tourism. Given the effect of these judgments in other States, those exercising restrictive laws and policies on surrogacy, such as France, will have to construe their arrangements around birth registration in international surrogacy situations in line with the ECtHR *Mennesson* and *Labassee* decisions and recognize the legal surrogacy recognitions established in other states. As things stand in the Netherlands, direct recognition of the intending parents as legal parents is in conflict with Dutch law, which provides that the surrogate mother is the legal mother of the child. This policy is problematic in case the intending mother requests a Dutch passport for the child at the Embassy, which will be denied under Dutch law.[659] By application of the ECHR and in line with the *Mennesson* and *Labassee* decisions, which envisages the right to respect for private and family life (Article 8 ECHR), it would be most likely that the Netherlands will be required to allow a child that has been born via (commercial) surrogacy, to legally reside in the Netherlands.[660]

CASE 1.4. FILIATION AND ADOPTION

Background: there are differences in the rules governing the adoption: simple or full adoption, revocable or irrevocable adoptions, adoptions that create a permanent parent-child relationship and adoptions that do not create it. They are also different regulations on the requirements for the constitution of the adoption, depending on the adopting parents are single parent families or same sex couples. In addition, adoptions may have consequences on the acquisition of the nationality of the adopted child. The ECHR Wagner case (Judgment of 28 June 2007) has revealed the incidence of the right to family life of Article 8 European Convention of Human Rights related to the recognition of adoptions legally created in another State.

1.4.1. Are simple or revocable adoptions allowed in your country?

-*Model Case:* A child is adopted in country A by a simple or revocable adoption. Later, the adoptive parents aim the recognition of such adoption in the State B.

In general terms, two legal categories of adoption exist: simple adoptions (*zwakke adopties*) and full adoptions (*sterke adopties*). Simple adoptions do not break off the filial tie between a child and his/her biological parents; in some cases such an adoption can even be revocable. This means that foster parents look after the child but they do not enjoy all parental rights. Full adoption means that the filial tie between a child and his/her biological parents does not exist anymore and all the rights and duties of the adoptive parents are in force. [661]

Book 10 of the Dutch Civil Code, under section 10.6.1, Article 10:104 defines the term adoption as the following:

"Without prejudice to the Hague Adoption Convention 1993, the Act for the implementation of the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption signed at The Hague on 29 May 1993 (Stb. 1998, 302) and the Act Regulating the

[659] See Dutch leading case on this matter: Rechtbank's-Gravenhage 23 November 2009, zaaknr. 328511, FA RK 09-317.

[660] See case Rechtbank 's-Gravenhage 09-02-2011, LJN: BP3764, The court ordered the state to issue a temporary document for the child that was born out of a commercial surrogacy agreement, applying the right to family life as enshrined in the ECHR.

[661] A. Ruzik, "Adoptions in the European Union", *Research Note Centre for Social and Economic Research,* 2008, p.3.

Placement of Foreign Children with a view to Adoption, adoption in the present Title (Title 10.6) means the decision of a competent authority establishing *legal familial relationships* between on the one hand a minor child and on the other hand two persons jointly or one person solely."

The Dutch adoption law has been significantly modified during the last years. On 1 April 1998 the old limitation of adoption to married couples only was set aside, and adoption is now equally available for cohabiting and single persons.[662] A key requirement for adoption in the Netherlands is that the child to be adopted must no longer be under the parental authority of his or her biological parents. This loss of authority is possible through for example death, the inability to exercise parental authority[663], the removal of the child by the State and hereby the cessation of parental rights [664] or the biological parents' decision to give up the child.[665] Hence, the Netherlands does not provide for simple adoptions.

Dutch law provides for the possibility for revocation of adoptions. This possibility is enshrined in articles 1:231 en 1:232 DCC. The revocation of an adoption is only possible on the basis of an application of the adopted child, pursuant to Article 1:231 DCC. Moreover, in accordance with article 1:231 Civil code, adoption can only be revoked by means of a court judgment. Two other conditions are required if one wants to revoke the adoption, as enshrined in Article 1:231(2) DCC. A revocation can only be filed if it is in the best interest of the child and if the District Court is convinced that a revocation is reasonable, whereas the request is filed *not* earlier than two years and not later than five years after the day on which the adoptive child has reached the age of 18.[666]

1.4.2. Is the adoption by single-parent families or by couples of the same-sex allowed in your country?

-*Model Case:* a single person adopts a child in a State A and applies for its recognition in his home State (receiving State B)

On 1 April 1998 the old limitation of adoption to married couples only was set aside and adoption is now also made available for cohabiting and single persons.[667] Since 1 April 2001 same-sex couples can also adopt a child.[668] The Dutch Government has acknowledged that the previously existing perception of adoption as a means of establishing filiation links has been set aside, and that adoption does not need to be inherent to creating natural family ties.[669] The legislator has chosen to institutionalize the social

[662] As the Act to Amend the Law of Parentage and Adoption was established.
[663] See Article 1: 246 DCC.
[664] See Articles 1:266-278 DCC.
[665] In the Netherlands, the Council for the protection of children must be informed on all cases in which measures concerning the authority over minors are necessary, as enshrined in Article 242 C.C. In cases in which the Council concludes that minors are not under the legally provided authority as enshrined in Article 245 C.C., it is under a duty to ask a request to the Court to adopt necessary measures as to the excercize of authority over these children, as enshrined in Article 241(1) C.C.
[666] Delfos & Doek, Maatregelen van kinderbescherming, Tjeenk Willink paperback, 1982, p. 136.
[667] As the Act to Amend the Law of Parentage and Adoption was established.
[668] Act on the Opening of Adoption to Same-Sex Persons of 21 December 2000, Staatsblad 2001, 10.
[669] Second Chamber, 26 673. For more information on this issue see F. Vliet, 'Door de zij-ingang naar niemandsland?', Nemesis 2000, p. 41-42.

parentage between a child, born within same-sex relationships with the aid of artificial procreation techniques, and the same-sex partner of the parent, not by amending paternity law, but via adoption law. The legislator has welcomed both adoption by couples, whether married or not, and adoption by the opposite-sex partner of a parent, by providing that these adoptions can be granted after those persons have cared for the child for a period of one year, whereas for a single person this period should be at least three years, pursuant to Article 1:228(1)(f) DCC.[670] For two women the requirements are less stringent. The newest Act of 1 April 2014 has made it possible for a lesbian co-parent to recognize the child before the birth as a consequence that both female partners will become the legal parents of the child. Due to this Act, the mothers have the possibility to register their joint custody in the authority registry of the court *without* a prior judicial decision.[671]

1.4.3. Is the recognition of foreign adoptions which do not create a permanent parent-child relationship allowed in your country?

-*Model Case:* a couple adopts a child in a State A, which does not create a permanent parent-child relationship. How is that adoption recognized in the receiving State B?

An adoption order in a state that is party to the Hague Convention is legally recognized in the Netherlands. Provided that the adoption order has the effect of not only the establishment of legal family ties between the child and his/her adoptive parents, but also of terminating the child's legal relationship between his/her biological parents, no additional adoption order is required under Dutch law.[672] Article 26 of The Hague Adoption Convention does not specify anything on (the termination of) family ties between the child and his/her biological parents. This means that the state that needs to recognize the adoption needs to determine on the basis of its own International private law rules whether the family ties between the adopted child and his biological parents and blood relatives will be terminated or not. For the Netherlands, it would be most logical to apply Article 10:110 (1) (c) and paragraph 2 DCC to this situation. This leads to the situation that by recognition of a foreign convention adoption in the Netherlands, the family ties between the adopted child and the blood relatives of his/her biological parents will only be terminated if the adoption has this effect in the Contracting state where it was made.[673]

A foreign adoption order that is issued in a country that is not party to the Hague Convention, is only eligible for automatic recognition in the Netherlands under certain circumstances, which since 1 January 2012 are codified in book 10.6 under Articles 10:107-109 DCC.[674] Title 6 of book 10 DCC applies two different recognition regimes: 1) Article 10:08 DCC is applicable to a situation in which both the child as well as the adoptive parents had their habitual residence outside the Netherlands at the moment of the

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[670] M. Antokolskaia and K. Boele-Woelki' "Dutch family law in the 21st century: trend setting and straggling behin at the same time", *Electronic Journal of comparative law* 6:4 (2002), <http://law.kub.nl/ejcl/64/art64-5.html>

[671] See *Wet Lesbisch Ouderschap* (Act on Lesbian parenting*),* entered into force on 1 April 2014.

[672] Center for Adoption policy, Overview of Dutch adoption law, p. 10, available at http://www.adoptionpolicy.org/pdf/eu-netherlands.pdf

[673] J.G. Knot and A. Mens, "Samenloop van erfrecht en adoptie in het Nederlandse Internationale privaatrecht, TE 4 (2013), p. 48.

[674] Ibid.

adoption order. If this is the case and if all the recognition requirements are fulfilled, an adoption order granted outside the Netherlands shall be recognised by operation of law in the Netherlands (Article 10:108(1)). This means that no legal procedure is necessary and that the foreign adoption order – in principle – can be directly registered by the Registrar of Civil Status.[675] The Registrar needs to check whether all conditions for recognition have been respected. 2) Article 10:109 DCC on the other hand envisages the situation in which the adoptive parents had their habitual residence in the Netherlands at the time of the adoption order. This provision hence regulates intercountry adoptions in which the Netherlands is the host country. Such adoptions shall only be recognised if a court has established that the conditions for recognition under Article 10:109 a, b and c have been met.[676] Exceptions to the recognition of foreign adoption orders are enshrined in Articles 10:108(2) DCC, and stipulates that in the following situations a foreign adoption order is not recognized: where the order was not preceded by an appropriate investigating or procedure; where the adoption order issued was not recognized in the foreign country in which either the parents or the child resided; or in situations in which recognition would be contrary to the public order.[677]

1.4.4. Is the acquisition of nationality a consequence of the adoption?

-*Model Case:* A Spanish citizen adopts a child of 10 years old and another for 18 years old. It raises the question if the children acquire the Spanish nationality as a result of the adoption.

If a child is adopted in another state than the Netherlands it becomes a Dutch citizen if at least one of the adoptive parents is a Dutch national and if the adoption followed the Dutch adoption proceedings, provided that the child was a minor on the date of the adoption order.[678] This rule is applicable to adoption orders issued in the Netherlands, the Netherlands Antilles or Aruba, in states that are party to the Hague Convention and in other states, provided that the adoption order is in line with the criteria for recognition in the Netherlands, as enshrined in Articles 10:107-109 DCC.[679]

Case 2. Forenames and surnames

The CJEU has shown a special concern regarding the forenames and surnames of EU citizens. Firstly, in *Konstantinidis*, the CJEU ruled that a national provision for a Greek national to be obliged to use, in the pursuit of his occupation, concerning a spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons, was contrary to the freedom of establishment. Secondly, in *García Avello* the CJEU ruled that

[675] Kamerstukken II 2001/02, 28 457, nr. 3, p. 14, Kamerstukken II, 2002/03, 28 457, nr. 6, p. 7, en Kamerstukken II 2005/06, 28 457,, nr. 27, p. 9. J.G. Knot and A. Mens, "Samenloop van erfrecht en adoptie in het Nederlandse Internationale privaatrecht, TE 4 (2013), p. 48.

[676] Article 10:109(2), the procedure set out in Article 1:26 of the Civil Code shall apply. The following conditions should be met: the provisions of the Act regulating the placement of foreign children with a view to adoption are observed; recognition of the adoption is manifestly in the best interests of the child; recognition would not be denied on a ground referred to in Article 10:108, paragraph 2 or 3.

[677] See Th. M. de Boer, F. Ibili e.a., "Nederlands Internationaal personen en familierecht, Kluwer 2010, p. 260.

[678] See Articles 5, 5a, 5b and 5c enshrined in the Act of Dutch Nationality.

[679] Immigration and naturalisation Service of the Netherlands, available at https://ind.nl/EN/individuals/residence-wizard/dutch-citizenship/citizenship-by-law.

nationals from two Member States could choose the identity in accordance with one of these Member States and this identity should be recognized in the other Member State in order to respect the EU citizen and the free movement of persons. Thirdly, and in a similar sense, the CJEU ruled in *Grunkin Paul* that the surname acquired in the Member State of birth and residence shall be recognized in the Member State of which the applicant is national in order to protect the right to move and reside freely within the territory of the Member States. Fourthly, another landmark case in which the CJEU ruled on name recognition was *Sayn Wittgenstein*. In this case, the CJEU stipulated that the non-recognition of the surnames from other Member States is only based on public policy grounds (in this case, the abolition of the nobility), which are necessary for the protection of the interests which they are intended to protect and they are proportionate to the legitimate aim pursued.

The above-described rulings illustrate that the forenames and surnames of Union citizens have a large impact on the enjoyment of EU citizenship rights. Nevertheless, the EU has not adopted any legal act in relation to the legal rules of forenames and surnames. This fact is particularly relevant. Not only because this leads to an obligation to assess country-by-country the impact of the case law of the CJEU, but also because the national legislations contain many disparities. Although names and surnames do not exactly constitute "life events", they are a very relevant consequence of some life events as, for instance, filiation and marriage. However, instead of analysing the issues of the names in each "life event", an autonomous and independent analysis is more adequate, regarding the special attention that the CJEU has paid in this sense and the connection of the forenames and surnames with some civil rights, in many legal systems.

CASE 2.1: DISPARITIES AMONG LEGAL SYSTEMS

Background: due to the several differences among national legal systems and their impact on the free movement of persons and the principle of unique identity, please provide an explanation and indication of leading/model cases about your national legislation concerning forenames and surnames.

2.1.1. Explain your conflicts of law rules, highlighting the cases in which your national legislation is applicable

-*Model Case 1*: a child was born in a third country, where his parents (national of your Member State) reside.

-*Model Case 2*: a child was born in your Member State, where his foreign parents reside.

The nationality is the starting point to determine which name somebody has.[680]

Model case 1: a child of a Dutch mother automatically acquires the Dutch nationality and hence her surname pursuant to Article 1(5)(1) DCC. If – for example – a child will be recognized by an Australian man, and if according to Dutch law this recognition is valid, the child will keep the name of the mother according to Dutch applicable law, unless the parents have chosen the name of the Australian man for the child.[681]

[680] S.F.M. Wortmann & J. Van Duijvendijk-Brand, Personen en Familierecht, Kluwer: Deventer 2009, p. 23.
[681] S.F.M. Wortmann & J. Van Duijvendijk-Brand, Personen en Familierecht, Kluwer: Deventer 2009, p. 23.

Model case 2: in situations in which foreign parents are residing in the Netherlands, the law of the child's nationality is applicable. Article 10:20 DCC, regulating the applicable law for the determination of the names of a person of Dutch nationality, states the following on this matter: the surname and the forename of a person of Dutch nationality shall be determined, regardless whether he has another nationality, by Dutch internal (national) law. This will be the case even when foreign law is applicable to the familial (parent-child) relationship and the existence of that relationship may have effect on the surname.[682]

2.1.2. Explain briefly the main rules concerning forenames and surnames, especially focusing on number, limits, civil acts which affect to forenames and surnames, admission of foreign forenames and surnames, and translations of them.

-*Model Case*: a child born in your Sate whose parents are nationals and resident in your State.

From 1 January 1998 the rules on names have been significantly modified in the Netherlands. The main starting point of the law is that the parents can choose the family name of the child, pursuant to Article 1:5 DCC. [683]

The name choice is restricted to the following rules:[684]

1. The parents choose one of both their names.
2. The choice that the parents make for their first child – that is the first child to whom they fall in family law relations – is applicable to all the following children. In the interest of the child, Dutch law has pursued unity of the name in the family (article 1:5 (8) DCC).

With regard to foreign names, Article 10:19 DCC[685] concerning the determination of the names of a foreigner is applicable and stipulates that the surname and forenames of a foreigner shall be determined by the law of the State of his nationality. The law of that State comprises the rules of international private law of that State. For this purpose exclusively, the situations on which surnames and forenames depend shall be assessed in accordance with the law of that State. Article 10:19 paragraph 2 DCC regulates the applicable law for persons with double nationality and states that when a person has more than one nationality, and he/she has in one of these States his/her habitual residence, the law of that State will be applicable as is his national law. If the person concerned does not have his habitual residence in one of these states, the law of the state of his nationality with which, taken all circumstances into account, he is most closely connected shall be applicable.

CASE 2.2: GENDER EQUALITY

Background: some legislations establish gender equality between the surnames of men and women as a matter of public policy and the marriage does not alter the surnames of the spouses and the children receive surnames of both parents. In this context, please provide explanation and indication of

[682] See Dutch Civil Code book 10 Chapter 2 on Dutch International Private Law rules regulating names.
[683] S.F.M. Wortmann & J. Van Duijvendijk-Brand, Personen en Familierecht, Kluwer: Deventer 2009, p. 17.
[684] Ibid., pp. 18-19.
[685] The former Act on Conflict of Names 3 July 1989 is now codified in book 10 of the Dutch Civil Code.

leading/model cases concerning gender equality at the moment of attribution of the forenames and surnames, particularly:

2.2.1. What are the main issues with the surnames of the wife?

-*Model Case*: a wife with maiden surname Ms. Smith and married name Ms. Fernández. How is she referred in your Civil Register?

Article 1:9 DCC states that men and women preserve within the marriage and registered partnership their own family name. Article 1:9 DCC also grants them the right (not the duty) to apply the name of the other partner instead of the own family name, prior to the own family name or following the own family name.[686]

2.2.2. What are the main issues with the surnames of mothers?

-*Model Case*: a husband and a wife (maiden name: Ms. Smith; married name: Ms. Fernández) have a child. Which are his surnames?

Prior to the birth or adoption of a first child, married parents may choose which surname the child will acquire (mother's or father's name, both is however not possible under Dutch law). If the parents make no choice, the child automatically obtains the father's surname. Any further children will also acquire this name. If the parents of the child are not married, the children will automatically obtain his/her mother's name unless otherwise indicated (Article 1:5(5) DCC).[687]

CASE 2.3: PUBLIC POLICY

Background: In the judgment of the Court of 22 December 2010 (Case C-208/09, Sayn Wittgenstein) the CJEU ruled that the non-recognition of the surnames from other Member States is only based on public policy grounds. Please, provide for cases of public policy which prevents the application of a foreign law concerning forenames and surnames by the authorities of your Member State (dignity of persons, superior interests of minor, gender grounds, rules abolishing the nobility). In this context, please highlight if the public policy clause can play in a total or attenuated form, depending on the foreign law is not admitted in any case or if exceptions are observed.

2.3.1. Explain cases of absolute application of public policy, in which foreign law is not applied in any situation without exceptions.

-*Model Case:* a foreign law of a child permits names which affect dignity of the persons.

[686] S.F.M. Wortmann & J. Van Duijvendijk-Brand, Personen en Familierecht, Kluwer: Deventer 2009, p. 22.
[687] Rijksoverheid.nl. 2009-06-24. Retrieved on 29 July 2010.

When a court determines that a foreign rule is incompatible with public order it has to be examined what other law should be applied to the case at hand. The foreign law is only set aside to the extent that it is incompatible with public policy. Nevertheless, no general rule is given in the event that the public policy exception does apply. The decision is hereby left to the courts. One possibility is to turn to the application of the *lex fori*.[688]

2.3.2. Explain cases of attenuated public policy, in which foreign law is applied in a "soft" way (material attenuation) or in which public policy is only applied when the case is connected with the territory or nationals of your Member State (spatial attenuation):

-*Model Case:* a "foreign wife" who is a mother with the legal surname of the husband.

Article 10:24 DCC nowadays regulates the recognition of foreign names and changes of names established outside the Netherlands. It stipulates that when the surname or forename of a person have been recorded at the occasion of a birth outside the Netherlands or have been changed as a result of a change made in the civil status outside the Netherlands, and the surname or forenames have been laid down in a certificate issued for this purpose by a competent authority in accordance with local regulations, then such recorded or changed surname or forenames shall be recognized in the Netherlands. The provision moreover states that such recognition cannot be refused as being in conflict with public order on the sole ground that another law has been applied than the law that would have been applicable pursuant to the provisions of the Dutch Civil Code.

CASE 2.4: DIVERSITY OF SURNAMES BY NATIONALITY AND PLACE OF BIRTH

Background: the record of a birth in several Registries, in the Registry of the nationality and in the Registry of the place of birth, can provoke diversity of surnames and affect to the free movement of persons and the principle of unique identity. In Grunkin and Paul the CJEU ruled that the surname acquired in the Member State of birth and residence shall be recognized in the Member State of which the applicant is national in order to protect the right to move and reside freely within the territory of the Member States.[689]

2.4.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in a third country:

-*Model Case:* nationals from your Member State born and resident in third countries.

Article 10:20 DCC is applicable to Dutch nationals resident in third countries, which stipulates that: "the surname and the forename of a person of Dutch nationality shall be determined, regardless whether he has another nationality, by Dutch internal (national) law." That same provision also states that this

[688] K. Boele-Woelki & D. Iverson "The Dutch Private International Law Codification: Principles, Objectives and Opportunities", *Electronic Journal of Comparative Law* , vol. 14.3 (2010), p. 8.
[689] CJEU case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-07639.

provision even applies when foreign law is applicable to the familial (parent-child) relationship and the existence of that relationship may have effect on the surname.

2.4.2. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in other Member States

-*Model Case:* nationals from your Member State born and resident in a Member State of the EU

The CJEU *Grunkin and Paul* case concerned Mr Grunkin and Ms Paul, two German nationals who had a child in Denmark, Leonhard Matthias. The child was, in accordance with the Danish rules applicable in relation to civil status, registered with the double-barrelled surname of the two parents, i.e. Grunkin-Paul.[690] The CJEU ruled here that Article 18 EC (now Article 21 TFEU) precludes the authorities of a Member State, in their application of national law, from refusing to recognise the surname of one of its nationals as determined and registered in a different Member State in which he was born and resides.

In a Dutch case concerning a Polish couple, the Dutch court ruled in favour of having Polish law applied to the last name of their children, who had both Dutch and Polish nationalities, even though the initially applicable law was the *lex fori,* Dutch law. In this judgment, the Polish couple invoked Article 8 ECHR (right to family life), but in the end the Dutch court decided to rule in favour based upon the analogy of the CJEU's judgment in *Garcia Avello.*[691] In this case the CJEU ruled that "art.12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State."[692]

Another interesting Dutch case in this regard concerned a Spanish couple born, married and resident in the Netherlands. They got a child that acquired both the Dutch and Spanish nationality. The couple requested that the child would acquire a surname as regulated in Spanish law in the Dutch birth certificate. The civil registrar applied Article 2 of the Act conflict of Law Rules for Names[693] (since 1 January 2012 codified in Article 10:20 DCC) on the basis of which Dutch law is applicable The applicants challenged this decision and started a court proceeding on the basis of article 1:27 DCC to – other than in *Garcia Avello* – challenge the decision of the civil registrar to apply Dutch law in this case. The court allocated their request to improve the birth certificate of their child according to Spanish law on the basis of Article 8 of the Convention of children's right and stipulated that it would be an impairment of the identity of the child, if the application of Spanish law would not be allowed. The civil registrar went in appeal, but the Court of 's Hertogenbosch did not rule in favour of the registrar and cited the CJEU's

[690] CJEU case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-07639.
[691] Rb. Amsterdam 23 September 2009, NIPR 2010, par. 21.
[692] CJEU case C-148/02 *Carlos Garcia Avello v État belge* [2003] ECR I -11613, par. 45.
[693] Article 2 of the Act conflict of Law Rules for Names stipulates that "the surname and the forename of a person of Dutch nationality shall be determined, regardless whether he has another nationality, by Dutch internal (national) law. This will be the case even when foreign law is applicable to the familial (parent-child) relationship and the existence of that relationship may have effect on the surname." This article is now codified in Article 10:20 DCC.

Garcia Avello ruling whereby it stipulated that in line with that reasoning the birth certificate should be changed according to Spanish law.[694]

CASE 2.5: DIVERSITY OF SURNAMES BY DOUBLE NATIONALITY

Background: the double nationality of the applicant can also provoke "diversity of surnames" and this one affects free movement of persons and the principle of unique identity. Judgment of the Court of Justice of European Union of 2 October 2003 (Case-148/02, García Avello) ruled that nationals from two Member States could choose the identity in accordance with one of these Member States and this identity should be recognized in the other Member State in order to respect the EU citizen and the free movement of persons.

2.5.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals from your Member State who are also nationals from third countries:

-*Model Case:* nationals from your Member State who are also nationals from third countries

Article 10:20 DCC regulates the applicable law in cases of double nationality of Dutch persons and provides that when a person has next to his/her Dutch nationality another nationality, Dutch law applies. This provision moreover states that Dutch law even applies in the situation when foreign law is applicable to the familial relationship and the existence or ending of that relationship may have effect on the surname.

2.5.2. Explanation and indication of leading/model cases concerning "diversity of surnames", particularly, in relation with nationals from your Member State who are also nationals from other Member States:

-*Model Case*: nationals from your Member State who are nationals from other Member State.

If a person has – next to his/her Dutch nationality – another nationality, the Dutch nationality is decisive concerning the question which law is applicable to decide the name of the person with dual citizenship as stipulated in Article 10:20 DCC. In situations in which somebody has two or more nationalities, the law of the State of which he/she has the nationality and with which, taken all circumstances into account, he/she is most closely connected, shall be applicable (Article 10:21 DCC). However, it is not always easy to prevent situations in which a person – as a consequence of disparities in different legal systems in a country – has another name in another country. To this person, a declaration of differences in family names can be issued from which it can be deducted that the different names are applicable to one person.[695]

Case 3. Recognition of marriages concluded abroad

With regard to the regulation of marriages, the EU has adopted acts in relation to divorce, legal separation and marriage annulment. Examples of this are Council Regulation (EC) n. 2201/2003

[694] Hof 's-Hertogenbosch 27 January 2004, LJN: AO2510, NIPR 2004, 106, paras. 4.4 and 4.7.

[695] S.F.M. Wortmann & J. Van Duijvendijk-Brand, Personen en Familierecht, Kluwer: Deventer 2009, p. 23.

concerning jurisdiction and recognition and enforcement of judgments of matrimonial matters and the matters of parental responsibility, and Council Regulation (EC) n. 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.[696] Until now, the EU has not provided any legal act in order to harmonise rules on marriages in the Union. Consequently, different rules on marriage are applicable in Member States, which in the end may cause problems for EU citizens that want to move to and reside in another Member State. This paragraph examines how rules regarding marriage that affect cross-border situations are regulated in the Netherlands.

3.1. DISPARITIES AMONG LEGAL SYSTEMS

Background: the disparities among legal systems affect the right to marry of EU Citizens, concerning questions as the age, consent, religious or civil form. These disparities might be able to obstruct the civil right to marry and, on the other hand, trigger increased "matrimonial tourism", i.e. conclusion of a marriage which is not admitted in the origin country of the spouses.

Short explanation and indication of leading/model cases about the main requirements of the national legislation, concerning matrimonial capacity, legal impediments, gender requirements and issues of the marriage of the same sex, matrimonial consent and religious and civil forms:

-Model Case: spouses nationals and residents of your Member State

Book 1 Title 1.5 DCC regulates marriage rules in the Netherlands. Article 1:30 DCC stipulates that a marriage can be concluded by two persons of a different or same gender. In order for a marriage - concluded by two Dutch nationals - to be valid, both prospective spouses need to explicitly give their consent to the marriage before the Registrar of Civil Status, pursuant to Article 1:67 DCC. With regard to religious ceremonies, Article 1:68 stipulates that no religious ceremonies may be concluded before the parties have shown to the foreman of the religious service that the marriage has been contracted before a Registrar of Civil Status. In addition, Article 1:49 (a) DCC regulates the certificate of legal capacity to marry for persons with Dutch nationality who intent to enter into a marriage outside the Netherlands. Paragraph 2 of that same provision states that this certificate will be issued to Dutch nationals who have their domicile in the Netherlands, by the Registrar of Civil Status of the municipality where that domicile is located.

CASE 3.2. CROSS-BORDER CONCLUSION OF MARRIAGE

Background: as aforementioned, due to the differences among the many legal systems, a hypothetical cross-border civil right to marry can be difficult. But in the other hand, this cross-border civil right can produce the practice of matrimonial tourism in order to elude the requirements of the law of a Member State applicable to its nationals or residents. This fact is particularly visible in the cases of marriage of persons of the same-sex. In this context, it is very important to know which conflict of law rules are applicable concerning the conclusion of marriage by Dutch authorities.

[696] Implemented in Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

3.2.1. Explanation and indication of leading/model cases concerning the conclusion of marriage to foreigners in your Member State.

-*Model Case 1:* marriage between a national of your Member State and national of other Member State.

-*Model Case 2:* marriage between spouses of a Member State other than your Member State

Since 1 January 2012, Book 10 Chapter 3 of the Dutch Civil Code regulates the international private law rules regarding (foreign) marriages.[697].

Model case 1: a marriage between a national of the Netherlands and a national of another State can be concluded in the Netherlands. For the non-Dutch partner, a declaration is necessary. The Municipality at issue can issue this declaration. The immigration and naturalization service (IND) checks the residency status of the non-Dutch national and the Alien police (*Vreemdelingenpolitie*) checks whether the marriage is a marriage of convenience, i.e. a marriage for the sole reason to get a permanent residency for the non-Dutch national.[698]
Model case 2: Article 10:28 DCC regulates the recognition of the concluding of a marriage in the Netherlands. Article 10:28(a) stipulates that a marriage is contracted if each of the prospective spouses meets the requirements for entering into a marriage set by Dutch law and one of them is exclusively or also of Dutch nationality or has his habitual residence in the Netherlands. Subparagraph b states the a marriage can also be contracted in the Netherlands if each of the prospective spouses meets the requirements for entering into a marriage of the State of his nationality.

The following table illustrates the possibilities of concluding a marriage in the Netherlands for both foreigners and Dutch nationals[699]:

[697] Note however that Article 1 of book 10 DCC states that "the provisions of the present Book (Book 10) and of other statutory regulations of private international law do not affect International and Community legislation that is binding for the Netherlands." See also Asser international Familierecht.

[698] See website Rijksoverheid on marriages and registered partnerships in the Netherlands, available at https://www.rijksoverheid.nl/onderwerpen/trouwen-samenlevingscontract-en-geregistreerd-partnerschap/vraag-en-antwoord/huwelijk-in-nederland-met-een-buitenlander, and Access-Netherlands, "Legal matters regarding key life events", 2014, p. 7. If a couple plans to get married in the Netherlands, it first needs to notify this to the municipality. This is also called "Notice of Intent to Marry" (ondertrouw). This notice must be made at the local municipality (gemeente) or Town Hall (stadhuis, Afdeling huwelijkszaken) of the city of residence of one of the partners involved. This has to be done at least two weeks before the intended wedding date and the wedding must be concluded at least one year of the Notice of Intent to Marry. If the one year period is expired, then another submission is required by the couples.

[699] See website Rijksoverheid, available at < https://www.rijksoverheid.nl/onderwerpen/trouwen-samenlevingscontract-en-geregistreerd-partnerschap/vraag-en-antwoord/huwelijk-in-nederland-met-een-buitenlander>.

Dutch nationality	Own declaration of both parties is necessary	Residence required	Marriage/ registered partnership in the Netherland
One partner is non-Dutch	Yes, for the non-Dutch national	Yes, for the non-Dutch partner[700]	Yes
Both partners are non-Dutch	Yes, for both partners	Yes, for both partners	Yes

3.2.2. Can the Consular Officers from your Member State conclude marriage? If so, which are the requirements?

-*Model Case*: the Consular Officer of your Member State concludes a marriage in another Member State.

Article 10:30 DCC, regulating Dutch International Private Law on marriages, stipulates that a marriage concluded in the Netherlands is only valid if it has been celebrated by the Registrar of Civil Status (*Ambtenaar van de Burgerlijke Stand*) and with due observance of Dutch law.[701] That same provision stipulates that foreign diplomatic and consular civil servants may participate in the contracting of a marriage in accordance with the requirements of the law of the State they represent, provided that none of the involved spouses is or is also of Dutch nationality.

3.2.3. Has your Member State adopted some legal measures to prevent the conclusion of marriage by its authorities when this one can be considered matrimonial tourism? If so, are they applied by Consular Officers too?

-*Model Case:* marriage of spouses of same sex and the origin country of one of them does not admit marriage of the same sex.

Both opposite and same-sex couples in the Netherlands can get married, conclude a registered partnership, create a legally binding *de facto* partnership, or cohabit without any legal status. In 2001, the Netherlands was the first country in the world to legalize same-sex marriage.[702] In most cases, the

[700] A residence requirement is not necessary in case the non-Dutch partner is a national of a EU Member state.

[701] See Dutch Civil Code Book 10 Article 30.

[702] K. Waaldijk, "More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners: A comparative study of nine European countries'' (in

procedures and ceremonies are identical for both heterosexual and same-sex couples.[703] However, pursuant to Article 1:43 DCC, at least one of the partners entering into a marriage must be a permanent resident or a national of the Netherlands. It is not possible for two non-permanent residents, i.e. non-Dutch citizens, to get married in the Netherlands. In other words, two Italians[704] who spend holiday in the Netherlands cannot get married in the Netherlands. Hence, the Dutch legislative model prevents access to marriage in order to avoid matrimonial tourism.[705] In addition, Article 10:31 DCC regulates the recognition of the contracting of a marriage of foreigners and states that a marriage that is contracted outside the Netherlands and that is valid under the law of the State where it took place or that has become valid afterwards according to the law of that State, is recognised in the Netherlands as a valid marriage (*lex loci celebrationis* principle). Hence, if same-sex marriage is not recognized in the home State, the Dutch rules on private international law hinder matrimonial tourism by preventing non-Dutch same-sex couples who merely come to the Netherlands to circumvent their home State rules from concluding a marriage under Dutch law.

CASE 3.3. RECOGNITION OF MARRIAGES CONCLUDED ABROAD

Background: in the previous case, we could analyse the balance between a cross-border civil right to marry and prevention of matrimonial tourism (abuse of this right) from the point of view of the authorities of marriage conclusion. But, obviously, if the marriage is finally concluded, other States can refuse the recognition of that marriage balancing this civil right to marry and the prevention of matrimonial tourism or even its public policy.

3.3.1. Conditions of the recognition in your Member State of marriages concluded by authorities of other Member States or by religious form:

-*Model Case*: marriage between a national of your Member State and a foreign spouse, concluded by the authorities of other Member State or by religious form within the territory of other Member State.

On 1 January 2012, Book 10 of the Dutch Civil code entered into force, which regulates Dutch Private international Law rules.[706] With regard to the conclusion of marriages, one can distinguish between the following three issues:
1) marriage competence
2) marriage conclusion
3) recognition of marriages concluded abroad[707]

Pursuant to Article 10:31 DCC regulating the recognition of foreign marriages, a marriage concluded

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cooperation with John Asland et al.), Documents de travail no.125, Paris: Institut national d'études démographiques (2005), p. 3.

[703] Ibid.

[704] Note that as things stand, Italy does not recognize any form of same-sex relationships.

[705] See http://www.canadainternational.gc.ca/netherlands-pays_bas/consular_services_consulaires/marriage-mariage.aspx?lang=eng.

[706] Important to note here is that regulations from Europe and International Treaties have precedence over book 10 DCC. If a certain topic is regulated in a regulation or treaty the latter will be applied to the situation at hand.

[707] M.H. ten Wolde, Inleiding Nederlands en Europees Internationaal Privaatrecht, Hephaestus: Groningen 2009, p. 127.

outside the Netherlands will be recognized under Dutch private international law when this marriage is valid under the law of the land where the marriage has been celebrated (principle of *lex loci celebrationis*) (Article 10:31(1) DCC). A marriage that is contracted outside the Netherlands in front of a diplomatic or consular civil servant in accordance with the requirements of the law of the State that is represented by this civil servant, is recognized in the Netherlands as a valid marriage, unless it was not allowed to contract such a marriage in the State where the marriage took place (Article 10:31(2) DCC).[708] In both situations the international private law rules should be taken into account.[709]

3.3.2. Cases of public policy which imply the refusal of recognition of marriages

-*Model Case:* a polygamous marriage concluded abroad between a third country national and a EU citizen

According to Article 1:33 DCC, Dutch law requires that a person may only be united in a marriage with *one* other person at the same time. As of 5 December 2015 a new Act entered into force by which the conditions to contract a foreign marriage in the Netherlands have become more stringent. The Dutch Ministry of Security and Justice aims to increase marriage freedom by means of limiting forced marriages and wants to limit the recognition of some types of foreign marriages. It will hereby be easier to annul forced marriages and there will be a ban on marriages concluded by children younger than 18 years old.[710]

Polygamy is forbidden in the Netherlands. In its judgment of July 1, 1993, the Dutch Supreme Court confirmed this and stated that the substantive prohibition of polygamy in the Netherlands is a principle of public policy.[711] In some situations, foreign polygamous marriages can be recognized in the Netherlands. Recognition of a foreign polygamous marriage does not involve the consequence that someone can receive a residence permit for his multiple wives in the Netherlands. Only one spouse can obtain a residence permit. The possibility of recognition of polygamous marriages contracted abroad is further reduced by this new Act of 5 December. If a non-national concludes a polygamous marriage abroad - after his application for a residence permit - this marriage will not be recognized when he moves to the Netherlands. Moreover, that marriage does not justify admission of the spouse. Once the non-national has settled in the Netherlands, he must abide to the Dutch laws and regulations. If he

[708] One example is case HR 26.9.2008 LJN: BD5517, in which a Dutch man and a Dutch woman concluded a marriage in Hungary. The consequences of this foreign marriage for the surname of the wife made justice necessary to the Hoge Raad (High Council in English).

[709] M.H. ten Wolde, " Inleiding Nederlands en Europees Internationaal Privaatrecht", Hephaestus: Groningen 2009, p. 130.

[710] Wet van 7 oktober 2015 tot wijziging van Boek 1 en Boek 10 van het Burgerlijk Wetboek betreffende de huwelijksleeftijd, de huwelijksbeletselen, de nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken (Wet tegengaan huwelijksdwang)

[711] HR 1 juli 1993, NJ 1994, nr. 105, RvdW 1993, nr. 159.

travels in time to go abroad to enter into a polygamous marriage there, then this does not lead to recognition in the Netherlands.[712]

CASE 3.4. ACQUISTION OF NATIONALITY OF THE SPOUSE

Background: marriage is one of the life events that has legal consequences in relation with acquisition of the nationality of a Member State and, in this way, the acquisition of EU citizenship. Explanation and indication of leading/model cases concerning the acquisition of nationality of Member State by marriage.

3.4.1. What are the general requirements for acquisition of nationality of the spouse?

-*Model Case*: a foreigner is married to a national of your Member State.

If you are married to a Dutch national, you can apply for naturalisation after three years of marriage. The same applies to registered partnerships after three years of uninterrupted cohabitation.[713] The municipality at issue will check the information you have given and will forward your application to the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst,* IND) with a favourable or unfavourable recommendation by the mayor. The IND will afterwards determine whether you are eligible for Dutch nationality.[714]

3.4.2. If your national legislation requires a period of residence of the spouse, shall the residence meet some specific requirements?

-*Model Case 1:* a third national country person who is not legal resident has been married to a national of your Member State for the required period and he has illegally resided in your Member State for one year.

-*Model Case 2:* a foreigner has been married to a national of your Member State for the legal period and he has resided in your Member State for the legal period, but, at the moment of the application, he is residing in another State.

The following requirements should be fulfilled in the Netherlands with regard to the period of residence of the foreign spouse:

- You have a valid travel document (for example a passport).
- You are not a threat to Dutch public order or national security.
- You are willing to undertake a tuberculosis test upon arrival in the Netherlands. Certain nationalities are exempt from this obligation.
- You have not provided false information or have withheld important information to support

[712] Wet van 7 oktober 2015 tot wijziging van Boek 1 en Boek 10 van het Burgerlijk Wetboek betreffende de huwelijksleeftijd, de huwelijksbeletselen, de nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken (Wet tegengaan huwelijksdwang).

[713] You can read about all the conditions in the brochure *Hoe kunt u Nederlander worden?* (How can you become a Dutch citizen?, available in Dutch only), available at https://ind.nl/Documents/5013.pdf.

[714]. See https://www.government.nl/topics/dutch-nationality/contents/becoming-a-dutch-national

any previous applications.

- You are married to or are in a registered partnership with a person resident in the Netherlands.
- Your spouse or registered partner has signed the sponsor's declaration.
- Your spouse or registered partner has sufficient long-term means of support for at least another 12 months at the start of the procedure.
- You have passed the Civic Integration Examination Abroad or you are exempt from this examination.
- You are both 21 years old or older.[715]
- You will live together with your spouse or registered partner as soon as you arrive in the Netherlands.
- Upon arrival in the Netherlands you must register in the Municipal Personal Records
  - ✓ Database (BRP) of your local municipality at the same address as your spouse or
  - ✓ registered partner.
- When your spouse or registered partner holds a temporary residence permit with a non-temporary purpose of stay, he/she must have been in the Netherlands for at least one year. This does not apply to a spouse or registered partner holding a temporary residence permit with a purpose. For example for students, highly skilled migrants, scientific researchers, employees or self-employees this requirement of at least one year is not applicable.[716]
  - ✓

3.4.3. Does the national legislation contain provisions in cases of separation or divorce of the spouses?

-*Model Case*: a foreigner has habitual residence in your Member State for the legal required period, which is on-going and immediately prior to the application. He has been married to a national for more of required period, but at the moment of the application, they are legally separated.

In case someone has a residence permit resulting from a marriage or relationship with a Dutch citizen and the marriage or the relationship ends after a certain period, it has to be assessed whether one is eligible for another residence. For example for residence on the grounds of "humanitarian not temporarily" (*humanitair niet tijdelijk*). In order to be eligible for a continued residence, the applicant must have been in a relationship or marriage with his/her Dutch spouse for at least five years and in those five years the partners need to have lived together. The date, which is determinative is the date on which both partners have decided to live separately.[717] Since 2010, the requirements have been modified and a civic integration exam is a necessary requirement. However, different rules are applicable to different categories of people, e.g. for Turkish people and EU citizens and their family members different rules are applicable.[718]

[715] In Dutch law there exists an exception for Turkish nationals. In respect of the standstill clause to the EC Association Agreement with Turkey, the minimum age for Turkish nationals and their family member is 18.

[716] Conditions available at https://ind.nl/EN/individuals/residence-wizard/family/marriage.

[717] Note that the continued residence needs to be asked within four weeks after separation with the partner.

[718] Het Juridisch Loket, available at https://www.juridischloket.nl/verblijf-en-immigratie/verblijfsvergunning-en-echtscheiding-of-einde-relatie/. See also the website of the www.ind.nl for more general information on this matter.

CASE 3.5. SPOUSE REUNIFICATION

Background: although Council Directive 2003/86/EC of 22 September 2003, in relation with third countries national-sponsors and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, in relation with EU citizens sponsors, some aspects of family reunification have not harmonized or can be regulated by the Member States of different ways [see for more details Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification (COM/2008/0610 final) and Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members (COM/2009/0313 final)].*

3.5.1. Can the spouse be reunified under Council Directive 2003/86/EC and Directive 2004/38/EC although the marriage is not recognized in your Member State? If necessary, distinguish between the particular case of polygamous marriage (which is harmonized in relation with Directive 2003/86 but not in relation with Directive 2004/38/EC) and other cases without any harmonization (for instance, persons of the same sex, "forced marriage"…).

-*Model Case*: application for reunification of spouse, although the marriage cannot be recognized in your Member State

Even though there is no harmonization of same-sex marriage recognition in the EU, the Netherlands has recognized same-sex marriages since 2001, and hence recognition of validly concluded foreign same-sex marriages would not be problematic in the Netherlands. The rules under article 10:31 DCC of Dutch International Private Law are applicable in this situation and generally resemble the *lex loci celebrationis* principle, i.e. a marriage that is concluded outside the Netherlands and that is valid under the law of the State where it took place or that has become valid afterwards according to the law of that State, is recognised as a valid marriage in the Netherlands.

The conclusion of a polygamous marriage is prohibited under the Dutch legal framework. According to article 1:30 (1) DCC, a marriage can only be concluded by two persons of different or of the same-sex, while art. 1:33 DCC stipulates that a person only simultaneously with one other person may be joined in marriage. Consequently, these two provisions contain the prohibition of polygamy in the Netherlands. Moreover, criminal law also punishes entering into a polygamous marriages under article 23 (7) of the Dutch Criminal Code, persons that in the Netherlands deliberately enter into a marriage of more than two persons are punishable and can face an imprisonment or a fine.[719]

Regarding the recognition of foreign polygamous marriages, the rules of Dutch international private law need to be consulted. Foreign marriages can be eligible for recognition in the Netherlands if such marriages are valid under the law of the State where it took place or if that marriage has become valid

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* **Take into account that this question is formulated in a different style and short answers are appropriate due to the wide harmonization of the EU Law.**

[719] K. Boele-Woelki, W. Schrama and I. Curry-Sumner, "De juridische status van polygame huwelijken in rechtsvergelijkend perspectief", *Utrecht Centre for European Research of European and International family law,* p. 18.

afterwards according to the law of that State (specified in Article 10:31 DCC). In the context of polygamy, which is prohibited in the Netherlands, the new Act of 5 December 2015 has made the conditions to recognize foreign polygamous marriages more stringent. Recognition of a foreign polygamous marriage does not involve the consequence that someone can receive a residence permit for his multiple wives in the Netherlands. Only one spouse can obtain a residence permit. That possibility of recognition of polygamous marriages contracted abroad is further reduced by the new Act of 5 December 2015. If a non-national concludes a polygamous marriage abroad - after his application for a residence permit - this marriage will not be recognized when he moves back to the Netherlands. Moreover, that marriage does not justify admission of the spouse. Once the non-national has settled in the Netherlands, he must abide to the Dutch laws and regulations. If he/she travels in time to go abroad to enter into a polygamous marriage there, then this does not involve recognition in the Netherlands.[720]

3.5.2. In accordance with Article 16 Council Directive 2003/86/EC about family reunification, has your Member State adopted some provisions for refusal entry and residence of the spouse regarding a marriage of a couple which does not live in a real marital relationship?

-*Model case*: a third country national legally resides in your Member State and applies for the reunification of his foreign spouse, but authorities observe that they do not live in a real marital relationship.

In the Netherlands, rules on entry and residence of third country nationals are enshrined in the Alien's Act (*Vreemdelingenwet*)[721] and the Alien's Decree (*Vreemdelingenbesluit*).[722] The implementing measure for EU Directive 2003/86 was a Royal Decree adopted on 29 September 2004, amending the Dutch Alien's Decree.[723] Dutch law requires the existence of a 'real family relationship' as enshrined in 3.14(1) sub c of the Aliens Decree. In the Alien's Circular[724] it was stipulated that a real family relationship was deemed no longer to exist if the parent and child had been separated for more than a period of five years, the so-called 'period of reference'. The Dutch government regarded the requirement of a real family relationship in compliance with the ground for refusal of an application for entry and residence in Article 16(1)(b) of the Directive, which provides for a ground of refusal for family reunification in case the sponsor and the family member no longer live in a real family relationship.

In various cases, Dutch courts nevertheless stipulated that the Dutch policy regarding the real family relationship went much further than the discretion given by Article 16(1)(b) of Directive 2003/86. By

[720] Wet van 7 oktober 2015 tot wijziging van Boek 1 en Boek 10 van het Burgerlijk Wetboek betreffende de huwelijksleeftijd, de huwelijksbeletselen, de nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken (Wet tegengaan huwelijksdwang)

[721] The first Aliens'Act (Vreemdelingenwet) which was adopted in 1965 (Stb. 1965, 40), has been changed several times and has been replaced by a new Aliens' Act on 23 Nov. 2000(Stb. 2000, 495, iwt. 1 April 2001).

[722] Besluit van 23 Nov. 2000 tot uitvoering van de Vreemdelingenwet 2000 (Vreemdelingenbesluit 2000).

[723] Besluit van 29 Sept. 2004 tot wijziging van het Vreemdelingenbesluit 2000 in verband met de implementatie van de Richtlijn 2003/86/EG van de Raad van 22 Sept. 2003 inzake het recht op gezinshereniging (PbEG L 251) en enkele andere onderwerpen betreffende gezinshereniging, gezinsvorming en openbare orde, Stb. 2004, 496.

[724] Vc B2/6.4.2.

letter of 25 September 2006, the Minister of Alien Affairs and Integration annulled the policy advocating that a real family relationship was deemed no longer to exist in case of separation of parent and child of more than five years. The minister stipulated that for the interpretation of the requirement of a 'real family relationship', Article 8 ECHR, which protects the right to a family life, should be taken into account and consequently, the period of reference will not be applicable anymore.[725]

3.5.3. In accordance with Article 15 Council Directive 2003/86/EC about family reunification, has your Member State limited the granting of autonomous residence permit to the spouse in cases of breakdown of the family relationship (widowhood, divorce or separation)?

-*Model Case:* a third country national legally resides in your Member State and died, after two years of residence with his foreign spouse.

The Dutch rules are in this matter more favourable than the minimum standard provided for in Directive 2003/86. Children of age who have held a residence permit for family reunification being a minor are entitled to an autonomous residence permit after one year (Article 3.50 Aliens Decree). Pursuant to Article 3.51 Aliens Decree, spouses and unmarried partners are eligible for an autonomous residence permit after they have held a residence permit on the basis of family reunification for **three** years.

3.5.4. In accordance with Article 4.5 Council Directive 2003/86/EC about family reunification of third countries nationals, has your Member State required the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her, in order to ensure better integration and to prevent forced marriages?

-*Model Case:* a third country national that legally resides in your Member State applies for the reunification of his foreign spouse. Both of them are 18 years old.

The Dutch Aliens Decree requires a minimum age of 21 years for family formation of both spouses or partners.[726] Both provisions have been included in the Royal Decree implementing the directive. The regulations provide that admission should always be refused to spouses or partners below 21 years of age.[727]

Unless the applicants are EU, EEA or Swiss nationals, partners need to fulfil the following conditions in order to benefit from family reunification in the Netherlands:

- Health insurance, which covers all risks;
- Possessing a valid passport;
- Absence of a criminal record;
- Tuberculosis certificate;

[725] Rechtbank Den Haag, 16 November 2005, JV 2006/28, Rechtbank Den Haag, 21 December 2005, (LJN AU8416), Rechtbank Middelburg 14 March 2006, JV 2006/177).
[726] See article 3.14 paragraph 2, article 3.15 paragraph 2 Dutch Aliens Decree.
[727] http://cmr.jur.ru.nl/CMR/Qs/family/netherlands/

- The sponsor (i.e. the inviting party) must satisfy a 1.424,40 euro brute per month criteria and has a working agreement for at least one year from the moment of application;
- The foreign partner has to pass a civic integration exam (*inburgeringsexamen* in Dutch).[728]
- Both partners have to be at least 21 years old;
- Marriage certificate in case of family re-unification and a document, which proves celibacy in case of family formation; these records should *not* be older than 6 months at the moment of filling an application for a Dutch residence permit in the IND and should include a legalisation or apostle stamps;
- In cases in which partners are already married, the marriage has to be registered in the Dutch Municipal Administration (*Nederlandse Gemeentelijke Basisadministratie – GBA*);
- Both partners have to live together from the moment of their stay in the Netherlands and have to be registered at the same address in the Netherlands.[729]

3.5.5. In accordance with Article 4.3 Council Directive 2003/86/EC, has your Member State decided that registered partners are to be treated equally as spouses with respect to family reunification?

-*Model Case*: a third country national resident in your Member State applies for the reunification of his/her registered partner

Dutch law has not been amended as a consequence of the implementation of Directive 2003/86 on family reunification. The right to family reunification already included the non-married partner of 18 years or older having a permanent and exclusive relationship with the sponsor, as enshrined in article 3.14 paragraph 1 sub b of the Dutch Aliens Decree. In the Netherlands, registered partners have an equal status as regards to married couples.

Dutch law recognizes 2 possibilities to form a family: 1) family re-unification, i.e. a marriage or other relationships (e.g. children) between family members who have already lived together for a certain period in the host State. Family re-unification may be applicable to spouses, unmarried partners, couples of the same-sex, children under the age of 18 who wish to join their parents in the Netherlands, 2) being with another partner: a coming partner is dependent on the residing partner. The Dutch residence permit will be terminated in the case of living apart or divorce. After 3 years of living together, a foreign partner can receive an independent Dutch residence permit. The partner residing in the Netherlands has to satisfy minimum salary criteria. For both categories the conditions as described earlier in question 3.5.4 have to be satisfied.[730]

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[728] Foreigners from MVV exempted countries (USA, Australia, Canada, Japan, New Zealand, South Korea, Switzerland, Norway, Island and EU countries) are excluded from this requirement; moreover, foreign partners (spouses), who came to the Netherlands (Holland) with a purpose of study or work are exempted from taking an integration exam regardless of their nationality; the price of the exam is 350 euro;

[729] http://www.businesslegalconsultancy.com/en/3213/family-reunification-in-the-netherlands-holland-ind.html

[730] Business Legal Consultancy, available at http://www.businesslegalconsultancy.com/en/3213/family-reunification-in-the-netherlands-holland-ind.html.

3.5.6. In accordance with Article 26 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members, does your Member State carry out checks on compliance with carry their registration certificate or residence card?

-*Model Case*: the residence card of a spouse of the EU citizens is required by the police.

According to Article 26 of Directive 2004/38, 'Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card. In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.'[731]

In the Netherlands, certain officials may require proof of identity on the street, including police officers; ticket inspectors on public transport and special enforcement officers (BOAs). These officials may not ask proof of identity without giving any specific reasons for it. Situations in which they may do so include the following: traffic management (for instance, if a cyclist rides without lights); the maintenance of public order (cases in which people's safety is at stake) or the investigation of criminal offences. If one is unable or unwilling to identify oneself in such situations, applicants will be liable to prosecution. If a person is not able to establish his/her identity, the risk is that he/she will be taken to the police station and will have to pay a fine. For persons aged 16 or over who fail to comply with the requirement to identify themselves, the fine is set at €60. For persons aged 14 and 15, the fine is set at €30.[732] This law does not make a distinction between nationals and non-nationals in this matter.

CASE 3.6. MARRIAGE OF CONVENIENCE

Background: the EU has adopted complementary texts in relation with the marriage of convenience. See in this respect mainly: Resolution of the Council of 4 December 1997 (OJ C 382, 16 December 1997) on marriage of convenience; Communication of the Commission to the European Parliament and to the Council [COM(2014) 604 final] and a Commission Staff Working Document as handbook about marriage of convenience [SWD(2014) 284 final]. EU is concerned in order to prevent "marriage of convenience" for acquisition of nationality or for family reunification.

3.6.1. Does the law of your Member State forbid "marriage of convenience"? If so, which are the concept and effects of this kind of marriage?

-*Model Case:* a third country national marries to a national from your Member State in order to obtain

[731] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96.

[732] See Rijksoverheid, "Compulsory identification" available at https://www.government.nl/topics/identification-documents/contents/compulsory-identification

residence permit or even nationality.

The concept of "marriage of convenience" is defined in the civil law of the Netherlands under Article 1:50 DCC.[733] The provisions concerning marriage of convenience are laid down in the Marriages of Convenience (Prevention) Act, which entered into force on 1 November 1994. The law was introduced to reduce the number of marriages of convenience. It now contains provisions that have the function to prevent and stop the conclusion of marriages of convenience in the Netherlands. The first evaluation of the Act in 1998 led to an amendment of the regulations in Book 1 of the Dutch Civil Code and the Municipalities Database (Personal Records) Act. As enshrined in Article 1:44 (1)(k) DCC, the municipal official of the Registry of birth, marriage and deaths can only register marriages of non-Dutch citizens in case if the Superintendent of the Police has issued a declaration in which advice is given on the relationship of the applicants involved. Once it has been concluded that the marriage at stake is a marriage of convenience, this marriage can be punished by Dutch criminal law on the grounds of forgery or fraud.[734]

3.6.2. How do the authorities of your Member State control if the marriage before them is of convenience? (See also question 4.3.2.)

-Model Case: see previous case and assess if, for instance, the authorities of your State can/shall interview the spouses.

According to Directive 2003/86, a marriage of convenience is a marriage contracted for the sole purpose of enabling the person concerned to enter or reside in the territory of a State.[735] In Dutch law, the legal definition of a marriage of convenience can be found in the Dutch Civil Code, Book 1, article 50, which illustrates in which situations a request for registration of a marriage in the Netherlands may be rejected and stipulates the following:

"a marriage can be refused when the partners to be do not fulfil the requirements for marriage, and where the intentions of the partners or of one of them is not to fulfil the duties attached by law to a marriage but the intention to marry is directed at getting (legal) access to the Netherlands".[736]

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[733] See http://www.udi.no/globalassets/global/european-migration-network_i/studies-reports/misuse-family-reunification-study.pdf, p. 11.

[734] WODC van het Ministerie van Justitie, Enforcement of the Marriages of Convenience (Prevention) Act 2004, p.1. Note that this practice complies with Article 16(4) of Directive 2003/86 on the reunification of third country nationals.

[735] See Article 16(2)(b) Council Directive 2003/86 on family reunification.

[736] European Migration Network, Ad-Hoc Query on Marriages of Convenience available at http://www.udi.no/globalassets/global/forskning-fou_i/arbeid-og-opphold/marriages-of-convenience.pdf (2011), pp. 7-8. Note that this is an unofficial translation.

In addition, provisions on marriages of convenience are enshrined in the 1994 Act on the Prevention of Marriages of Convenience.[737] This Act contains articles to both stop and suppress marriages of convenience. As discussed earlier, according to Article 1:44 (1)(k), the municipal official of the Registry of Births, Deaths and Marriages can in case one or both spouses or registered partners hold a non-Dutch nationality only cooperate with registering a marriage if a declaration of the Superintendent of the police is being issued. In this declaration, information concerning the residence of the alien is given as well as an advice of the Superintendent for the municipal official whether he should or should not cooperate in the marriage.[738] This advice is based upon indications whether the marriage may or may not constitute a marriage of convenience. A negative advice of the Superintendent requires justification and needs to be followed by a completed questionnaire with possible observations by the Superintendent that can indicate a marriage/partnership of convenience. Only a justified negative advice of the Superintendent will allow the municipal official to decide not to conclude the marriage or registered partnership. This national practice is in line with Article 16(4) of Directive 2003/86 on family reunification.[739]

3.6.3. What happens with the control of the convenience when the marriage is concluded before a foreign authority but it provokes effects in your Member State?

- *Model Case:* a national from your Member State and a third country national marry abroad in order to obtain residence permit in your Member State or even nationality. The marriage wishes the recognition of this foreign act by the authorities of your Member State.

As discussed earlier, a foreign marriage will be recognized in the Netherlands if the law of the land where the marriage has been celebrated recognizes this marriage as a valid marriage, according to the principle of *lex loci celebrationis* as enshrined in Article 10:31(1) DCC. A marriage needs to be entered into the Persons Database (*Basisregistratie Personen,* BRP) before a residence permit can be granted to the couples in the Netherlands.

Prior to the entering in the Municipal Administration, the so-called M46 procedure has to be concluded. Based on this procedure, the Municipality at issue can check whether the marriage of concern is a marriage of convenience. The role of the Dutch Immigration Service (IND) in the M46 procedure is limited to providing data concerning the legal aspects of residence. The chief of the Aliens police has the competence to formulate the advice that is used by the municipal official to decide to enter the marriage into the Municipal Administration. When judging an application (e.g. for naturalisation) and the presumption of a marriage of convenience persists, more detailed investigation is possible. As is

[737] Stb. 1994, 405.

[738] Aliens Act Implementation Guidelines (Vreemdelingencirculaire B2/3.1c): "Definitie van een schijnhuwelijk/-partnerschap: Een schijnhuwelijk of -partnerschap is een huwelijk of geregistreerd partnerschap dat wordt aangegaan met als enig oogmerk een vreemdeling die nog niet (of niet meer) over een verblijfsrecht in Nederland beschikt alsnog een verblijfsrecht te verschaffen."

[739] See Dutch answers on transposition of Directive 2003.86,
available at http://cmr.jur.ru.nl/CMR/Qs/family/netherlands/.

often the case, only after the residence permit has been granted it is possible to determine whether the persons involved are actually living together and form a domestic unit.[740] The law on the *Prevention of Marriages of Convenience* enables the municipality to deny registration of the marriage in the Municipal Administration.[741] Once it has been concluded that the marriage at stake is a marriage of convenience, the spouses can be punished under Dutch criminal law on the ground of forgery or fraud.[742]

3.6.4. What are the main proofs and presumptions concerning convenience and are they in accordance with EU recommendations?

-*Model Case:* the authorities of your Member State observe that marriage formed by a national of your Member State and a foreigner ignore basic personal and family data of each other, although previous relations in presence or by mail, post mail, telephone, internet are proven.

In the Netherlands, a residence permit for family reunification can be revoked and renewal can be refused in the following circumstances: 1) if the conditions for a permanent residence are no longer complied with; 2) if the holder of the residence permit moved to another state; 3) if the holder has submitted incorrect information or 4) if he has withheld relevant information which might have led to the rejection of the application. A foreign national is responsible to illustrate changes in his situation that are relevant for his/her right to a residence permit in the Netherlands. One example is when the relationship between the two spouses no longer exists. Failure to report relevant information can be punished under Dutch criminal law.

Article 35 of Directive 2004/38/EC allows Member States to adopt the necessary measures to "refuse, terminate or withdraw" any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience, provided the conditions referred to in that article are respected.[743] As discussed earlier in question 3.6.2, only a justified negative advice of the Superintendent will allow the municipal official to decide not to conclude the marriage or registered partnership. This national practice is in line with Article 16(4) of Directive 2003/86.[744]

Case 4. Life-events and registry offices

[740] European Migration Network, Ad-Hoc Query on Marriages of Convenience available at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/family-reunification/303_emn_ad-hoc_query_marriage_of_convenience_18mar2011_wider_dissemination_en.pdf , (2011), pp. 7-8. No structural investigation into marriages of convenience outside of the M46 procedure currently takes place in the Netherlands, but risk indicators are available for IND-officials.

[741] Ibid.

[742] ECtHR case 46410/99 *Judgment Űner v The Netherlands*, The ECtHR set out the requirements in order to assess whether a marriage is a marriage of convenience, with a view to assessing whether a decision restricting the right to enter and reside may be considered necessary in a democratic society and proportionate to the legitimate aim pursued, so that it does not interfere with the right to family life.

[743] See Directive 2004/38/EC on the right of EU citizens to move and reside freely in the European Union.

[744] See Dutch answers on transposition of Directive 2003/86/EC, available at http://cmr.jur.ru.nl/CMR/Qs/family/netherlands/.

CASE 4.1: CIVIL REGISTRATION SYSTEMS

Background: the different registration models existing in Europe are regulated in event-based systems, person-based systems or population register. An event based registration system records all relevant changes to the civil status of a person occurring in the respective country at the place, where the event occurred. A person-based registration system records all relevant changes to the civil status of a person occurring in the respective country at a central place. Population registers are based on an inventory of the inhabitants and their characteristics such as for example sex and the facts of birth, death and marriage, and the continuous updating of this information. Each one of them poses different difficulties. For example, the event-based systems promote the register tourism and can generate problems for accessing the Registry Offices of other States (for instance, the Registry of their nationality). The person-based systems allow a single record of the person but always require a recognition of civil status acts created in other States.

4.1.1. What kind of registration system exists in your country?

-*Model Case:* While on vacation in France, a child of a Spanish citizen couple is born in that country. The child's birth was recorded in a French Registry Office. Later, the birth has to be recorded also in the Spanish Registry Office.

The Netherlands applies an *event-based* registration system, which contains the registration of births, marriages, registered partnerships and deaths. The registrations are executed by the appropriate municipality where the event occurred, or in case the event took place abroad, in the municipality of The Hague.[745] Next to these civil status registers, the Netherlands also has a population register, which records additional details of citizens living in the Netherlands. However, the population-based registration should be seen as a continuous record of current available data on Dutch citizens, such as current addresses. It is the task of each municipality to update the population registers. The events are registered chronologically. The indexes are sorted alphabetically by surname. All registers are held in duplicate form and one is submitted to the Ministry for Foreign Affairs to be deposited in the central files (*Centraal Bewaarplaats* in Dutch).[746]

4.1.2. Have fundamental rights any consequence on the content of the civil registration?

-*Model Case:* the parenthood of an adopted child is recorded in a Registry Office. The question is whether there should be or should not be included in the Registry Office that the parentage derived

[745] Directorate-general for Internal Policies, Policy Department citizen's rights and constitutional affairs, "Life in cross-border situations in the EU (a comparative study on civil status) Country Report on the Netherlands 2013, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474395/IPOL-JURI_ET(2013)474395(ANN09)_EN.pdf>, p. 4.

[746] Directorate-general for Internal Policies, Policy Department citizen's rights and constitutional affairs, "Life in cross-border situations in the EU (a comparative study on civil status) Country Report on the Netherlands 2013, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474395/IPOL-JURI_ET(2013)474395(ANN09)_EN.pdf>, p. 4.

from an adoption.

With respect to the rights of adopted children, in 1994 the Dutch High Court (*Hoge Raad)* ruled on a landmark case in *Valkenhorst II*, which granted adopted children better access to their adoption documents.[747] This case concerned an institution, Valkenhorst, whose main goal was to care for and assist non-married mothers. The court ruled that this institution had to provide adoption documentation (including information on the biological father) to a child whose biological mother stayed in Valkenhorst, although the mother did not give consent for the access to such information. The court clarified here that the rights of children to trace their origin generally prevailed over the right of the mother to keep such information secret.[748] Hence, the court recognized the rights of children to fully and freely develop their own personality, including the right to trace the identity of their biological parents.[749]

With regard to foreign adoptions, adoption agencies are obliged to gather the information that is needed to trace the origin and background of the child and to keep a file for every case for at least 30 years *after* the child arrived in the Netherlands. Hence, from this it can be concluded that fundamental rights do have a consequence on the content of the civil registration in case of adopted children, as their right to trace they origin is developed in Dutch case law as a fundamental right. In addition, the Strasbourg Court ruled in various cases that the individuals' interest in knowing the truth about their genetic descent constitutes a fundamental right, on the basis of the right to 'private life' as enshrined in Article 8 ECHR.[750]

CASE 4.2: DOCUMENTS TO REGISTRY OFFICES

Background: the register of the acts performed in other States can be practiced on the basis of different documents (judgments, notarized documents, civil status certificates). The requirements for the effectiveness of the documents depend on the document in question and also on the State from which they originate. The control of equivalence between the authorities involved in the State of origin and the role of the authorities of the requested State is important in this matter. In the case of foreign judgments, it may be necessary to go prior to a procedure of the exequatur. The requirements of documents to access to the registry of each State must be established here.

4.2.1. Civil status certificates of foreign Registry Offices

-*Model Case:* a marriage between a Spanish citizen and an Italian citizen is celebrated and recorded in an Italian Registry Office. The couple provides the certificate of the Italian civil register to apply for register in the Spanish Registry Office.

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[747] NJ 1994/606, Hoge Raad, 15 April 1994, nr. 15307.

[748] Center for Adoption policy, Overview of Dutch adoption law, pp. 8-9, available at http://www.adoptionpolicy.org/pdf/eu-netherlands.pdf.

[749] Note that this right is not absolute.

[750] ECtHR, *Gaskin v. United Kingdom,* Appl. no. 10454/83, 7 July 1989; ECtHR Case *Odievre v. France*, (App. 42326/98), 13 February 2003 GC, (2004); ECtHR Case *Jaggi v Switzerland,* (App. 58757/00), 3 July 2003, (2004) and *Godelli v Italy,* (App. 33783/09), 25 September 2012. See also R.J. Blauwhoff, "Tracing down the historical development of the legal concept of the right to know one's origins Has 'to know or not to know' ever been the legal question?", *Utrecht Law Review* 2 (2008), pp.99.

A document that is legally valid in another state is not always recognised in the Netherlands. In order to be recognised, the authorities of the country where the document originates from must show its authenticity, usually by issuing it with stamps and signatures by means of a process called legalization.[751]

The specific conditions for the recognition of foreign certificates are regulated under Article1:25 DCC, which stipulates that birth certificates, marriage certificates, certificates of a registered partnership and death certificates, issued outside the Netherlands by *a competent authority in accordance with the local regulations*, are registered by instruction of the Public Prosecution Service or at the request of an interested person in the registers of births, marriages, registered partnerships or death of the municipality of The Hague, in the following two situations: a) if the certificate concerns a person who at the moment of the application is a Dutch national or who, at any time, has had the Dutch nationality or, although not being of Dutch nationality, has once been a legal resident of the Netherlands; or b) if the certificate concerns a person who lawfully resides in the Netherlands pursuant to Article 8, under point (c) and (d) of the Aliens Act 2000.

With regard to foreign marriage certificates, paragraph 4 of provision 1:25 DCC stipulates that before the Registrar of Civil Status of the municipality of The Hague registers a marriage certificate, he must receive a declaration as enshrined in Article 44 (1) (k) of the Aliens Act 2000 from the chief of police as referred to in that Act. This declaration will be issued at the request of the spouse or the registered partner to whom it relates. In addition to the request a certified copy as meant in Article 44 paragraph 1, under point (a) of the Aliens Act 2000, must be submitted. In case the person making the request has no habitual residence in the Netherlands, this declaration will be issued at the request of the other spouse or registered partner. A declaration as referred to in the Aliens Act is not required in the following circumstances: a) if since the conclusion of the marriage or registration of the partnership at least ten years have passed or b) if the marriage or registered partnership has ended.

4.2.2. Foreign notarized documents

-*Model Case:* a marriage applies for the record of the matrimonial agreement in the Registry Office. The agreement is included in a public document provided by a German Notary.

In the Netherlands, documents issued in French, German or English will not be translated when being accepted by the Registry Office (*Burgerlijke stand*) in The Hague at the National Tasks Division (*Landelijke Taken*). If foreign documents are issued in other languages, the applicant will need to supply a translation from a sworn translator. The foreign documents also require an *Apostille* stamp in order to be legalized or to be verified in the Netherlands, if the country is party to the *Apostille* Convention.[752]

[751] See for more details on this issue the following website:
https://www.government.nl/topics/legalising-documents/contents/legalising-foreign-documents

[752] Formal requirements can be found at the website of the Registry Office (Burgerlijke Stand) in Den Haag, Landelijke Taken, available at www.denhaag.nl.

4.2.3. Foreign judgments

-*Model Case:* a judgment issued in France establishes that a Spanish citizen is the biological father of a child. The father provides this judgment to the Spanish Registry Office to register the fatherhood in the birth record of the child.

Pursuant to Article 1:26 DCC, the court could be asked to issue a declaratory court order which establishes that a foreign act or judgment is amenable for inclusion in the Dutch Civil Registry.[753] The applicant is required to provide the judge with a certified copy of the judgment, and a certificate of the court of origin, identifying the court and the parties to the judgment. Such petition can be filed on behalf of the claimant by a Dutch attorney/lawyer.[754] The preliminary relief judge will not examine the grounds on which an application for enforcement can be denied, but only test if all formalities have been complied with. The court only looks into the refusal grounds if the party against whom the judgment is given appeals the declaration of enforceability. The court is not allowed to review the case on its merits.[755]

CASE 4.3: CONTROL OF EQUIVALENCE BETWEEN EU REGISTRY OFFICES

Background: according to some European laws, the registrar has to control the legality of the act before recording it in the Registry. This control is made according to family law and international private law rules in force in each State. These rules differ significantly among Member States. The registrar also has to refuse the entry if the act violates public policy. Due to the fact that this control could be an obstacle to the free movement of persons, the scope of this control of legality might be affected by the mutual recognition principle.

4.3.1. Are registrars compelled to do a control of legality of the civil act?

-*Model Case:* the parenthood of a child, born by a surrogacy arrangement, is established by a foreign judgment. The intending parents provide this judgment to the register officer in order to register the filiation of the child. Accordance with the law, the officer of the register may refuse to register if he is obliged to control the document on the ground of public policy.

In principle, the content of the document is recognized in the Netherlands if the instrument is made in a foreign country, following the local requirements and by an authorized authority (Article 1:21b DCC). The majority of civil status documents contain specific rules determining their recognition. The recognition of the following civil status records will be dealt with by the Registrar according to the provisions listed below:

- Birth: Article 10:100-10:101 DCC;
- Marriage: Article10:31-10:34 DCC;
- Registered Partnership: Article 10:61-10:62 DCC;
- Death: Article 10:100-10:101 DCC.

[753] Th. M. de Boer, F. Ibili e.a., "Nederlands Internationaal personen en familierecht, Kluwer 2010, p. 269.
[754] The recognition proceedings under the Lugano Convention and the EEX regulation are generally equal.
[755] See http://www.amsadvocaten.com/litigation/recognition-and-enforcement-of-a-foreign-judgment/.

The document may itself be recognized, but the effects of the document can be restricted by virtue of for example the public policy exception. A general public policy exception exists for the entire application of Dutch private international law as enshrined in Article 10:6 DCC.[756] An authority will sometimes first try to verify the content of the document or it may also ask the applicant to produce additional documents. In addition, the Registrar can have the legalized document verified in the country where it originated by asking the authorities in that State whether the information in their register confirms the information in the document.[757]

4.3.2. How do registrars control marriages of convenience? (see also question 3.6.2.)

-*Model Case:* before the registration of a marriage between a Spanish citizen and an Ecuadorian citizen, the register officer refuses to record it on the grounds that it is a marriage of convenience.

Dutch law provides for the prevention of misuse of the right to family reunification. One example is the Marriages of Convenience (Prevention) Act as already discussed in §3 above.[758] The registrar is required to ask a declaration of the chief of the police in cases where one of the partners to be does not hold a legal permanent residence status. The police is responsible to investigate the situation and conduct home visits and interviews in order to ascertain whether the relationship concerns a marriage of convenience.

4.3.3. How do registrars control the filiations of complacency?

-*Model Case:* after the acknowledgement of the fatherhood of a child, the registrar rejects the registration on the grounds that it is a recognition of filiation by complacency

"Filiation of complacency" in this context resembles the recognition of fatherhood by someone who knows that he is not the biological father of the children with the sole aim that the son or daughter acquires the nationality of the father or in some cases the permanent residency. In principle, non-biological fathers are allowed to recognize the child under Dutch law. However, if recognition of a child is done for certain fraudulent reasons such as solely acquiring the Dutch nationality, the recognition is not allowed. This is regulated in Article 1:205(1)(c) DCC, which stipulates that a request for the nullification of a recognition of paternity – on the ground that the man who has recognized paternity is not the biological father of the child –may be filed at the District Court "by the mother if she had been moved to give her consent to the recognition of paternity under the influence of threat, mistake or

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[756] Directorate-general for Internal Policies, Policy Department citizen's rights and constitutional affairs, "Life in cross-border situations in the EU (a comparative study on civil status) Country Report on the Netherlands 2013, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474395/IPOL-JURI_ET(2013)474395(ANN09)_EN.pdf>, p. 23.

[757] See Rijksoverheid on legalising foreign documents, available at https://www.government.nl/topics/legalising-documents/contents/legalising-foreign-documents.

[758] See http://www.udi.no/globalassets/global/european-migration-network_i/studies-reports/misuse-family-reunification-study.pdf, p. 11.

fraud (deception) or, provided that the influence occurred in a period that she was still under age, under the influence of abuse of circumstance."

If it concerns a filiation of complacency, (*schijnerkenning*) the Registrar of civil status can refuse the registration of the birth certificate on the basis that it conflicts with Dutch public order in case the foreign child has been recognized by a Dutch father for the sole purpose of obtaining admission to the Netherlands.[759] Pursuant to Article 1:18b(3), the Registrar of civil status will notify the Aliens police on his findings. If the birth certificate has been registered already, the Registrar or the Public Prosecutor service can turn to the court to ask for a declaratory court order. If the judge rules that the foreign recognition constitutes a filiation of complacency (*schijnerkenning*), this can lead to – upon the request of the Public Prosecutor Service – the situation that a wrongly registered certificate is removed from the registration (Article 1:24 DCC).[760]

In April 2003, a new law on Dutch nationality entered into force (*Rijkswet*). Before this amendment, children born out of wedlock would acquire Dutch citizenship automatically if a Dutch father would recognize them. Due to the increasing fraudulent forms of recognitions, this law was amended. The Dutch government decided that children born out of wedlock could only acquire the Dutch nationality in case the Dutch father would take care of them for a minimum of three years. However, if – in the meantime – these children would not acquire the mother's nationality, this would render them stateless. Consequently, the law had been amended again in 2009. As things stand, children will automatically acquire Dutch nationality if their Dutch father recognizes them before they reach the age of seven. After this age, fatherhood has to be confirmed by means of a DNA test.[761]

CASE 4.4: CROSS-BORDER COOPERATION BETWEEN REGISTRY OFFICES

Background: the different registration systems among States and the lack of harmonization of the registry law cause different obstacles to the free movement of persons. Particularly important, in order to guarantee the right to the unique identity, is the ability to communicate the data of the civil status that may affect the nationals of other States. It is also important to facilitate the performance the events that affects the civil status in other States. However, there could be problems due to the requirement in a State of the event of documents that were unknown to the State of the register.

4.4.1. Are there any specific instruments in your country for cross-border cooperation among Registry Offices?

-*Model Case:* a national of a State seeks to celebrate their marriage in another State (State B), whose authorities requested a certificate of no impediment marriage. Requested the certificate, the registrar of Registry Office of State A refuses to give that document because such a document is unknown in its

[759] C. Asser and I. de Boer, Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Personen en Familierecht, Kluwer: Deventer 2010, pp. 97-98.

[760] C. Asser and I. de Boer, Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Personen en Familierecht, Kluwer: Deventer 2010, pp. 97-98.

[761] United Nations High Commissioner for Refugees, "Staatloosheid in Nederland", 2011, p. 11, available at http://www.unhcr.nl/fileadmin/user_upload/pdf/UNHCR-Statelessness_in_-NLD-screen_1.pdf. See also C. Asser and I. de Boer, Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Personen en Familierecht, Kluwer: Deventer 2010, p. 98.

law.

The Conventions of the International Commission on Civil Status, of which the Netherlands is a party, facilitate the traditional cooperation between the civil status authorities. However, these Conventions have not been ratified by all Member States.[762]

In addition, all Member States of the EU have ratified international legalization conventions, which make the legalization procedure easier. One example is the Apostille Convention that entered into force on 5 October 1960. This convention makes it possible for the applicant to get his/her document legalized by a single procedure – the issue of an Apostille stamp – and immediately use that document in any state that is a party to the Apostille Convention by means of mutual recognition. A birth certificate issued in the Netherlands for example is legally valid in all countries that have ratified the Apostille Convention and hence no translation is necessary.[763] The Apostille Convention has been ratified in all Member States of the EU and all – but 10 – members of the Hague Conference of Private International Law.

4.4.2. Is there any means for the communication of registry data when they may affect nationals of other States?

-*Model Case:* a French national got married in Spain. The marriage is registered at the Spanish civil register but not in France. To return to France, the French national wants to marry before a French authority. It raises the question of proof of the capacity of the spouse.

As things stand, there is no harmonization with regard to civil status documents and their recognition in the EU. However, civil registrars in some Member States - including the Netherlands - currently undertake administrative cooperation on an informal basis. In addition, based on the CIEC Conventions, in particular Conventions No 3, 8 and 26, administrative cooperation in cases of civil status documents could be developed. Pursuant to Convention No 3, when civil registrars issue a record of marriage, they must give notice of this to the civil registrar for the place of birth of each one of the spouses, using a standard form. This Convention is in force in eleven Contracting States, six of which are EU Member States, including Austria, Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Poland, Portugal and Spain.[764]

In addition, the European Commission issued a Green Paper on this matter proposing automatic recognition of civil status documents such as marriage certificates. According to the Commission's Green Paper, automatic recognition implies that 'each member state would accept and recognise, on the basis

[762] Registered partnerships are for example not covered by these Conventions. See, however, Convention No 32 on the recognition of registered partnerships of 5 September 2007, which has not yet entered into force.

[763] The Apostille Convention is in force in all Member states of the European Union and all – but 10 – members of the Hague Conference of Private International Law. See C. Bernasconi,"Some obersvations from the Hague Conference on Private International Law", Proceedings of the Annual Meeting (American Society of International Law) Vol. 101 (MARCH 28-31, 2007), pp. 350-353.

[764] Commission Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM(2010) 747 final of 14 December 2010.

of mutual trust, the effects of a legal situation created in another Member State.'[765] This process would not require harmonisation. According to the Commission, this solution would be simple and transparent with respect to all citizens exercising their free movement throughout the EU, as a person's civil status would not be questioned if he or she decided to move to another member state. However, at the same time the Commission is of the opinion that automatic recognition should be accompanied by compensatory measures in order to prevent fraud and abuse. Public order rules in the Member States should be taken into account in this matter.[766]

4.4.3. In the issuance of civil status certificates, are language requirements or other formal conditions of other States considered?

-*Model Case:* a birth certificate of a French national who is registered in the Spanish Civil Registry is requested. The certificate is requested to provide it to a French authority. Is it possible that the certificate be issued in French?

The Netherlands is a party to the Convention on the Issue of Multilingual Extracts from Civil Status Records, which has as its purpose to define a uniform format for civil status documents (i.e. marriage, death, and birth).[767] States that are party to this Convention, including the Netherlands, are obliged to issue multilingual extracts if requested and accept the abstracts of other States and treat them equally compared to their national abstracts. States should hereby provide for translations of basic elements on the civil status records for inclusion by the other State parties.

CASE 4.5: EVIDENTIARY VALUE OF CIVIL STATUS CERTIFICATES

Background: the diversity among national registries affects the value of the certificates issued and in its evidentiary value in other States. Moreover, this evidentiary value is affected by the different rules of evidence established in the States. There could also exist differences depending on the type of authority (judicial or administrative), which the certificate is provided to.

4.5.1. What evidentiary value has in your country the certificate of a foreign Registry?

-*Model Case:* a citizen brings a birth certificate to prove their age. The Registry Office of the State of origin based their records solely on the strength of a declaration made by the person concerned thereby, without additional control of legality by the registrar. This certificate is provided in a judicial procedure before a Spanish court.

With regard to the evidential value of certificates of civil statuses in general, Article 1:22 DCC stipulates

[765] Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM(2010) 747 final of 14 December 2010.

[766] Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM(2010) 747 final of 14 December 2010, pp. 14-15.

[767] In total 24 States are party to this Convention, including: Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Cape Verde, Croatia, Estonia, France, Germany, Italy, Lithuania, Luxembourg, Macedonia, Moldova, Montenegro, Netherlands (European territory), Poland, Portugal, Romania, Serbia, Slovenia, Spain, Switzerland and Turkey.

that certificates of civil status have the same evidential value as other authentic deeds.[768] Some foreign certificates issued by a qualified instance such as birth certificates, certificates of registered partnerships and death certificates can be registered in the Dutch registry of civil status in The Hague. This constitutes certificates of people that at the moment of registration are Dutch, have been Dutch for a certain amount of time or have been accepted in the Netherlands by means of a refugee status (Article 1:25 (1) DCC). Pursuant to Article 1:25 (2) DCC, birth certificates issued outside the Netherlands by a competent authority "in accordance with the local regulations are registered on instruction of the Public Prosecution Service or at the request of an interested person in the register of births of the municipality of The Hague, if the birth certificate concerns a person of foreign nationality and a later mark must be added to the birth certificate pursuant to a statutory provision of Book 1 of the Dutch Civil Code."

With regard to the legality of the facts of the civil status that have been included in a foreign certificate one can ask the Dutch District Court to issue a declaratory court order on a certificate or court order, stating that the act or decision has been issued according to the local regulations by a qualified instance and that this act or decision can be issued in the Dutch registers of civil statuses (Article 1:26 DCC).[769]

4.5.2. Does the foreign registration certificate have the same evidentiary value in the judicial sphere that at the administrative level?

-*Model Case:* it is provided before an administrative authority a certificate of marriage to apply for a visa for family reunification.

A legally valid document in a foreign country is not always recognized in the Netherlands. In order for a marriage certificate to be recognized, authorities in the State from which the document originates have the duty to show its authenticity, in most cases this is done by the foreign ministry. Once this process has been finalized, the document should also be legalized by a Dutch mission located in that State. However, legalization of a document does not automatically lead to acceptance by Dutch authorities of that document as a proof. An authority will sometimes first try to verify the content of the document or it may also ask the applicant to produce additional documents. Furthermore, the Registry Office can ask for verification of the legalized document in the country where it originated by asking the authorities in that State whether the information in their register confirms the information in the document.[770] In addition, pursuant to article 1:20 (b) DCC, a foreign certificate or foreign court order might not be recognized in case it conflicts with Dutch public order.

[768] Article 1:22 DCC on evidential value of certificates states that: "1) a birth certificate constitutes proof against everyone of the fact that at the place and on the day and hour mentioned in that certificate a child is born of a sex (gender) as indicated in that certificate from the mother mentioned as such in that certificate. Where the birth certificate indicates that the place of birth of the child is unknown, the indicated place where the child was found will have the same evidential value. 2) A death certificate constitutes proof against everyone of the fact that at the place and on the day and hour, mentioned in that certificate, the person, who as such is indicated in that certificate, has died or, if this certificate was drawn up pursuant to Article 1:19f paragraph 2, that the body of the person indicated as such in that certificate was found at the place and on the day and hour as mentioned in this certificate."

[769] Th. M. de Boer, F. Ibili e.a., Nederlands Internationaal personen en familierecht, Kluwer 2010, pp. 31+32.

[770] See Rijksoverheid on legalising foreign documents, available at https://www.government.nl/topics/legalising-documents/contents/legalising-foreign-documents.

With regard to the general rules for acceptance of foreign documents in judicial proceedings: only authentic instruments issued by authorities from the Netherlands (i.e. notaries, the public or civil registrar) need to be accepted before a Dutch court in judicial proceedings. Other instruments can be considered as free evidence at the discretion of the Dutch judge in the particular case.[771]

4.5.3. In what cases may the evidentiary value of the foreign certificate be rejected?

-*Model Case:* it is provided a certificate of a marriage, issued by a foreign registry, without translating nor legalized. In addition, there are contradictory data in the registry of origin.

Article 1:18(b) DCC lists the following grounds on the basis of which a registrar may refuse to draw up (foreign) certificates: 1) where a party to a certificate of civil status or an interested person fails to submit a document with all the legally required documents or where the Registrar is of the opinion that a submitted document is inadequate; 2) the Registrar will refuse to draw up a certificate if he finds that this would be contrary to Dutch public order; 3) the Registrar will notify all parties to the certificate and all interested persons in writing a refusal, hereby stating the reason for the refusal as well as the available remedy against it. In addition, a copy of this written notification will be send to the chief of the local police force.[772]

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5. SPAIN

UNIVERSITY OF OVIEDO

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PRESENTATION

The EU Citizenship and the free movement of persons are directly affected by life events. If the legislations of the Member States concerning life events increasingly differ, the EU citizenship is clearly prejudiced. Regarding the lack of harmonization by EU Law, the disparities of the national legislations and the effects and impact of them in the EU citizenship and the free movement of persons, it is convenience to select the following life events: filiation, forenames and surnames and marriage, accompanied by a final and transversal topic relating to circulation and recognition of documents on civil status. See, in this sense:

1. Parentage: The area of parentage and parent-child relationships is one of the areas of family law that lacks harmonization between European States and where there are more differences among national laws. The European Union Member States have different solutions as regards the attribution of custody rights based on the existence (or absence) of a marital relationship between the parents. This has implications for the mobility of citizens and families between Member States. In this sense, it can be seen the implications in a case of unmarried fathers and child abduction in the Judgment of the European Court of Justice in the *McB* case (Judgment of 5 October 2010, Case 400/10). These differences affect their rights of inheritance rights or maintenance obligations. There are also some problems in the area of the effectiveness of surrogacy arrangements, whose international regulation is being proposed in The Hague Conference on Private International Law (*The Desirability and Feasibillity of further Work on the Parentage/Surrogacy Project,* April 2014). In these cases, the case law of the European Court of Human Rights, in *Mennesson* and *Labasse* cases (ECHR Judgments of 26 Juin 2014), has already revealed that directly affected the right of the child to respect their private life, stated in the Article 8 of the European Convention of Human Rights.

2. Forenames and surnames: the Court of Justice of the EU has shown a special concern about the forenames and surnames of the EU citizens. Firstly, the Judgment of the Court of 30 March 1993 (Case C-168/91, *Konstantinidis*) ruled that it was contrary to the freedom of establishment a national provision for a Greek national to be obliged to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons. Secondly, the Judgment of the Court of Justice of European Union of 2 October 2003 (Case-148/02, *García Avello*) ruled that nationals from two Member States could choose the identity in according with one of these Member States and this identity should be recognized in the other Member State in order to respect the EU citizen and the free movement of persons. Thirdly, and in a similar sense, Judgment of the Court of14 October 2008 (Case C-353/06, *Grunkin Paul*) ruled that the surname acquired in the Member State of birth and residence shall be recognized in the Member State of which the applicant is national in order to protect the right to move and reside freely within the territory of the Member States. Fourthly, Judgment of the Court of 22 December 2010 (Case C-208/09, *Sayn Wittgenstein*) ruled that the no recognition of the surnames from other Member State is only based on public policy grounds (in this case, the abolition of the nobility), which are necessary for the protection of the interests which they are intended to protect and they are proportionate to the legitimate aim pursued.

This set of rulings, *inter alia*, shows that the forenames and surnames definitively affect to the EU citizenship. Nevertheless, the EU has not adopted any legal act in relation with the legal rules of

forenames and surnames. This fact is particularly relevant. Not only because this fact obliges to assess country-by-country the impact of the case-law of the CJEU, but also because the national legislations contain many disparities. It is true that the name and surnames are not exactly a "life event", but they are a very relevant consequence of some life events as, for instance, filiation and marriage. But, instead of analyzing the issues of the name in each "life event", an autonomous and independent analysis is more adequate, regarding the special attention that the Court of Justice of EU has paid in this right and the connection of the forenames and surnames with some civil rights, in many legal systems.

3. Marriage: the EU has adopted acts in relation with the divorce, legal separation and marriage annulment. Such are the cases of Council Regulation (EC) n. 2201/2003, of 27 November 2003, concerning jurisdiction and recognition and enforcement of judgments of matrimonial matters and the matters of parental responsibility, and Council Regulation (EC) n. 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).

Nevertheless, the EU has not adopted any general act in order to promote the free movement of marriages in the EU, although this life event extremely affects the rights of EU Citizens and the freedom movement of persons. In this context, many disparities among Member States are observed. In this sense, in many systems the marriage is a civil right linked to the right of a family life or even the freedom of religion. Furthermore, the marriage is an event that facilitates the legal residence in the EU in accordance with Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, or even the access to the nationality of the Member States and, by this way, to the EU citizenship. In order to fight abuses of the marriage, EU has only adopted complementary texts, mainly: Resolution of the Council of 4 December 1997 (OJ C 382, 16 December 1997) on marriage of convenience; Communication of the Commission to the European Parliament and to the Council [COM(2014) 604 final] and a Commission Staff Working Document as handbook about marriage of convenience [SWD(2014) 284 final].

4. Life events and Registries: In the European rules the on free movement of people plays an essential role the need of mutual recognition of civil status acts between States (such as names, marriages, parenthood). At present, this trend is an unfinished model in Europe and one of the reasons lies in the different registrations systems in the European States. According some European laws, the registrar has to control the legality of the act before recording it in the Registry. This control is made according to family law and international private law rules in force in each State. These rules differ significantly among the States. These differences create obstacles to an increased intra-EU mobility of Union citizens and an indirect discrimination of nationals of other Member States in comparison with own nationals in cross-border relationships. The Conventions of the International Commission on Civil Status (ICCS) are insufficient and not all European States are member of them.

The non-harmonized system of Registries among European States creates also many obstacles to mobility of EU citizens in order to do life events (such as marriage) in the State where they want. This has been highlighted in the Report for the European Commission "Facilitating Life Events" (von Freyhold, Vial & Partner Consultants), October 2008. At the same time, and closely related to this issue, the problem of free movement of documents arises. There is an urgent need to settle mutual recognition of documents issued in Member States. This mutual recognition is necessary to enable the registration of acts of civil status in the Registry Offices. This mutual recognition also serves to facilitate the proof of

identity and family relationships to other effects. Such evidentiary value is required in the field of social security benefits (see Judgment of the European Court of Justice in the *Dafeki* case, C- 336/94). It is also required for the purpose to prove the family ties to exercise family reunification linked to citizen mobility. In this field, it is necessary to take into account the *Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012* [COM (2013) 228].

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In this context, maybe it would be convenience to finish this presentation with some general recommendations or instructions. On the one hand, each case is initiated with a short background explaining the subject and scope of the topic and the aims of the research. On the other hand, each case includes model cases in order to illustrate the standard practice. You can use the model case as an example in order to explain the solutions of your Law. Anyway, do not hesitate to add more or different cases of the habitual practices in each country. Furthermore, the study shall include leading cases, if possible.

1. PARENTAGE

CASE 1.1: TYPES OF PARENTAGE

Background: One of the most important differences among Member States law is derived from the different conceptions about the parent-child relationships. The European Union Member States have different solutions as regards the attribution of custody rights based on the existence (or absence) of a marital relationship between the parents. There may be legal distinctions on the basis of the different criteria: depending on matrimonial or no matrimonial parentage; natural or adoptive. The national laws could establish differences on the content of parental responsibility or on the children's rights concerning their parents as regards their rights of inheritance or maintenance. Other legal systems are based on the principle of equality between children and the prohibition of discrimination among them children based on the child's or his or her parents' birth or other status. In such cases, there is possible to refuse the application of foreign law on the ground of public policy.

1.1.6. What types of parentage exists in your law?

-*Model Case*: A couple has a child born out of wedlock. After marriage, they have another child born in wedlock and they adopt a third child. Do these children deserve the equal treatment?

Model Answer: According to Article 39.2 of Spanish Constitution, the public authorities likewise shall ensure full protection of children, who are equal before the law, irrespective of their parentage and the marital status of the mothers. Non-discrimination among children based on the child's or his or her parents' birth or other status is, at present, also a generally assumed principle stated in Article 2(1) of the United Nations Convention on the Rights of the Child, of 20 November 1989.
Consequently, the parent-child relationship is the same, irrespective if their parentage is biological or adoptive, matrimonial or not matrimonial. The difference between matrimonial or not matrimonial parentage only has consequences for proof of parentage.
As the Spanish law allowing marriage between same sex couple, this marriage can also be attributed parentage.

1.1.7. Does the type of parentage have consequences on its content?

-*Model Case*: Caused the death of the deceased, arises the distribution of the estate among his three sons, two of them are biological children and the third is an adopted child.

Model Answer: Due to the fact that in the Spanish law there is an equal treatment for all children, there could not be any difference related to the content of the parent-child relationship, maintenance obligations or inheritance rights.

1.1.3. Is it a principle of public policy in your country the equal treatment of children?

-*Model Case:* A deceased leaves two sons, one biological and one adopted. The law of the competent court for the succession states the equality between children. The law applicable to the succession only recognizes inheritance rights to biological child.

Model Answer: According to Article 39 of Spanish Constitution, the principle of equality between children is a principle of public policy. Then a Spanish judge rejected the application of a foreign law that discriminates parentage depending, for example, on the marital status of the parents. This conclusion has even considered by the English judge in Re K (Children) (Rights of Custody: Spain) [2009]: In that case, the removal carried out by the mother contrary to the will of the unmarried father is considered wrongful even though English law does not automatically grant custody to the father. What is interesting about the case is that the English court interprets the content of English law in view of Spanish public policy as established in Article 39.2 of the Spanish Constitution, which guarantees the equality of all children, irrespective of their parentage.

CASE 1.2: WAYS TO ASCERTAIN PARENTHOOD

Background: The differences between the European States laws are shown different ways to ascertain the biological parenthood. The rules concerning when the competent State authorities will have jurisdiction to accept a voluntary acknowledgement of legal parentage vary considerably between States. There were problems with the acknowledgement natural children before different authorities at the State of the register. Some national laws could regard as a matter of public policy the practice of biological test (DNA analysis) to prove paternity, allowed in some States. It should also be assessed when it is possible to register parentage established in a certificate obtained of a foreign Registry Office.

1.2.1. What effects has the acknowledgement natural children before a foreign authority?

-*Model Case:* The birth record of a natural child only named a person as the mother in the Registry Office of State A. The child is acknowledged at a later date by the biological father. This acknowledgement is made before a notary of State B. The father provides this document to the Registry Office of A to register paternal parenthood.

Model Answer: The Spanish Civil Code establishes the voluntary acknowledgment of parentage (arts. 120). If the child birth is registered in the Spanish Registry Office, recognition of parentage made before a foreign authority can access to the Registry Office. In these cases, according to Article 9.4 of Spanish Civil Code, the substantive conditions for the voluntary acknowledgment of a child born out of wedlock shall be governed by the domestic provisions of the national law of the child (Resolution of General Directorate of the Registries and Notaries of 16 January 2003; Resolution of 18 April 2008). The formal conditions for the acknowledgment shall be governed by one of the laws mentioned in the Article 11 of Spanish Civil Code. The acknowledgment of paternity in a document by a notary shall be possible as long as the national law of the child does not impose other conditions (for example, the acknowledgement of parentage must be approved by a judicial authority). According to Spanish law, the acknowledgement of a Spanish child can be given before the registrar of the Registry Office, in a testament or in other public document. Then, an acknowledgement made in a private document has no effect to a Spanish child.

Spain is member of the ICCS Convention extending the competence of authorities empowered to receive declarations acknowledging natural children (Rome, 14 September 1961) (ICCS Convention nº 5); and the ICCS Convention on the establishment of maternal descent of natural children, Brussels, 12 September 1962 (ICCS Convention nº 6).

1.2.2. How is regulated in your law the biological test of fatherhood?

-*Model Case:* The alleged father refuses to practice a DNA test to prove the paternity of a child. The State where the test shall be performed allows the coercive practice of the test. Nevertheless, the court where the fatherhood procedure was raised rejects this practice on the ground of public policy.

Model Answer: The proof of paternity is governed by the national law of the child. The law shall provide for the investigation of paternity, according to Article 39.2 of the Spanish Constitution. The Spanish law allows the practice of biological test (DNA testing) to ascertain paternity. But this could not be practice coercively without the consent of the alleged father, unless there is an authorization by a judge (Sentence of Spanish Constitutional Court 211/1994). An informed consent of the person concerned is required to ensure respect for fundamental rights (Sentence of the Supreme Court 211/1996, 7 March). However, if he refuses to do it without justification, the court may consider the existence of a presumption of paternity, which will help to determine the biological parenthood of the child along with other evidence.

1.2.3. It is possible to register the parenthood in your State on the basis of a certificate of civil status issued by a foreign Registry Office?

-*Model Case:* The record of birth of a child is in the Registry Office of the State where he is born (State A). Then, it is applied the recognition of the certificate of the Registry Office of A to record the child in the Registry Office of their nationality (State B).

Model Answer: The events are not automatically registered in the Spanish Judiciary Registry Office based on the foreign certificate. The register of a foreign certificate requires compliance with several controls, including checking the validity of the act under the rules of private international law and that the act does not violate the Spanish public policy.

CASE 1.3: SURROGACY ARRANGEMENTS

Background: The different approaches among States in the field of surrogacy arrangements caused the phenomenon of reproductive tourism. In these cases, the prohibitions in the domestic law are trying to avoid by going to more permissive States in which the intending parents obtain the legal parentage of the child. The problem arises when the receiving States do not recognize this parentage and, consequently, the situation of the child becomes uncertain. It should also be assessed the impact of the case law of the European Court of Human Rights with the Mennesson and Labasse cases.

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1.3.1. Are surrogacy arrangements allowed or prohibited in your country?

-*Model Case:* A couple signs a surrogacy arrangement in their home country. When they applied for registration the child birth, the problem of the parenthood of the child arises: has the parenthood be established to the intending parents or to the gestational carrier (surrogate mother)?

Model Answer: According to Spanish law, the 14/2006 Law, of 26 May, on Assisted Human Reproduction, states the nullity of the surrogacy arrangement: the early resignation childbirth of the pregnant mother is void and the motherhood is always determined by birth.

1.3.2. It is recognized in your country the legal parenthood acquired abroad by a surrogacy arrangement?

-*Model Case:* The intending parents register in an USA Registry Office the legal parenthood of a child established by a USA judge. Then, they applied to register this parenthood in their home country (receiving State). Is it possible that registration if the law of the receiving State prohibits the surrogacy arrangements?

Model Answer: Nowadays, there is no a certain solution in Spanish Law in this field. The Instruction of General Directorate of the Registries and Notaries, of 5 October 2010, allows the registration of surrogacy whenever there is a judgment in the State of origin that guarantees the rights of children and

pregnant mothers (Resolution of General Directorate of the Registries and Notaries 1/2011, of 3 May; Resolution 6/2011, of 6 May). If there is no a judgment in the State of origin, it will be not possible the recognition (Resolution 5/2011, of 6 May).

On other hand, the Sentence of Supreme Court of 6 February 2014 stated that the surrogacy arrangement violates Spanish public policy. However, the Ministry of Justice has ordered to continue practicing the inscriptions on the basis of Instruction 2010. At present is pending a reform of the Law 20/2011, of the Registry Office, that affects this issue and whose content is yet to be decided.

If parenthood has already recorded in the Spanish Registry Office, the Spanish courts grants maternity and social security benefits to intentional parents (Judgments of Juzgado de lo Social nº 2 of Oviedo, nº 212/2012, of 9 April; Tribunal Superior de Justicia of Madrid (Sala de lo Social) nº 668/2012, of 18 October; Tribunal Superior de Justicia of Madrid (Sala de lo Social) nº 216/2013, of 13 Mars; Tribunal Superior de Justicia of Cataluña (Sala de lo Social) nº 7985/2012, of 23 November and Tribunal Superior de Justicia of Asturias (Sala de lo Social) nº 2320/2012, of 20 September.

1.3.3. In the case of no recognition of the legal parentage established abroad, what will be the future status of minors?

-*Model Case:* The record of birth of a child named the intending mother as the mother in the Registry Office of State A. Nevertheless, the receiving State B does not recognize and establishes the motherhood to the gestational carrier (surrogate mother). Then, who should take charge of this child?

Model Answer: The Judgment of Supreme Court of 6 February 2014, rejecting the surrogacy arrangements on the ground of public policy, at same time urging the Public Prosecutor (Ministerio Fiscal) to ascertain, as far as possible, the correct parenthood of children and consider, where appropriate, the integration of them into a household “de facto”. The final solution would therefore be to find a way to maintain the status quo of the relationship already generated among the intending parents and the children.

1.3.4. What shall the impact be on your country of the case law of the European Court of Human Rights in the *Mennesson* and *Labassee* cases?

-*Model Case:* According to *Mennesson* and *Labassee* cases, the non-recognition of a legal parenthood already registered in another State infringes the right of the child to respect for their private life according to article 8 of the European Convention of Human Rights.

Model Answer: The first impact of ECHR case law is the "return" to the Instruction of General Directorate of the Registries and Notaries of 5 October 2010. This has been established in the guideline established by the Spanish Ministry of Justice in July 2014. It seems not possible a consolidation of the doctrine of Supreme Court established in the Judgment of 6 February 2014.

The second impact is related to the project of reform of the 20/2011 Law of Registry Office, which initially reiterates a restrictive approach towards the recognition of parenthood derived from a surrogacy arrangement. In this sense, the Spanish Ministry of Justice has announced an adaptation of this reform at the ECHR case law in the *Mennesson* and *Labassee* affairs.

CASE 1.4. FILIATION AND ADOPTION

Background: There are differences in the rules governing the adoption: adoptions simple or full adoption, revocable or irrevocable adoptions, adoptions that create a permanent parent-child relationship and adoptions that do not create it. They are also different regulations on the requirements for the constitution of the adoption, depending on the adopting parents are single parent families or same sex couples. In addition, adoptions may have consequences on th acquisition of the nationality of the adopted child. The ECHR Wagner case (Judgment of 28 Juin 2007) has revealed the incidence of the right to family life of the article 8 European Convention of Human Rights related to the recognition of adoptions legally created in another State.

1.4.1. Are allowed in your country the simple or revocable adoptions?

-*Model Case:* A child is adopted in a country A by a simple or revocable adoption. Later, the adoptive parents aim the recognition of such adoption in the State B.

Model Answer: The Spanish law only allows the full and irrevocable adoption, in which the filiation to the adopting parents replaces filiation with the natural family.

1.4.2. Is it allowed in your country the adoption by single-parent families or by couples of the same sex?

-*Model Case:* A single person adopts a child in a State A and applies for its recognition in his home State (receiving State B).

Model Answer: According to Spanish law, it is possible to adopt by singles. The 13/2005 Act allows marriage between same sex couples and adoption by same-sex couples. This adoption is allowed when the adoption takes place before a Spanish authority and the adopted is habitually resident in Spain. The problem may arise related to the adoptions established by foreign authorities, whose laws usually do not allow the adoption by same sex couples.

1.4.3. Is it allowed in your country the recognition of foreign adoptions which do not create a permanent parent-child relationship?

-*Model Case:* A couple adopts a child in a State A, which does not create a permanent parent-child relationship. How is recognized that adoption in the receiving State B?

Model Answer: According to Spanish law, adoptions are only full adoptions and adoptions which create a permanent parent-child relationship between the adoptive parents and the adoptee. If the adoption has been created by a foreign authority and the adoptive parents or adopting are Spanish citizens, the adoption must meet the conditions that Spanish law provides for the adoption (Article 26 of the 54/2007 Law, on Intercountry Adoption).
The "simple" adoptions established by a foreign authority have the effects given by the national law of the adopting.
Spain is member of the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. The Convention covers only adoptions which create a permanent parent-child relationship.

1.4.4. Is a consequence of the adoption the acquisition of nationality?

-*Model Case:* A Spanish citizen adopts a child of 10 years old and another for 18 years old. It raises the question if the children acquire the Spanish nationality as a result of the adoption.

Model Answer: According to Article 19 of Spanish Civil Code, the foreign child under eighteen adopted by a Spanish citizen acquired the Spanish nationality of origin since the adoption.
If the adoptee is over eighteen years he may opt for Spanish nationality of origin within two years from the constitution of adoption.

2. FORENAMES AND SURNAMES

CASE 2.1: DISPARITIES AMONG LEGAL SYSTEMS

Background: due to the several differences among legal systems and their impact in the free movement of persons and the principle of unique identity, please provide explanation and indication of leading/model cases about your national legislation concerning forenames and surnames

2.1.1. Explain your conflicts of law rules, highlighting the cases in which your national legislation is applicable

-*Model Case 1*: a child was born in a third country, where his parents (national of your Member State) reside.

-*Model Case 2*: a child was born in your Member State, where his foreign parents reside.

Model Answer 1: For instance, in Spain due to the child is Spaniard, the forenames and surnames are governed by Spanish Law, irrespective of the place of birth or residence. In Spain, the law of the nationality of the applicant governs the name and surnames, in accordance with the Convention n. 19 of the law applicable to surnames and forenames, concluded in Munich, on 5 September 1980, signed and ratified by Spain. Spain has not made any reservation in favor of the application of the Spanish Law when the applicant resides in Spain (Article 6 of the Munich Convention). In consequence, Spanish Law is applicable to Spaniards, irrespective of the place of birth or place of residence. In contrast, Spanish law is not applicable to foreigners, irrespective of they was born in Spain or have habitual residence in Spain (…).

Model Answer 2: From the point of view of Spanish Law, in this case, the Judge of the Registry will apply the law of the State of which he is a national. If at least on the parents transfers their proper nationality to the child, the child is not Spaniard, irrespective of the place of birth or residence. But the birth shall be recorded in the Spanish Civil Registry because it has occurred in Spain.

2.1.2. Explain briefly the main rules concerning forenames and surnames, especially focusing on number, limits, civil acts which affect to forenames and surnames, admission of foreign forenames and surnames, and translations of them.

-*Model Case*: a child born in your Sate whose parents are nationals and resident in your State.

Model Answer: in principle, in Spain the filiation is the unique civil act which affect to forenames and surnames, due to the marriage does not alter the surnames of the spouses. In the habitual practice, the acquisition of Spanish Nationality is a very relevant event which can imply the change of surnames. On the other hand, Spanish Law permits up to two simple forenames or one integrated forename. The forename can be expressed in a foreign language. In relation with the surnames, Spanish Law requires two surnames, the first one of the father and the first one of the mother. The order of the surnames is agreed by the parents (…).

CASE 2.2: GENDER EQUALITY

Background: some legislations establishes gender equality between the surnames of men and women as a matter of public policy and the marriage does not alter the surnames of the spouses and the children receive surnames of both parents. In this context, please provide explanation and indication of leading/model cases concerning gender equality at the moment of attribution of the forenames and surnames, particularly:

2.2.1. Which are the main issues with the surnames of the wife?

-*Model Case*: a wife with maiden surname Ms. Smith and married name Ms. Fernández. How is she referred in your Civil Register?

Model Answer: For instance, in Spanish Register, any reference to the wife will be made as Ms. Fernández, according her national law, but also will include the reference to her surname Smith. Spanish Law provides some special provisions for foreign wife. When a foreign wife has to be mentioned in the Civil Register and, in according to her national law, she has the husband's surname, the Civil Register mentions this surname because it is the legal surname of the wife. But, for reasons of public policy and in order to respect the gender equality, the maiden surname will be also included (Article 137 Regulation of the Civil Register) (…).

2.2.2. Which are the main issues with the surnames of mothers?

-*Model Case*: a husband and a wife (maiden name: Ms. Smith; married name: Ms. Fernández) has a child. Which are his surnames?

Model Answer: For instance in Spain, the Spanish surnames of the child are Fernández Smith and not Fernández Fernández, because the mother transfers her personal surname. Spaniards have two surnames and one of them is the first one of the mother. But Spanish Law contains specific rules for

mothers who are lost her surname in favor of the surname of the husband. In this case the mother transfers her maiden name, in order to respect the aims of the Spanish Law and its public policy, which does not admit gender discrimination (…).

CASE 2.3: PUBLIC POLICY

Background: Judgment of the Court of 22 December 2010 (Case C-208/09, Sayn Wittgenstein) ruled that the no recognition of the surnames from other Member State is only based on public policy grounds. Please, provide for cases of public policy which prevents the application of a foreign law concerning forenames and surnames by the authorities of your Member State (dignity of persons, superior interests of minor, gender grounds, rules abolishing the nobility). In this context, please highlight if the public policy clause can play in a total or attenuated form, depending on the foreign law is not admitted in any case or if exceptions are observed.

2.3.1. Explain cases of absolute application of public policy, in which foreign law is not applied in any situation without exceptions.

-*Model Case:* A foreign law of a child permits names which affect dignity of the persons.

-*Model Answer:* for instance, in relation with Spanish Law, the forename cannot be objectively prejudicial for the applicant and his dignity neither confused nor misleading in relation with the gender. Furthermore, the forenames and surnames cannot prejudice the superior interest of the minor.

2.3.2. Explain cases of attenuated public policy, in which foreign law is applied in a "soft" way (material attenuation) or in which public policy is only applied when the case is connected with the territory or nationals of your Member State (spatial attenuation):

-*Model Case:* "foreign wife" who is mother with the legal surname of the husband.

-*Model Answer:* For instance, Spanish Law requires that she is nominated with this legal surname but even the maiden surname will be included. This is a case of material attenuation because foreign law is not absolutely excluded. Furthermore, from the point of view of Spanish Law, in those cases she transfers her maiden name to the child, in order to respect public policy. This is a case of spatial attenuation, because it only plays in relation with Spanish children.

CASE 2.4: DIVERSITY OF SURNAMES BY NATIONALITY AND PLACE OF BIRTH

Background: the record of a birth in several Registries, in the Registry of the nationality and in the Registry of the place of birth, can provoke diversity of surnames and affect to the free movement of persons and the principle of unique identity. Thus, Judgment of the Court of 14 October 2008 (Case C-353/06, Grunkin Paul) ruled that the surname acquired in the Member State of birth and residence shall be recognized in the Member State of which the applicant is national in order to protect the right to move and reside freely within the territory of the Member States.

2.4.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in a third country:

-*Model Case:* nationals from your Member State born and resident in third countries.

Model Answer: For instance, Spanish Law does not contain any solution. Thus, Spanish Law requires the application of the Spanish rules and the surnames provided by other Civil Registries are not recognized in Spain.

2.4.2. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals of your Member State born or resident in other Member State

-*Model Case:* nationals from your Member State born and resident in a Member State of the EU

Model Answer: From the point of view of the Spanish Law, the requirements of the Judgment of the Court of EU of 14 October 2008 (Case C-353/06, *Grunkin Paul*) are absolutely applicable. As leading case, see Instruction of General Directorate of the Registries and Notaries of 24 February 2010 (BOE n. 60, 10-March-2010), which provide several requirements.

CASE 2.5: DIVERSITY OF SURNAMES BY DOUBLE NATIONALITY

Background: the double nationality of the applicant can also provoke "diversity of surnames" and this one affects free movement of persons and the principle of unique identity. Judgment of the Court of Justice of European Union of 2 October 2003 (Case-148/02, García Avello) ruled that nationals from two Member States could choose the identity in according with one of these Member States and this identity should be recognized in the other Member State in order to respect the EU citizen and the free movement of persons.

2.5.1. Explanation and indication of leading/model cases concerning "diversity of surnames", in relation with nationals from your Member State who are also nationals from third countries:

-*Model Case:* nationals from your Member State who are also nationals from third countries

Model Answer: for instance, the rules of Article 9.9 of the Spanish Civil Code are applicable. In this sense, the Spanish law governs the forenames and surnames unless in relation with double nationality expressly established (Latin American countries, Portugal, Philippines, Andorra, Equatorial Guinea). In these cases, rules established by Treaties shall be applied and, in absence thereof, the nationality of the last place of residence and, failing that, the last nationality acquired (Resolutions 15 February 1988, 19 November 2002 y 27-1.ª February 2003). Nevertheless, the application of the Spanish Law can provoke some negative effects if the Spanish nationality is the last one acquired and the applicant has a previous and stable identity. For these reasons, the Regulation of the Civil Registry provides that the applicant retain the surnames in a way other than the legal way if the applicant make a statement in the proper act or within the two months posterior to the acquisition or the full age Instruction of General [Directorate of the Registries and Notaries of 23 May 2007 **(***BOE* n. 159, 4-July-2007)].

2.5.2. Explanation and indication of leading/model cases concerning "diversity of surnames", particularly, in relation with nationals from your Member State who are also nationals from other Member States:

-*Model Case*: nationals from your Member State who are nationals from other Member State.

Model Answer: in Spain the requirements of the Judgment of the Court of 2 October 2003, Case-148/02*, García Avello* are absolutely applicable. In fact, the General Directorate of the Registries and Notaries has adopted an Instruction in order to clarify the scope of this ruling. In consequence, see, as leading case, Instruction of General Directorate of the Registries and Notaries of 23 May 2007 (BOE n. 159, 4-July-2007): The applicant has freedom of choice of the national law which he wishes to govern his forenames and surnames. It is not relevant that a nationality is more connected with the applicant, for instance, because his residence is located within the territory of this State The rules of the Spanish Civil Code concerning the determination of the personal law of a person with double nationality are not applicable in cases of two nationalities of the EU (…).

3. MARRIAGE

CASE 3.1. DISPARITIES AMONG LEGAL SYSTEMS

Background: The disparities among legal systems affect the right to marry of EU Citizens, concerning questions as the age, consent, religious or civil form. These disparities can block the civil right to marry and, on the other hand, have increased "matrimonial tourism" with the aim of conclusion of the marriage which is not admitted in the origin country of the spouses.

Short explanation and indication of leading/model cases about the main requirements of the national legislation, concerning matrimonial capacity, legal impediments, gender requirements and issues of the marriage of the same sex, matrimonial consent and religious and civil forms:

-Model Case: spouses nationals and residents of your Member State

Model Answer: Men and women are entitled to marry in the same conditions and effects, irrespective of the spouses are of the same or of different genders (Article 44 Civil Code). Non-emancipated minors (unless exemption of persons older than fourteen by First Instance Court) and persons who are already joined in marriage are not able to marry (Art. 46). Particularly, direct line relatives by consanguinity or adoption, collateral relatives consanguinity up to third degree (unless exemption by First Instance Court) and persons sentenced as authors or accomplices in the spouse of either of them may not marry each other (unless exemption by Minister of Justice) (Art. 47). Any citizen may marry inside Spain before the Judge, Mayor or public officer provided by the Spanish Civil Code or in according to following religious forms (Article 49): Canonical, Evangelical, Islamic or Hebrew form. As leading case: see Judgment 198/2012 of Spanish Constitutional Court, 6 November: From the point of view of marriage as an institutional guarantee, the option chosen by the legislator in this case cannot be reproached as being unconstitutional, within the margin of appreciation acknowledged in its favor by the Constitution. The option was not excluded by the constitutional founder and it may fall within the scope of Article 32 CE.

CASE 3.2. CROSS-BORDER CONCLUSION OF MARRIAGE

Background: as aforementioned, due to the differences among the many legal systems, a hypothetical cross-border civil right to marry can be difficult. But in the other hand, this cross-border civil right can produce the practice of matrimonial tourism in order to elude the requirements of the Law of a Member State applicable to its nationals or residents. This fact is particularly visible in the cases of marriage of persons of the same sex. In this context, it is very important to know the conflict of law rules concerning the conclusion of marriage by the authorities of your Member State.

3.2.1. Explanation and indication of leading/model cases concerning the conclusion of marriage to foreigners in your Member State.

-*Model Case 1:* Marriage between a national of your Member State and national of other Member State.

-*Model Case 2:* Marriage between spouses of a Member State other than your Member State

Model Answer: Spanish Civil Code provides the same rules in favor of EU citizens than in favor of third countries nationals. Firstly, the law of the nationality of the spouses governs the matrimonial capacity (Art. 9.1), although the foreign law must respect the Spanish public policy and the fundamental rights provided by the Spanish Constitution. Secondly, the Spanish law governs the requirements of the consent of the spouses, due to a Spanish authority concludes the marriage. Concerning the form of the conclusion, two situations shall be distinguished: A) If at least one of the spouses is Spaniard, the Spanish religious or civil forms shall be applied. B) If both spouses are foreigners, the marriage may be concluded in Spain in according to the civil or religious form provided for Spaniards, or in compliance with the form set forth in the personal law applicable to either of them (Art. 50). (…)

3.2.2. Can the Consular Officers from your Member State conclude marriage? If so, which are the requirements?

-*Model Case*: the Consular Officer of your Member State concludes a marriage in other Member State.

Model Answer: concerning marriage concluded by Spanish Consular Officers located in other Member States, the Consular Officers may conclude marriage provided that, at least, a spouse is Spaniard, any spouse is not national of the receiving State, and there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular office.

3.2.3. Has your Member State adopted some legal measures to prevent the conclusion of marriage by its authorities when this one can be considered matrimonial tourism? If so, are they applied by Consular Officers too?

-Model Case: marriage of spouses of same sex and the origin country of one of them does not admit marriage of the same sex.

Model Answer: from the point of view of the Spanish Law, Resolución-Circular of the General Directorate of the Registries and Notaries of 29 July 2005 (*BOE* n. 188, 8 August 2005) is the leading

case. The admission of the marriage between persons of the same sex since 2005 has increased the cases in which foreign citizens wish to marry in Spain, due to their origin countries do not admit this marriage. In order to prevent "matrimonial tourism", the Resolution requires that the Spanish authority only concludes the marriage between two foreign persons of the same sex when both of them reside in Spain. It is not enough that only one of them resides in Spain.

On the other hand, this Resolution lays down that Spanish Consular Officers cannot conclude marriage between persons of the same sex, if this marriage is contrary to the rules of the State where the officer is established [Art. 5.f) Vienna Convention on Consular Relations]. Anyway, the Consular Officer could admit the consent of the spouses before a Spanish authority in Spain, acting by delegation (Art. 57 Civil Code).

CASE 3.3. RECOGNITION OF MARRIAGES CONCLUDED ABROAD

Background: in the previous case, we could analyze the balance between a cross-border civil right to marry and prevention of matrimonial tourism (abuse of this right) from the point of view of the authorities of marriage conclusion. But, obviously, if the marriage is finally concluded, other States can refuse the recognition of that marriage balancing this civil right to marry and the prevention of matrimonial tourism or even its public policy.

3.3.1. Conditions of the recognition in your Member State of marriages concluded by authorities of other Member States or by religious form:

-*Model Case*: marriage between a national of your Member State and a foreign spouse, concluded by the authorities of other Member State or by religious form within the territory of other Member State.

Model Answer: in relation with the marriage concluded by authorities of Member States other than Spain, the Spanish Law distinguished between civil form and religious form. Concerning civil form, Spanish Law recognizes the marriage concluded by Consular Officers, provided that at least one of the parties is a national of the sending State, that neither of them is a national of the receiving State and that there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular officer (Art. 13 European Convention on Consular Functions of 1967). On the other hand, the religious form receives a different treatment. In principle, the religious marriage concluded abroad will be recognized in Spain if the marriage is admitted in the State of conclusion. Nevertheless, and due to the Agreement between the Holy See and Spain of 1979, the canonical marriage will be recognized in Spain, irrespective of its consideration in the State of conclusion.

3.3.2. Cases of public policy which imply the refusal of recognition of marriages.

-*Model Case:* a polygamous marriage concluded abroad between a third country national and a EU citizen.

Model Answer: Although matrimonial capacity is governed by the national law of the spouses (art. 9.1 Civil Code), polygamous marriage under personal law is not admitted by reasons of public policy, in particular by violation of the full legal equality between men and women. But also it is true that is possible the attenuation of the public policy in order to protect the family (Article 39) or to obtain maintenance or inheritance or even widowhood pensions for successive spouses [Ress . DGRN of March 8, 1995 and (2nd) of 14 May 2001; Social Court of La Coruña of 13 July 1998, Social Court of Barcelona of 10 of October of 2001, dissenting opinion in Superior Court of Justice of Catalunya of 30 July of 2003]. It is also admitted "potential polygamous", in other words, the first marriage of both spouses (Res. DGRN of April 23, 1998). Finally, forced marriages, in which one or both parties is married without his or her consent or against his or her will, are not recognized unlike to “arranged marriages”, where both parties fully and freely consent to the marriage proposed by family leader.

CASE 3.4. ACQUISTION OF NATIONALITY OF THE SPOUSE

Background: Marriage is one of the life event that has legal consequences in relation with acquisition of the nationality of a Member State and, by this way, the acquisition of the EU Citizenship. Explanation and indication of leading/model cases concerning the acquisition of nationality of Member State by marriage:

3.4.1. Which are the general requirements for acquisition of nationality of the spouse?

-*Model Case*: a foreigner is married to a national of your Member State.

Model Answer: Spanish Civil Code lays down that a foreigner may obtain the Spanish Nationality after one year of residence in Spain and one year of marriage with a Spaniard. Notice that the requirement of one year is double: one year of residence and one year of marriage.

3.4.2. If your national legislation requires a period of residence in the spouse, shall the residence meet some specific requirements?

-*Model Case 1:* a third national country person who is not legal resident has been married to a national of your Member State for the required period and he has illegally resided in your Member State for one year.

-*Model Case 2:* a foreigner has been married to a national of your Member State for the legal period and he has resided in your Member State for the legal period, but, at the moment of the application, he is residing in other State.

Model Answer: the residence in Spain must be ongoing and immediately prior to the application. Furthermore, in relation with third countries national, the residence must be legal.

3.4.3. Does the national legislation contain provisions in cases of separation or divorce of the spouses?

-*Model Case*: a foreigner has habitual residence in your Member State for the legal required period, which is ongoing and immediately prior to the application. He has been married to a national for more of required period, but at the moment of the application, they are legally separated.

-*Model Answer:* finally, at the time of application, the applicant cannot be divorced or *de facto* or legally separated.

CASE 3.5. SPOUSE REUNIFICATION

Background: although Council Directive 2003/86/EC of 22 September 2003, in relation with third countries national-sponsors and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, in relation with EU citizens sponsors, some aspects of family reunification have not harmonized or can be regulated by the Member States of different ways [see for more details Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification (COM/2008/0610 final) and Communication from the Commission to the European Parliament and the Council on guidance for better transposition and

application of Directive 2004/38/EC on the right of citizens of the Union and their family members (COM/2009/0313 final)].*

3.5.1. Can the spouse be reunified under Council Directive 2003/86/EC and Directive 2004/38/EC although the marriage is not recognized in your Member State? If necessary, distinguish between the particular case of polygamous marriage (which is harmonized in relation with Directive 2003/86 but not in relation with Directive 2004/38/EC) and other cases without any harmonization (for instance, persons of the same sex, "forced marriage"…).

-*Model Case*: application for reunification of spouse, although the marriage cannot be recognized in your Member State

Model Answer: Spanish Law permits the reunification of one of the fourth spouses of the third country husband. In contrast, and in accordance with Article 4.4 Council Directive 2003/86/EC, where the husband has already a spouse living with him in the territory of Spain, Spain shall not authorize the family reunification of a further spouse. On the other hand, Royal Decree 240/2007, concerning reunification by EU citizens, does not provide any solution for polygamous marriage, because Spanish Law presumes that any national law of the EU citizens does not admit polygamous marriage and precisely it is the law of the nationality which governs this aspect. Finally, in relation with cases other than the polygamous marriage, Spanish Law does not provide any explicit solution. Nevertheless, the best practice follows the Guidelines of the Commission (COM/2009/0313 final). In this sense, forced marriages are not recognized unlike "arranged marriages" with a fully and freely consent by the parties.

3.5.2. In accordance with Article 16 Council Directive 2003/86/EC about family reunification, has your Member State adopted some provision for refusal entry and residence of the spouse regarding that marriage does not live in a real marital relationship?

-*Model case*: a third country national legally resides in your Member State and applies for the reunification of his foreign spouse, but authorities observe that they do not live in a real marital relationship.

Model answer: according to Article 17 Organic Act 4/2000 of rights and freedoms of foreigners and their social integration and Article 53 Royal Decree 557/2011 of development, the spouse cannot be

* **Take into account that this question is formulated in a different style and short answers are appropriate due to the wide harmonization of the EU Law.**

separated *de facto*. Really, this provision is referred to the absence of a real marital relationship, in the sense of the Directive.

3.5.3. In accordance with Article 15 Council Directive 2003/86/EC about family reunification, has your Member State limit the granting of autonomous residence permit to the spouse in cases of breakdown of the family relationship (widowhood, divorce or separation)?

-*Model Case:* a third country national legally resides in your Member State and is died, after two years of residence with his foreign spouse.

Model Answer: according to Article 59 Royal Decree 557/2011 of development of Organic Act 4/2000 of rights and freedoms of foreigners and their social integration, in cases of divorce or separation, the spouse can obtain an autonomous residence permit if he lived in Spain with the sponsor during at least two years. However, the widow can automatically this permit, without any temporal requirement.

3.5.4. In accordance with Article 4.5 Council Directive 2003/86/EC about family reunification of third countries nationals, has your Member State required the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her, in order to ensure better integration and to prevent forced marriages?

-*Model Case:* a third country national legally resides in your Member State apply for the reunification of his foreign spouse. Both of them are 18 years old.

Model Answer: this provision is not included in the Spanish Law.

3.5.5. In accordance with Article 4.3 Council Directive 2003/86/EC, has your Member State decide that registered partners are to be treated equally as spouses with respect to family reunification?

-*Model Case*: a third country national resident in your Member State applies for the reunification of is registered partner

-*Model Answer*: According to Article 53 Royal Decree 557/2011 of development of Organic Act 4/2000 of rights and freedoms of foreigners and their social integration, Spanish Law recognized the right to registered partners.

3.5.6. In accordance with Article 26 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members, does your Member State carry out checks on compliance with carry their registration certificate or residence card?

-*Model Case*: the residence card of a spouse of the EU citizens is required by the police.

-*Model Answer:* According to Article 14.4 of Royal Decree 240/2007, the spouse can prove its condition of family of an EU Citizen by any means admitted by Law.

CASE 3.6. MARRIAGE OF CONVENIENCE

Background: EU has adopted complementary texts in relation with the marriage of convenience. See, mainly: Resolution of the Council of 4 December 1997 (OJ C 382, 16 December 1997) on marriage of convenience; Communication of the Commission to the European Parliament and to the Council [COM(2014) 604 final] and a Commission Staff Working Document as handbook about marriage of convenience [SWD(2014) 284 final]. EU is concerned in order to prevent "marriage of convenience" for acquisition of nationality or for family reunification.

3.6.1. Does the law of your Member State forbid "marriage of convenience"? If so, which are the concept and effects of this kind of marriage?

-*Model Case:* a third country national marries to a national from your Member State in order to obtain residence permit or even nationality.

Model Answer: The Directorate General of the Registries and Notaries considers "marriage of convenience" all the marriages in which a simulation is observed. The spouses, both or one of them, do not truly consent the marriage as a community of life and a set of legal rights and duties, but they intend to create a mere appearance in order to obtain legal advantages (Instruction of 31 January 2006, BOE n. 41, 17 February 2006). This simulated marriage is null so they do not have effects and cannot be authorized nor recognized. In consequence, this marriage is invalid for acquisition of nationality or reunification family (…).

3.6.2. How do the authorities of your Member State control if the marriage before them is of convenience? (See also question 4.3.2.)

-*Model Case:* see previous case and assess if, for instance, the authorities of your State can/shall interview the spouses.

Model Answer: from the point of view of Spanish Law, previously to the conclusion of a civil, Hebrew or Evangelical marriage, the Spanish Authority controls the convenience in a so called previous expedient. This previous expedient is also necessary for the inscription of the Islamic marriage. However, the canonical marriage is not submitted to a previous expedient and, in these circumstances, some scholars criticize that the marriage of convenience is difficult to control in this form. As leading case: see Instruction of 31 January 2006, BOE n. 41, 17 February 2006

3.6.3. What happens with the control of the convenience when the marriage is concluded before a foreign authority but it provokes effects in your Member State?

-*Model Case:* a national from your Member State and a third country national marry abroad in order to obtain residence permit in your Member State or even nationality. The marriage wishes the recognition of this foreign act by the authorities of your Member State.

Model Answer: on the one hand, the Spanish Judge of the Registry shall make an expedient previous to the access of the marriage to the Spanish Civil Registry. On the other hand, if a certificate of a foreign Registry is presented, the Spanish Registry controls this certificate and complementary statements obtained by separated and confidential interviews (art. 246 Regulation of Civil Registry). Particularly, when a Spaniard wish to marry abroad and apply for a certificate of matrimonial capacity of the Spanish Registry, the Spanish Judge will make a previous expedient (Instruction 9 January 1995). As *leading Case:* Instruction of 31 January 2006, BOE n. 41, 17 February 2006.

3.6.4. Which are the main proofs and presumptions concerning convenience and are they in accordance with EU recommendations?

-*Model Case:* the authorities of your Member State observe that marriage formed by a national of your Member State and a foreigner ignore basic personal and family data of each other, although previous relations in presence or by mail, post mail, telephone, internet are proven.

Model Answer: The proof of the convenience is usually based on judicial presumptions (Art. 386 Spanish Civil Procedure Act; Art. 16 Regulation of the Civil Registry), apart of strange cases in which there is a confession (direct proof). The judicial presumptions admit proof on contrary by the parties. Furthermore, it is always possible repeat the application for authorization or recognition of the marriage if new facts and circumstance appear, because the resolutions concerning Spanish Civil Registry have not the effect of *res judicata.* As, leading Case: Instruction of 31 January 2006, BOE n. 41, 17 February 2006 adopted as presumptions of convenience: a) ignorance of basic personal and family data; b) inexistence of previous relations in presence or by mail, post mail, telephone, internet (…).

4. LIFE EVENTS AND REGISTRY OFFICES

CASE 4.1: CIVIL REGISTRATION SYSTEMS

Background: The different registration models existing in Europe are based in event-based systems, in person-based systems or population register. An event based registration system records all relevant changes to the civil status of a person occurring in the respective country at the place, where the event occurred. A person-based registration system records all relevant changes to the civil status of a person occurring in the respective country at a central place. Population registers are based on an inventory of the inhabitants and their characteristics such as for example sex and the facts of birth, death and marriage, and the continuous updating of this information. Each one of them poses different difficulties. For example, the event-based systems promote the register tourism and can generate problems for accessing the Registry Offices of other States (for instance, the Registry of their nationality). The person-based systems allow a single record of the person but always requires a recognition of civil status acts created in other States.

4.1.1. What kind of registration system exists in your country?

-*Model Case:* While on vacation in France, a child of a Spanish citizen couple is born in that country. The child's birth was recorded in a French Registry Office. Later, the birth has to be recorded also in the Spanish Registry Office.

Model Answer: The Spanish Registry Office records all relevant changes to the civil status of a person occurring in Spain (an event based registration system) and records all relevant changes to the civil status of Spanish citizens occurring abroad (a person-based registration system) (Article 15 of the 1957 Law of Registry Office; and Article 9 of the 20/2001 Law of Registry Office, not yet in force).

4.1.2. Have fundamental rights any consequence on the content of the civil registration?

-*Model Case:* The parenthood of an adopted child is recorded in a Registry Office. The question is whether there should be or should not be included in the Registry Office that the parentage derived from an adoption.

Model Answer: The model of protection of fundamental rights enshrined in the Spanish Constitution affects the Registry Office. Thus the model of our matrimonial law, allowing marriage of same sex couple, allows the record of these marriages in the Registry Office. The protection of equality and non-discrimination between men and women ensures a system of double surnames derived from maternal and paternal parentage. The protection of the right to equality of all children justifies a limited access to birth certificates which contains the record of the adoption in.

CASE 4.2: DOCUMENTS TO REGISTRY OFFICES

Background: The register of the acts performed in other States can be practiced on the basis of different documents (judgments, notarized documents, civil status certificates). The requirements for the effectiveness of the documents depend on the document in question and also of the State of which come from. It becomes important the control of equivalence between the authorities involved in the State of origin and the role of the authorities of the requested State. In the case of foreign judgments, it may be necessary to go prior to a procedure of the exequatur. It must be established the requirements of documents to access to the registry of each State.

4.2.1. Civil status certificates of foreign Registry Offices

-*Model Case:* A marriage between a Spanish citizen and an Italian citizen is celebrated and recorded in an Italian Registry Office. The couple provides the certificate of the Italian civil register to apply for register in the Spanish Registry Office.

Model Answer: In the Spanish Registry Office, it is required to entry a foreign certificate to check the validity of the civil act (marriage, adoption…) according to the rules of international law applicable. It also usually requires the translation and legalization (or Apostille), unless the registrar knows the language and knows the authenticity of the document.

According to 20/2011 Law of Civil Registry (not yet in force) is required for the entry of these certificates the validity of the act according to the rules of private international law, the public policy control, the control of competence of foreign authority and the control of equivalence between the foreign certificates to Spanish certificates.

4.2.2. Foreign notarized documents

-*Model Case:* A marriage applies for the record of the matrimonial agreement in the Registry Office. The agreement is included in a public document provided by a German Notary.

Model Answer: A foreign notarized document (given by a foreign notary) entries to a Spanish Registry Office when certain conditions are met: the control of the formal guarantees of the document (translation and legalization/apostille, unless the registrar knows the language and the authenticity of the document); the control of the competence of the granting authority; the control of equivalence between the foreign notary function to the Spanish notary. It is also necessary that the registrar check the validity of the act stated in the document (the testament, the acknowledgement of a natural child) according to the rules of private international law applicable and this act pass the control of public policy.

In the area of patrimonial law, the Spanish Supreme Court stated the entry in the Property Registry the mortgage included in a document authorized by a German notary based on the equivalence of the notarial functions between German notaries and Spanish notaries (Sentence of Supreme Court, of 19 June 2012). When there is no equivalence, the entry is not possible (Resolution of General Directorate of the Registries and Notaries, of 22 February 2012).

4.2.3. Foreign judgments

-*Model Case:* A judgment issued in France establishes that a Spanish citizen is the biological father of a child. The father provides this judgment to the Spanish Registry Office to register the fatherhood in the birth record of the child.

Model Answer: Leaving aside the cases in which an European Regulation or an International Convention is applicable, in the current domestic Spanish law, a foreign judgment required previously the exequatur to entry in the registry.
Upon 20/2011 Law of Registry Office comes into force, the foreign judgment could be entry with automatic recognition before the Registry Office. The registrar has to check the authenticity of the documents, the international competence of the judge of origin, the requirements to service of documents and public policy control.

CASE 4.3: CONTROL OF EQUIVALENCE BETWEEN EU REGISTRY OFFICES

Background: According some European laws, the registrar has to control the legality of the act before recording it in the Registry. This control is made according to family law and international private law rules in force in each State. These rules differ significantly among the States. The registrar has also to refuse the entry if the act violates the public policy. Due to the fact that this control could be an obstacle to the free movement of persons, the scope of this control of legality might be affect by the mutual recognition principle.

4.3.1. Are registrars compelled to do a control of legality of the civil act?

-*Model Case:* The parenthood of a child, born by a surrogacy arrangement, is established by a foreign judgment. The intending parents provide this judgment to the register officer in order to register the filiation of the child. Accordance with the law, the officer of the register may refuse to register if he is obliged to control the on the ground of public policy.

Model Answer: According to the Article 23 of 1957 Law of the Registry Office, the registrar has to assess that the civil act is legal. This means that when international civil acts must be recorded, the registrar has to check their validity under the rules of private international law applicable and to control public policy. On this ground it has been justified, for example, the refuse of record the parenthood derived from surrogacy arrangements. Leading case: Sentence of Supreme Court of 6 February 2014.

4.3.2. How do registrars control the marriages of convenience? (see also question 3.6.2.)

-*Model Case:* Before the registration of a marriage between a Spanish citizen and an Ecuadorian citizen, the register officer refuses to record it on the grounds that it is a marriage of convenience.

Model Answer: The Instruction of the Directorate General of Registries and Notaries, of 31 January 2006, contains the guidelines to the control of marriages of convenience. The Spanish Judge of the Registry shall make an expedient previous to the access of the marriage to the Spanish Registry Office. If a certificate of a foreign Registry is provided, the registrar controls this certificate and complementary statements obtained by separated and confidential interviews (art. 246 Regulation of Civil Registry).

4.3.3. How do registrars control the filiations of complacency?

-*Model Case:* After the acknowledgement of fatherhood of a child, the registrar rejects the registration on the grounds that it is a recognition of filiation by complacency

Model Answer: The Instruction of the Directorate General of Registries and Notaries, of 20 Mars 2006, over prevention of documentary fraud with respect to civil status, refuse to register, for example, if there is no evidence of cohabitation between the mother and alleged father at the time of pregnancy or there are data that make suspect the reality of parenthood (Resolution of Directorate General of Registries and Notaries, 5 July 2006; Resolution of 25 November 2011; Resolution of 10 February 2012; Resolution of 4 May 2012).

CASE 4.4: CROSS-BORDER COOPERATION BETWEEN REGISTRY OFFICES

Background: The different registration systems among States and the lack of harmonization of the registry law cause different obstacles to the free movement of persons. Particularly important, in order to guarantee the right to the unique identity, is the ability to communicate the data of the civil status that may affect the nationals of other States. It is also important to facilitate the performance the events that affects the civil status in other States. However, there could be problems due to the requirement in a State of the event of documents that were unknown to the State of the register.

4.4.1. Are there any specific instruments in your country for cross-border cooperation among Registry Offices?

-*Model Case:* A national of a State seeks to celebrate their marriage in another State (State B), whose authorities requested a certificate of no impediment marriage. Requested the certificate, the registrar of Registry Office of State A refuse to give that document because such a document is unknown in its law.

Model Answer: The Registry Office establishes the annotation of events that affect civil status of Spanish citizens or events performed in Spain affecting the civil status under a foreign law. Also foreign judgments are noted in the Registry even they could not be recognized in Spain (art. 153 of Regulation of Civil Registry).

Spain is Member of the ICCS Convention to facilitate the celebration of marriages abroad, Paris, 10 September 1964 (ICCS Convention nº 7). It is also Member of the ICCS Convention on the issue of a certificate of legal capacity to marry (ICCS Convention nº 20).

4.4.2. Is there any mean for the communication of registry data when they may affect the nationals of other States?

-*Model Case:* A French national got marriage in Spain. The marriage is registered at the Spanish civil register but not in France. To return to France, the French national wants to marry before a French authority. It raises the question of proof of the capacity of the spouse.

Model Answer: Spanish civil status registrars do not transmit information about civil status acts and changes of citizens of other EU Member States.

Spain is Member of the ICCS Convention on the international exchange of information relating to civil status, 4 September 1958 (ICCS Convention nº 3). It is also Member of the ICCS Convention on the issue of a certificate of differing surnames , The Hague September 1982 (ICCS Convention nº 21).

4.4.3. In the issuance of civil status certificates, are language requirements or other formal conditions of other States considered?

-*Model Case:* It is requested a birth certificate of a French national who is register in the Spanish Civil Registry. The certificate is requested to provide it to a French authority. Is it possible that the

certificate be issued in French?

Model Answer: In Spanish Law, the rules about the issuance certificates according foreign requirements are included into the Conventions in force in Spain. For example, according to Art. 9 of the ICCS Convention on the issue of a certificate of differing surnames (ICCS Convention nº 21), the certificate shall be printed in one of the official languages of the State in which the certificate is being issued, and the French language.

CASE 4.5: EVIDENTIARY VALUE OF CIVIL STATUS CERTIFICATES

Background: The diversity among the national registries affects the value of the certificates issued and in its evidentiary value in other States. Moreover, this evidentiary value is affected by the different rules of evidence established in the States. There could be also differences depending on the type of authority (judicial or administrative) which the certificate is provided to.

4.5.1. What evidentiary value has in your country the certificate of a foreign Registry?

-*Model Case:* A citizen brings a birth certificate to prove their age. The Registry Office of the State of origin based their records solely on the strength of a declaration made by the person concerned thereby, without additional control of legality by the registrar. This certificate is provided in a judicial procedure before a Spanish court.

Model Answer: The registers are judicial registers and there is a presumption of exactitude of the content of the register. This presumption is a consequence of the control that the registers have to make about the validity of the act before recording it. That explains that the certificate have a special evidentiary value related to other means of proof. For example, the certificate prevails over the statements made by a witness.
The certificate of a foreign Registry Office contains only this presumption if it is equivalent to Spanish Registry Office. If the Registry Office of the State of origin has purely advertising function, the certificate issued will have a lower evidentiary value before Spanish authorities.

4.5.2. Do you have the foreign registration certificate the same evidentiary value in the judicial sphere that at the administrative level?

-*Model Case:* It is provided before an administrative authority a certificate of marriage to apply for a visa for family reunification.

Model Answer: In the field of immigration, for exercising family reunification, the family relationship must be proved in each case (marriage, parentage ...). To this end, it is usually enough accreditation by a certificate issued by the Registry of origin.
On a procedural level, the certificate of the foreign register established the presumption of exactitude of the content only if it is equivalent to a Spanish certificate.

4.5.3. In what cases it may be rejected the evidentiary value of the foreign certificate?

-*Model Case:* It is provided a certificate of a marriage, issued by a foreign registry, without translating nor legalize. In addition, there are contradictory data in the registry of origin.

Model Answer: The ICCS issued the Recommendation No. 9 on combating documentary fraud with respect to civil status and translations. The Instruction of the Directorate General of Registries and Notaries, of 20 March 2006, over prevention of documentary fraud on civil status, on the basis of Recommendation 9 ICCS, established different criteria to refuse foreign documents that generate doubts concerning the exactitude of the documentary evidence. Such criteria could refer to the accuracy of the data derived from the document (implausible aspects observed in the document) and "external" factors at the document (eg, past practices of irregularity in the register of origin).