
Cross-border recognition of adoptions

European Added Value Assessment

accompanying the European
Parliament's legislative own-
initiative report (rapporteur:
Tadeusz Zwiefka)

STUDY

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The European added value of an EU legal instrument on the cross-border recognition of adoptions

Study

In accordance with Article 225 of the Treaty on the Functioning of the European Union, the European Parliament has a right to request the European Commission to take legislative action. On 23 April 2015, the Conference of Presidents of the European Parliament authorised its Committee on Legal Affairs (JURI) to draft a legislative initiative report on the cross-border recognition of adoptions.

All European Parliament legislative initiative reports (INL) must automatically be accompanied by a detailed **European Added Value Assessment** (EAVA). Accordingly, the JURI Committee requested the Directorate-General for Parliamentary Research Services (EPRS) to prepare an EAVA to support the Legislative Initiative Report on **Cross-border recognition of adoptions**, 2015/2086(INL), prepared by Tadeusz Zwiefka.

The purpose of the European Added Value Assessment is to support a legislative initiative of the European Parliament by providing scientifically based evaluation and assessment of the potential added value of taking legislative action at EU level. In accordance with Article 10 of the Interinstitutional Agreement on Better Law-Making, the European Commission should respond to a request for proposals for Union acts made by the European Parliament by adopting a specific communication. If the Commission decides not to submit a proposal, it should inform the European Parliament of the detailed reasons therefore, including a response to the analysis on the potential European Added Value of the requested measure.

This analysis has been drawn up by the European Added Value Unit within DG EPRS. The present EAVA paper builds on expert research carried out by Ruth Cabeza, Claire Fenton-Glynn and Alexander Boiché for the European Parliament, DG EPRS, European Added Value Unit.

The assessment presents a qualitative analysis of possible policy options and quantitative estimates on the possible additional value of taking legislative action at EU level related to cross-border recognition of adoptions.

The expert research paper by Cabeza, Fenton-Glynn and Boiché is presented in full in Annex I.

This document was requested by the European Parliament's Committee on Legal Affairs.

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Executive Summary

The number of international couples and international families is continuously increasing.¹ Important differences between Member States in the rules applying to adoptions have significant impact on the ability and willingness of adopters to exercise their rights of free movement. The cost resulting from **lack of EU rules** on recognition of adoption decisions is estimated to amount to approximately **€1.65 million per annum**.

The cross-border recognition of adoptions is regulated at the level of the United Nations by the **Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption**. This Convention provides, among other things, for automatic recognition of adoption orders (Article 23), and is subject to a limited number of exceptions (Article 24 and 25). The scope of recognition granted by the Convention include adoptive parent-child relationship (Article 26(1)a); parental responsibility (Article 26(2)b); termination of the pre-existing parent-child relationship (Article 26(1)c) with an exception provided under Article 27. Whilst **the Convention** as a core principle provides for automatic recognition of Convention adoptions, its **scope of application is limited**. It only covers situations when the adopters and the adopted child are resident in two different states.

Adoption cases where the adopters and the adopted child are resident in one Member State are not covered by the 1993 Hague Convention and are subject to national law. National adoptions laws vary greatly between EU Member States. As legislation currently stands, within the EU, there is no legal protection or guarantee that domestic adoptions lawfully carried out in one EU Member State will be recognised in another. Thus, **there is no guarantee** – neither for the child, nor the adopter – that the status of adoption and the legal consequences thereof will be recognised **if the family exercises its right to free movement within the EU**.

This situation is highly problematic and generates economic, social and legal costs for adopters as well as for public administrations, and most importantly, puts the best interest of the child at stake. It can be argued that the current legislative gap creates a situation where the best interest of adopted children (who are the most vulnerable children in society) is not adequately protected in the EU. The lack of domestic legal recognition of adoptions may harm children's right, including their right to family life, non-discrimination, inheritance rights and right to nationality.

The current legal gap also creates an unjustified distinction between legal effects of Hague Convention adoptions and domestic adoptions with a foreign element. Whilst Hague Convention adoptions are subject to automatic recognition, domestic adoptions are not automatically recognised in another EU Member State. This more specifically impacts negatively on families that exercise their rights to free movement under EU law. In 2011, the European Parliament adopted a resolution on International Adoption in the

¹ Eurostat, Statistics in Focus 31/2012.

European Union.² The European Commission has not to date followed up the 2011 EP Resolution with a legislative initiative.

There are three main reasons why the EU should take action on cross-border recognition of adoption orders. Firstly, as stated above there are convincing economic benefits of adopting such a measure, which include reductions in administrative and legal costs both for citizens and public administrations. Secondly, there are social and fundamental rights benefits, in particular the better protection of the interest of the child, and of the fundamental rights of the adopters, as well as reduced uncertainty, emotional distress and possible health costs. Thirdly, rules on automatic recognition of adoptions in another EU Member State would advance the practical achievement of EU citizenship rights and the further development of the European area of justice, based on mutual recognition and mutual trust.

According to Article 4(2)j, the European Union has a shared competence with Member States in the area of freedom, security and justice. According to Article 81(1) the EU shall 'develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgements ...'. Such cooperation may include adoption of legislation ensuring 'the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases' (Article 81 (2) a)). The measures concerning family law with cross-border implications are covered in Article 81(3).

Considering the current legislative gaps, with the considerable implied economic and social disadvantages for citizens, it is recommended that the EU should take legislative action on the automatic recognition of the effects of adoptions. Based on the review of international law, more specifically the 1993 Hague Convention, the European Convention on Human Rights and the related decisions of the European Court for Human Rights, as well as EU instruments in the area of civil matters, it is suggested that such EU legislation should cover the following elements: (i) issues of jurisdiction and conflict of law; (ii) a uniform certification process and adoption certificate, as well as the effects of the certification; (iii) conditions for the recognition of adoptions orders; and (iv) setting the principle of mutual recognition as a default principle as well as defining the grounds for non-recognition.

There are four policy options that may be considered in addressing the current gap in recognition by Member States of adoptions made in another Member State.

- **Policy Option 1: Baseline scenario, maintaining the status quo.** Under this policy option there would be no initiative at EU level. The problems, economic and social costs identified above would remain. Moreover, considering the increasing number of citizens making use of their right to free movement, the number of conflicts would be likely to even increase, and thereby also the total estimated cost of the existing gap.

² European Parliament resolution of 19 January 2011 on international adoption in the European Union, P7_TA(2011)0013, OJ C 136 E/24 of 11 May 2012.

- **Policy Option 2: A Regulation on mutual recognition of adoption decisions.** Under this policy option, a binding EU regulation would be necessary. This Policy option would establish a streamlined recognition process, saving costs to both individual citizens and the public purse. It would also provide certainty on the status of adopted children and for the relatives of adopted families, as well as limit the scope for discrimination against families which have been legitimately constituted under the law of an EU Member State. This policy option only covers procedural rules related to the recognition of adoption orders. It does not interfere with national laws governing adoption, and leaves Member States free to legislate as they see fit in relation to the suitability and availability of children for adoption, matching criteria and eligibility of adopters. This policy option provides the most balanced solution in terms of effectiveness and efficiency as well as protection of fundamental rights. This policy option also meets the requirements of subsidiarity and proportionality tests as provided by EU law and case law of the Court of Justice.
- **Policy Option 3: Harmonisation of national adoption law.** In addition to the recognition rules as provided in Policy Option 2, under this policy option, the EU would attempt to harmonise national adoption laws. While this option may be preferred from the point of view of efficiency, it does not meet the test of proportionality and would incur high political costs. Family law is primarily in the competence of Member States, attempting to harmonise national adoptions laws is neither necessary, nor in proportion to the aim sought.
- **Policy Option 4: non-binding options.** Under this policy option, the EU would adopt a non-binding list of recommendations aiming at facilitating voluntary recognition of domestic adoptions. This policy option will not resolve difficulties identified in this report. The initiatives at the level of the Council of Europe have proved that this method is not effective.

In conclusion, based on the analysis of costs and benefits of the existing legal gap in relation to the automatic recognition of adoptions in EU Member States, this report recommends the adoption at EU-level of a legally binding instrument on the basis of Article 81 TFEU, providing automatic mutual recognition of domestic adoptions made by an EU Member State. This policy option has the potential to reduce administrative and legal costs; to contribute to the better protection of the welfare of adopted children and of their adopters; as well as to contribute to social cohesion and mutual trust among EU Member States.

Introduction

The purpose of the European Added Value Assessment (EAVA) is to support the Legislative Initiative of the European Parliament on **Cross-border recognition of adoptions**³ being prepared by Tadeusz Zwiefka, by providing scientifically based evaluation and assessment of the potential added value of taking legislative action at EU level.⁴ The EAVA focuses on and limits itself to the analysis and justification of possible actions at EU level to improve the recognition of cross-border adoptions, as well to measuring the added value that these EU action(s) could potentially create. The assessment identifies economic and social costs, and notably the costs related to the incomplete protection of rights of mobile EU citizens, born as a result of the absence of regulation on automatic recognition of adoption decisions at EU level. The substantive scope of the EAVA is limited to the issues related to the recognition of adoptions in EU Member States. The substantive family law issues, as well as issues related to the recognition of conventional adoptions, within the meaning of the 1993 Hague Convention on Intercountry Adoptions, are not covered in this assessment.

1. The costs of not having European Union rules on recognition of adoption decisions

Based on the available data, the costs linked to the absence of legislation on an automatic recognition of adoption decisions in the European Union is estimated to amount to approximately €1.65 million per annum.

The data on the number of adoptions is not systematically collected in the EU Member States.⁵ Member States have diverging national reporting requirements and the details of the collected data also greatly differ.⁶ This makes a systematic comparative statistical analysis of adoptions in the EU a very difficult task. To date the most comprehensive dataset on adoptions is 2009 United Nations data.⁷ This dataset covers all EU Member States and provides the most detailed comparative data on adoptions.

Based on Eurostat population statistics and the 2009 UN data on adoptions, it is estimated that there are 668 981 children under 15 years old residing in the EU. In the EU, on average 3.2% of citizens exercise their right to free movement.⁸ This amounts to approximately 21 000 adopted children living cross-border, for whom recognition could

³ 2015/2086(INL), Draft report is available at

[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/2086\(INL\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/2086(INL))

⁴ In accordance with Article 10 of the Interinstitutional Agreement on Better Law-making the European Commission will reply to the request for proposals for Union acts made by the European Parliament by adopting a specific communication. If the Commission decides not to submit a proposal it should inform the European Parliament of detailed reasons for its decision, including a response to the analysis concerning European Added Value.

⁵ For comparative data on EU Member States see Jurviste, Sabbati, Shreeves and Stull, [Adoption of children in the EU](#), Briefing, European Parliament Research Service, PE 583.860, June 2016.

⁶ For a detailed discussion on lack of data and divergence in common terms and definitions see the 2009 UN Report 'Child Adoptions' cited below.

⁷ [Child Adoptions: Trends and Policies](#), United Nations, 2009.

⁸ Source: Eurostat (online data code [migr_pop1ctz](#) and [migr_pop3ctb](#))

potentially be an issue. The number of problematic cases is difficult to estimate. Taking a very moderate estimate of 1%, the number of problematic cases might be in the range of 200-250 cases per year. Accounting for the average legal and emotional costs per Member State, the total estimate of costs related to the litigation of problematic situations emerging from cross-border movement is €1.65 million per year. This estimate is very moderate and includes only costs related to the **litigation** related to the recognition of adoptions. This number does not include costs of problematic situations that do not end up under litigation. For example, it also does not include the costs of administrative procedures, legal counselling and translation costs, as well as travelling and loss of productivity related to the additional administrative proceedings that are necessary when recognition of a domestic adoption is not automatic. Those costs may be further multiplied if adopters or adoptees move within the EU to more than one country.

Table 1 - Estimated costs relating to the lack of EU legislation on the automatic recognition of adoption decisions per annum⁹

Total number of adoptions & proportion of dispute cases	
Total adoptions of under 15s ¹⁰	668 981
Proportion living cross-border ¹¹	3.2%
Estimated number encountering difficulties	1%
Proportion reaching court/ legal proceeding	50%

Legal costs of resolving disputes on recognition and/ or legal uncertainty per annum	
Cost per case (€)	€5 000
<i>Sub-total</i>	<i>€0.54 million</i>
Emotional costs	
Cost per case	€10 000
<i>Sub-total</i>	<i>€1.1 million</i>
Cost of Non-Europe (CoNE)	€1.65 million

The gaps and barriers to recognition by Member States of adoptions conducted in another Member State directly impact on the daily lives of the citizens concerned and entail severe consequences and important costs for both national administrations and the EU citizens.¹² The adoption of an EU instrument providing automatic mutual recognition of domestic adoptions made by EU MS has the potential to reduce administrative and legal costs, contribute to the better protection of the welfare of the adopted child and the

⁹ Source: Cost of Non-Europe Report, European Code on Private International Law, European Parliament, PE 504.468

¹⁰ Based on UN data on the number of the births adopted per annum in each Member State applied to the total EU population aged under 15 years, Eurostat (2012)

¹¹ [Eurostat](#) (2010: Number of citizens born in (other) EU Member States to the one they reside in.

¹² See section 2.3 below for discussion

adopters, as well as to contribute to social cohesion and mutual trust among EU Member States. Table 2 below provides an overview of the main advantages that an EU instrument on cross border recognition of adoptions might bring. Not all benefits are of a direct economic nature, however they are no less important.

Table 2 - Estimated qualitative benefits resulting from the mutual recognition of adoptions

Benefits of resolving recognition disputes and reducing legal uncertainty	
Administrative benefits	- applications for the recognition of adoptions would be automatic and thus would not require additional certificates, validation, translations and recognition.
Legal benefits	- adopters would not need to obtain professional legal advice, and court defence in multiple jurisdictions, on the recognition of the adoption decisions and the management of inheritance; - would provide legal certainty in relation to the effects of adoption for children, adopters and the relatives of adopted families; - the automatic recognition of adoption decisions (provided in the 1993 Hague Convention for Intercountry Adoptions) would also benefit domestic adoptions in EU MS involving a foreign component, thus putting an end to an unjustified difference of treatment within the EU of recognition cases concerning domestic adoptions with a foreign component; - would improve the protection of the fundamental rights of the children and their adopters, notably the protection of the right of the child, the right to the respect for private and family life and freedom from discrimination.
Social and Emotional benefits	- the right of the child, in particular their right to a stable and permanent family, would be better protected; - the inconveniences to adopters, including well-being and even possible loss of employment, due to prolonged litigation and uncertainty, would be avoided.
Wider economic benefits and impact on EU mobility	- Adopters would not face challenges in exercising their right to mobility provided under EU law; - Adopted children would have better protection of their right to mobility provided under EU law.
Wider EU law benefits	- This legislative action would complement the existing EU regulation on issues of jurisdiction and parental responsibility (Brussels IIa) and fill the existing gap on recognition of adoptions as provided under international law (the 1993 Hague Convention); - The principle of mutual recognition and mutual trust, a pillar of the European area of justice, would be strengthened

2. The current system and potential barriers to recognition by one Member State of adoptions made in another Member State

2.1. The EU Policy Context

- 1997 – The Treaty of Amsterdam introduced provisions related to judicial cooperation in civil matters.¹³
- 2011 – The European Parliament adopted a Resolution on International Adoption in the European Union on 19 January 2011.
- No follow-up by the Commission on the 2011 EP Resolution.
- From 1994 to 2015, over 80 written questions submitted by the Members of the European Parliament to the European Commission on issues related to adoptions.¹⁴
- The European Parliament Committee on Petitions continuously receives letters from citizens on issues related to adoptions.¹⁵
- 2015 – The Conference of Presidents of the European Parliament authorised the Committee on Legal Affairs to draft a legislative initiative report on Cross-border recognition of adoptions, 2015/2086(INL).

The Committee on Legal Affairs (JURI Committee) has a long-standing interest in the issue of adoptions. During the 1994-1997 legislative period, an own initiative report (1995/2106(INI)) on improving adoption law was adopted (URI/4/06675, 1996 (PE 215.242/fin). In 2008/2009 two large scale studies related to adoption were commissioned by the European Parliament and the European Commission. This preparatory work resulted in the 2011 European Parliament Resolution (P7_TA(2011)0013) on international adoption in the European Union. This EP Resolution has not so far been followed by a legislative initiative by the European Commission.

European Union citizens are also highly concerned by the various problems related to adoption issues in the EU Member States. The EP Committee on Petitions (Committee for Opinion) receives continuous complaints from EU citizens related to adoption issues.¹⁶ In 2013, the JURI Committee organised a public hearing ‘The Law Protecting Children in Europe and worldwide: provisions facilitating adoptions and resolving abductions’; and in 2015, together with the PETI Committee, a Workshop on ‘Adoption: Cross-border legal issues’.¹⁷

¹³ Article 81 TFEU (ex. Article 65 TEC)

¹⁴ see Appendix I, for overview of the submitted questions and replies by the European Commission).

¹⁵ See for example, [Petition No 1420/2013](#) by E.M.R.G. (Spanish), on adoption within the EU and the reply by the European Commission.

¹⁶ Most recently for example, petition No 1420/2013 by E.M.R.G. on adoption within the EU.

¹⁷ The 2015 Workshop resulted in the publication ‘[Adoption: Cross-border issues](#)’, Policy Department C, European Parliament PE 536.477, available at; see also Briefing by Chateau, Céline, [Adoption: Cross-border Legal Issues and Gaps in the European Union](#), Policy Department C, European Parliament, 2015, PE 536.480.

While recognising the importance and achievements of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption, the Committee on Legal Affairs of the European Parliament considers that there is a need for a European instrument covering the recognition by a EU Member State of an adoption having taken place in another EU Member State. In February 2015, the European Parliament's Committee on Legal Affairs decided to draw-up a new Legislative Own-Initiative report on the 'Cross Border Recognition of adoptions' (2015/2086(INL)). The JURI Committee provided the following justification for the necessity to proceed with a new Legislative Initiative report: 'Relatively few adoptions have one EU Member State as the country of origin and another country of destination. However, what does frequently happen is that parents and their adoptive children move to another Member State. In certain cases, the authorities of the new state do not recognise the validity of the adoption. Complications can then vary, from problems with registration at school to cases of children being taken away from the adoptive parents. The Committee considers that there is a need for a European instrument covering the recognition of adoptions which have taken place in another Member State.'

2.2. Legal Background

On European Union Level

- No EU legislative instrument which regulates the recognition of adoptions in another Member State

At international level

- The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoptions.
- **all EU Member States are parties to the Convention:**
- the convention only applies when the adopters and the adopted child usually reside in two different countries:
- the convention does not cover domestic adoptions, i.e. situations where the adopters complete the adoption procedure in one Member State, and then later, decide to move to another EU Member State with the child.
- United Nations Convention on the Rights of the Child
- Council of Europe, European Convention on the Adoption of Children (revised)
- The European Convention on Human Rights

There are two types of adoptions: **domestic adoptions** and **intercountry adoptions**. Intercountry adoptions cover situations where the adopters and the adopted child are usually resident in two different countries. If both countries are parties to the 1993 Hague Convention, then procedure for the adoption, including applicable rules on the recognition of the adoption, are subject to the provisions of the 1993 Hague Convention.

At the international level, the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption is the main legal instrument, ratified and adopted by all EU Member States, applicable to cross-border adoptions. A core provision of the Hague Convention, under Article 23, sets out that adoptions must be automatically recognised in other convention countries.

The 1993 Hague Convention is an important step towards coordination and simplification of cross-border adoptions, and is generally considered a very successful international instrument. Nevertheless, it does not provide rules on applicable law, nor common definitions related to adoption. The enforcement and complaint mechanisms available to citizens are limited to international law instruments that are often lengthy and *inter alia* require intermediation of state authorities.

More fundamentally, as far EU families are concerned, the scope of the Hague Convention is limited: it only applies to the situations when adoptive parents and adopted child come from two different countries. Adoption cases where the adoptive parents and the adopted child are usually resident in one EU Member State, and following the adoption, move to another EU Member State, are not covered by the Hague Convention. As a result, domestic adoptions carried out in one EU Member State are not automatically recognised in another EU Member State. The current situation is an obstacle to increasingly mobile EU citizens.

At the EU level, there is currently no legal instrument which regulates the recognition of an adoption order made in another MS. Each MS has its own rules on recognition of foreign adoptions. This means that, if an adoption is not governed by the 1993 Hague Convention, i.e. at the time of adoption the adoptive parents and the adoptive child were usual residents of two different countries, then the provisions on automatic recognition of adoption decisions does not apply.

If rules on intercountry adoptions do not apply, then the adoption is considered to be a domestic adoption, and therefore governed by national law. As explained in detail by Cabeza et.al 'A domestic adoption is defined by the law under which it is made, and not by the absence of any international element within the factual adoption itself.'¹⁸ In contrast to the intercountry adoptions, domestic adoptions made in one Member State are not automatically recognised in another EU MS. The recognition of domestic adoptions is subject to the national rules of each Member State.

However, there are a number of cases where adoptions include an international component, which in terms of applicable law and procedural rules, are nevertheless considered as domestic adoptions. These examples include situations where the adopters and the child reside in one country, but either the child or one of the adopters is a foreign national.

2.3. Barriers to recognition of adoptions

The recognition of domestic adoptions with a foreign component in the EU may lead to a variety of practical problems, especially if the child and the adopters decide to exercise their EU rights to free movements from one EU Member State to another EU Member State. As a result of diverging rules governing the recognition of foreign domestic adoption orders in the EU Member States, families with adopted children may face significant practical uncertainties and difficulties.

¹⁸ See section 1.2 Domestic Adoptions, in Annex I below.

Based on the analysis of national laws related to the recognition of adoptions in various EU Member States, Cabeza et al. identify **five main areas** where families may confront practical obstacles:

- Additional procedural steps necessary to establish custody and parental responsibility in relation to the adopted child, in order to ensure that they have a right to manage their money, authorise medical treatment and make arrangements for their education;
- Entitlement of the adoptee to claim nationality of either or both of their adopters;
- Entitlement to inherit land/property under the inheritance and intestacy laws of any relevant EU MS, not just from parents, but also from the extended family members. For example, a will that states 'I leave my house and land to be shared in equal proportions between my grandchildren' would exclude a grandchild through adoption, if the adoption was not recognised under the law governing the grandparent's will;
- Entitlement to special treatment accruing from a status as adopted child for the purpose of welfare entitlement;
- Entitlement to special treatment accruing from the status of the parent/child relationship for tax reasons (gifts/inheritance/other tax allowances).¹⁹

3. Policy Options

There are three main reasons why the EU should take action on the cross-border recognition of adoption orders. Firstly, as stated above, there are convincing economic benefits of adopting legislation at EU level, notably a reduction of administrative and legal costs both for citizens and public administrations. Secondly, there are social and fundamental rights benefits, in particular better protection of the interest of the child, and of the fundamental rights of the adopters, as well as reduced uncertainty, emotional distress and possible health costs. Third, rules on automatic recognition of adoptions completed in one Member State in another EU Member State would advance the practical achievement of EU citizenship rights and the further development of the European area of justice based on mutual recognition and mutual trust.

Considering the current legislative gaps, with the considerable implied economic and social disadvantages for citizens, it is recommended that EU should take legislative action on the automatic recognition of the effects of cross-border adoptions. Based on a review of international law, in particular the 1993 Hague Convention, the European Convention on Human Rights and the relevant decisions of the European Court for Human Rights, as well as EU instruments in the area of civil matters, it is suggested that EU legislation should cover the following elements:

- issues of jurisdiction and conflict of law;
- a uniform certification process and adoption certificate, as well as the effects of certification;

¹⁹ See Section 4.2. Annex I below for discussion.

- conditions for recognition of adoptions orders;
- principle of mutual recognition as a default principle;
- grounds for non-recognition, which mirror the provisions of Article 24 of the 1993 Hague Convention.

3.1. Subsidiarity and Proportionality

According to Article 4(2j), the European Union has shared competence with Member States in the area of freedom, security and justice. According to Article 81(1), the EU shall 'develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgements ...'. This cooperation may include adoption of legislation ensuring 'the mutual recognition and enforcement between Member States of judgements and of decisions in extrajudicial cases' (Article 81(2a)). The measures concerning family law with cross-border implications are covered in Article 81(3).

3.2. Policy Options and their impact

There are four policy options that may be considered when addressing the current gap in recognition by Member States of adoptions made in another Member State.

Table 3 - Policy Options and their impact

	Impacts (compared to baseline scenario)
Policy Option 1: Baseline scenario, Maintaining the status quo	Under this policy option there would be no initiative at EU level. The problems, economic and social costs identified above would remain. Moreover, considering the increasing number of citizens making use of their right to free movement, the number of conflicts would be likely to increase, and therefore also the total estimated cost of the legal gap.
Policy Option 2: A Regulation on mutual recognition of adoption decisions	Under this policy option, a binding EU regulation would be necessary. it would establish a streamlined recognition process, saving costs to both individual citizens and the public purse; it would provide certainty on the status of adopted children and for the relatives of adopted families; it would limit the scope for discrimination against families which have been legitimately constituted under the law of an EU MS; it does not interfere with national laws governing adoption, and leaves MS free to legislate as they see fit in relation to the suitability and availability of children for adoption, matching criteria, and eligibility of adopters. This policy option meets the requirements of subsidiarity and proportionality tests as provided by EU law and case law of the Court of Justice.
Policy Option 3:	Under this policy option, in addition to the recognition rules as

	Impacts (compared to baseline scenario)
Harmonisation of national adoption laws	provided in Policy Option 2, the EU would attempt to harmonise national adoption laws. While this option may be preferred from the point of view of efficiency, it does not meet the test of proportionality and would incur high political costs. Family law is primarily in the competence of Member States; attempting to harmonise national adoptions law is neither necessary, nor proportionate to the aim sought.
Policy Option 4: non-binding options	Under this policy option the EU would adopt a non-binding list of recommendations aiming at facilitating voluntary recognition of domestic adoptions. It would not resolve the difficulties identified in this report. The initiatives at the level of the Council of Europe have proved that this method was not effective.

In conclusion, based on the analysis of costs and benefits of the existing legal gap in relation to the automatic recognition of adoptions in EU Member States, this report recommends the adoption at EU level of a legally binding instrument on the basis of Article 81 TFEU, providing automatic mutual recognition of domestic adoptions made by an EU Member State. This policy option has the potential to reduce administrative and legal costs, contribute to the better protection of the welfare of adopted children and of the adopters, as well as to contribute to social cohesion and mutual trust among EU MS.

Cross-border recognition of adoptions

Annex I -

Research paper

**by Ruth Cabeza, Claire Fenton-Glynn and Alexander
Boiché**

Abstract

This report explores the extent to which the current framework of domestic, EU and international laws provide an effective mechanism for cross-border recognition of adoptions made in EU Member States.

AUTHORS

This study has been written by: **Ruth Cabeza**, a self-employed barrister in practice at Field Court Chambers, London, UK, **Dr Claire Fenton-Glynn** of the University of Cambridge, and **Alexander Boiché** a self-employed lawyer in practice in Paris, at the request of the Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

The study has been undertaken at the request of the Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the European Parliament.

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Executive summary

This report has been prepared to investigate the adequacy of the current framework for the recognition and enforcement of adoptions made in EU MSs when they have cross border implications.

Our research has revealed that save for the provisions of the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the '1993 Hague Convention') there is no EU or other international instrument which governs this issue. Further, as set out in detail in chapter 2, the 1993 Hague Convention has limited application and is not a solution to all adoptions that involve an international element.

A natural and positive consequence of the free movement of citizens within the EU is that citizens meet, and sometimes start families with citizens of different nationality. While adoptions under the national laws of a MS are able to accommodate these families, the cross border implications flowing from such adoptions are more complex. No single MS acting on its own can resolve the difficulties for families caused by these cross border complications.

All of the EU MS we researched have national laws which govern the recognition of foreign adoption orders. However, the legal procedures which govern recognition vary widely across MS. This is clear from the table on comparative law at the end of the report. Moreover, recognition of a foreign adoption order does not have any legal effect beyond the borders of that MS. Accordingly, it may be necessary for an adoptive family to undertake an adoption in one MS, and seek recognition in several other MS in order to fully protect the rights and advance the welfare of the adopted child.

The current system is not cost effective and presents a real difficulty for families with mixed nationality when they adopt children, particularly if their work has caused them to migrate within the EU and set up home in a different MS. These issues are explored in depth in chapter 2. There are comparative tables at the end of the report which give a more concise comparison of the differing forms of adoption and of differing laws relating to the recognition of foreign adoption.

Although the EU has not yet legislated for recognition of any orders which concern the attribution of parenthood or which concern the status of the child, there does not appear to be any prohibition against such legislation in the TEU or the TFEU. Moreover, the provisions of Articles 67 and 81 of TFEU appear to provide a clear shared competence to legislate in this area.

The recommendation of this report is that the only means by which a uniform and streamlined procedure for mutual recognition of domestic adoption orders can be achieved is by the implementation of a scheme which encompasses all EU MS and overlies their own national laws of adoption. Individual MS cannot give effect to such a scheme and therefore the only means of achieving this would be by regulation at an EU

level. For this reason the report recommends the enactment of a Regulation to achieve this purpose.

Having regard to the difficulties that the absence of a coherent recognition system poses to children, their families and the public purse, there is clear added value in the creation of the proposed legislation.

The proposed legislation draws inspiration from and seeks to build on the successes of both the 1993 Hague Convention and the Brussels IIa Regulation. The principles which underpin the proposed legislation, the detail of which is set out in Chapter 5, are already in force in relation to: jurisdiction, recognition and enforcement of intercountry adoptions under the 1993 Hague Convention; and of orders concerning the attribution and exercise of parental responsibility under the Brussels IIa Regulation.

Chapter 1 Introduction

1. Background

At present the jurisdiction to make and to recognise an adoption order is a matter of national, and not EU, law. In simple terms this means that each MS must look to its own national law when determining adoption applications and when considering whether or not to recognise and give effect to adoption orders made in other MS. This is in marked contrast to the position with regard to the attribution and exercise of parental responsibility which is a matter of both national and EU law, being governed by Brussels IIa Regulation.²⁰ It is of note that the Brussels IIa Regulation does not apply to adoption orders.

The absence of any EU framework to govern jurisdiction, recognition and enforcement of adoption orders is a matter which has been under review by the Legal Affairs Committee since the mid 1990s. However, no legislation has emerged during that time. Meanwhile, over the last 30 years the EU has grown, and its people have become increasingly mobile. There have been significant social changes and technological advances throughout this period, and some MSs have seen an increasing recognition of diverse family units, including same sex marriage/civil partnerships. These changes have impacted on family life at every level, including within the sphere of adoption.

Adoption is a recognised term throughout the EU. At its most fundamental level it attributes parenthood on the adopter and confers the legal relationship of parent and child to the adopter and adoptee. It also alters the legal relationship of the child with extended family members and can alter the child's nationality. The nature of adoption is that it creates a permanent parent child relationship²¹ and is binding not just on the parties to the adoption but to the rest of the world. *It is a matter of status*. However, like marriage, within the EU there is no guarantee that the status of adoption, for adopter or child, will be recognised if the family moves from one MS to another. It is the impact of this lacuna in the EU legal framework that this report investigates.

In some ways it is rather ironic that the attribution and exercise of parental responsibility for children has taken such a prominent position the EU legislative agenda whereas the recognition of adoption has been left unregulated. While they are matters of extreme importance to the practical upbringing of children, parental responsibility expires when the child attains the age of 18. Furthermore, orders concerning parental responsibility are subject to change throughout the child's minority. Adoption, by contrast, is lifelong and is not intended to be subject to review and alteration. Adoption can permanently sever a

²⁰ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

²¹ In most countries it is possible, in exceptional circumstances, to revoke an adoption order, but, unlike guardianship, the intention with adoption is for a lifelong familial link to be created.

child's connections to their cultural and biological heritage, not only at law, but in day to day reality. These issues are all the more poignant when they involve an international element. Within this context it is very surprising that the EU has not provided any mechanism under which citizens can have certainty that the adoption orders they obtain from a court in one MS will be recognised and given effect in all other MS. Equally it is surprising that there is no clarity as to jurisdiction and applicable law when it comes to the making of such important orders.

One example of the difficulties which arise out of a lack of regulation in relation to jurisdiction can be seen from the situation of migrant workers within the EU. When a migrant worker brings their children with them to live in a different MS, the welfare of those children becomes the responsibility of the host MS. Every MS has in place measures for the protection of child welfare, but there is a wide measure of appreciation for the practical implementation of such measures. The absence of any regulation as to jurisdiction and applicable law in relation to adoption has given rise to a number of petitions over recent years based on complaints about the approach of the courts in England and Wales to non-consensual adoption of children.²² This is an issue which could be resolved by clear regulation of jurisdiction and applicable law in relation to adoptions of EU citizens within the EU.

The 1993 Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption (the '1993 Hague Convention') is designed to ensure that the adoption of a child habitually resident in country A, by adopters who are habitually resident in country B, is only ever carried out when it is in the child's best interests. It achieves this by providing safeguards for the child at the heart of the adoption, in both countries and at all levels throughout the adoption process. There is a very real risk that when a child is taken from one country, to live with adopters in another country, the child's welfare will be compromised, unless the adoption and child protection services in both countries work hand in hand with each other, in a transparent and child focused way. *It is the dynamic of the working relationship between the two countries which is at the heart of the 1993 Hague Convention.* It sets minimum standards for the assessment of the child (carried out by the state of the child's habitual residence) and adopter (carried out by the state of the adopter's habitual residence), and stipulates that no person or organization can profit from the adoption process. Provided that both countries have agreed in advance that the proposed adoption should proceed,²³ an adoption order made consequent upon that agreement must be recognised and given effect by all states party to the Convention.²⁴

However, the 1993 Hague Convention only applies where the child is habitually resident in one State, and has been, is being, or is to be moved to another State, either after the

²² See Claire Fenton-Glynn, *Adoption without consent* (Directorate General for Internal Policies of the EU Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 519.236).

²³ This requirement is set out in Article 17(c) of the 1993 Hague Convention

²⁴ Article 24 of the 1993 Hague Convention.

adoption, or for the purposes of adoption.²⁵ It does not apply to adoptions where the child and adoptee are habitually resident in the same State. Furthermore, it follows that if an adoption is not governed by the 1993 Hague Convention, the provisions for recognition of the adoption order will not apply either.

The fact that the child and the adopters are both habitually resident in the same country does not mean that they share nationality, either with each other, or with the State in which they are living at the time that the adoption order is made. Further, that newly constituted family may move to another State, who may or may not recognise the domestic adoption lawfully carried out in another jurisdiction.

There are several problems that may occur if adoptions carried out in one MS are not recognised in other jurisdictions. For example, rights of inheritance for the adopted child under forced heirship rules might be compromised. Likewise, the parents may not be able to access social welfare benefits in relation to the child. This may be compounded by the fact that many EU citizens may not know that the adoption is not recognised in the host jurisdiction.

Combined, these factors may be a barrier to the free movement of EU citizens, if their family forms are not recognised in other MS.

Accordingly, the Legal Affairs Committee has commissioned this report in order to advise on whether EU legislation is necessary to regulate the law of adoption in relation to jurisdiction and/or recognition of adoption orders made in the EU.

2. Objectives

In order to assist the legislature to evaluate whether or not it should make provision to regulate the exercise of jurisdiction and recognition of adoption orders, and if so in what form, this report will seek to:

- identify the current provisions for recognition of adoption orders;
- consider the extent to which the free movement of citizens and/or the welfare of adopted children are impaired by the absence of a unified framework for recognition of adoption orders;
- consider the basis upon which the EU has competence to regulate the recognition of adoption orders;
- consider the options for instituting a framework for recognition of adoption orders;
- provide, so far as is possible, a quantitative and qualitative assessment of the benefits likely to flow from EU regulation of the jurisdiction and recognition of adoption orders made in EU MSs.

²⁵ Article 2.

3. Methodology

This report is academic in nature, and its findings and conclusions have been reached having regard to:

- research into ECHR case law;
- CJEU case law;
- a sample survey of MS national law in relation to recognition of foreign adoptions;
- a sample survey of MS national law in relation to conflict of laws and applicable law;
- consideration of relevant EU and international treaties;
- exploration of potential practical consequences flowing from the current legal framework using fictional scenarios for illustrative purposes.

4. Limitations of the report

In an ideal world the writers would have wished to have included in this report real life stories of practical implications of the current legal framework. We would have liked to have been able to have regard to data from quantitative surveys of the incidence, outcome, and cost of recognition in all EU MSs, but this data does not currently exist and was outside of the scope of our report because:

- the financial cost of bringing recognition proceedings will vary from firm to firm and in country to country, and will depend on a number of factors, including but not limited to, the legal process of the MS concerned. In order to obtain definitive data it would be necessary to survey a representative sample of law firms in each MS and ask them to provide details of the number of recognition of adoption applications they have been instructed in and the average costs of such applications. This would be an administratively burdensome (and expensive) survey.
- The personal cost to families who have had to endure recognition procedures for their foreign adoption orders when the families have migrated through different countries in the EU would be difficult to quantify, even if it were possible at a practical level to undertake a representative survey of families who have undertaken such proceedings within the EU following an adoption in another EU MS.

Furthermore, it must be remembered that:

- It is impossible to know how many adoptive families in the EU have moved with their adoptive child across EU state borders and believe, rightly or wrongly, that their adoption orders are entitled to automatic recognition in their new host MS and therefore take no action to ensure legal recognition is afforded in that MS.

- Litigation is a very blunt instrument and a hugely expensive process. The majority of disputes of all types are resolved outside of the courtroom. Many families will find a way to resolve their difficulties without resorting to appellate litigation. The absence of case law cannot be seen to be proof that difficulties do arise on the ground.

Accordingly, the writers have used fictional scenarios to illustrate the practical difficulties which may flow from the current lack of regulation in this area.

5. The authors respective roles in the preparation of the report

Ruth Cabeza is the lead author on this report. She is a self-employed barrister in practice in chambers in London and is a specialist family practitioner with a niche practice in international adoption and surrogacy law in England and Wales. She is a member of the Family Law Bar Association of England and Wales and a Fellow of the International Academy of Family Lawyers. Her role in this report has been to draw together the work of her co-authors and provide the overarching analysis.

Alexandre Boiché is a self-employed lawyer in practice in Paris and is a specialist international family practitioner. His role in this report has been to explain the French and Belgian systems of recognition of foreign adoptions.

Claire Fenton Glynn is a lecturer in law at the University of Cambridge, specializing in international and comparative family law. Her role has been to compile comparative information from researchers in different Member States on approaches to recognition of adoption.

Chapter 2 Current framework for recognition by MSS of adoptions made in other MSS

Key findings

- Domestic adoption can include adoptions which involve one or more foreign elements within the factual matrix.
- There is no EU instrument which regulates:
 - the jurisdiction of a MS to grant an adoption order; or
 - the recognition of an adoption order made in another MS.
- The 1993 Hague Convention on Intercountry Adoption is the only international instrument which applies to recognition of adoptions across borders:
 - All EU MS are members of this Convention.
 - The Convention only applies when the child and the adopters are habitually resident in different countries when the child is entrusted to the adopters.
 - Recognition of Hague Convention adoptions is automatic by operation of law.
 - Only a small proportion of adoption orders made in the EU each year are Hague Convention adoptions.
- **Each MS has its own rules governing the recognition of foreign domestic adoption orders and this gives rise to an unacceptable degree of uncertainty for the families of adopted children in an increasingly mobile EU population.**

1. Defining adoption

Adoption is a term which we all think we understand. It is when a person accepts responsibility for a child as if they were their own child. However, in and of itself this simple explanation does not provide a sufficiently clear foundation for the purposes of this report and it is necessary to explore in detail the differing forms of adoption orders so that when considering the recognition of adoptions it is clear what is being referred to.

1.1 Forms of Adoption: Full, Simple and Kafala

Several EU MSs – for example, Belgium, Bulgaria, France, Italy, Luxembourg, Poland, Portugal and Slovakia – differentiate between ‘simple’ and ‘full’ adoption. Kafala is a concept within Islamic law which provides a mechanism whereby someone other than a child’s parents assume the role of guardian and has rights of custody over the child.

1.1.1 Full Adoption

While the exact definition differs between jurisdictions, the difference between the full and simple adoption usually rests on the severance or maintenance of legal ties with the family of origin. A full adoption can be defined as an adoption which transfers to the adopters all rights and duties of a parent, together with the status of legal parenthood, upon the making of the adoption order.²⁶ Equally, upon the making of the adoption order all rights, duties and legal ties between the child and the former parents are extinguished. Following a full adoption, all of the child's legal family relationships are altered, with the effect that they are no longer legally related to their former siblings, aunts, uncles and cousins etc., and acquire new family relationships with the relatives of their adoptive parents commensurate with their status as the child of their adoptive parents.

1.1.2. Simple Adoption

On the other hand, a simple adoption allows for the coexistence of two parallel lines of filiation, between the family of origin and the child, as well as between the adoptive parents and child. As such, it is less radical in its effects than a full adoption. So although a child may acquire additional relatives, it will not necessarily lose the relatives it was born with. For example, a child can have more than two parents within the context of a simple adoption.

The availability of simple adoption in some European states (for example, Belgium, Bulgaria, France, Italy, Luxembourg, Poland, Portugal and Slovakia) is particularly important for cross-border recognition of adoption orders. If a simple adoption were automatically converted to a full adoption in a jurisdiction that does not recognise such differences, this could cause considerable difficulties, especially where the family of origin has given their consent to a simple adoption only. Such a situation is anticipated by the 1993 Hague Convention on Intercountry Adoption, where Article 27 requires that any such conversion have the explicit consent of the family of origin.

1.1.3. Kafala

The concept of the adoption of children is approached from a different perspective under Islamic law, and in most Islamic states the practice of adoption is illegal. Generally speaking under Islamic law, Kafala is an arrangement under which a child is formally placed into the care of alternative primary carers who are granted full custody and control over the child and who assume full financial responsibility for the child. However the key difference between Kafala and adoption is that Kafala does not change, or any way interfere with, the child's legal connections to their birth family. A child under

²⁶ "Societies across the world have developed arrangements whereby adults, who are not the natural parents of a child, may act as his parents in their place. In many countries such arrangements may be informal, or arranged within the extended family; in others a formal legal process of 'adoption' may be required. However even where there is a legal adoption, the resulting status will vary from country to country from a 'full adoption', under which there is a complete and irrevocable severance of all legal ties between the child and his natural family, to 'simple adoption', which is less severe in one or more respects." Child Care and Adoption Law, Andrew McFarlane & Madeleine Reardon, 1st Edn. 2010.

Kafala does not acquire new relatives and does not lose the relatives arising from his birth family. Nadjma Yassari has provided a compelling case for equality of treatment of Kafala with adoption in terms of recognition of the effect of the order for child protection and child welfare.²⁷

There have been adoption applications in which the applicants are the carers for the subject child under a Kafala arrangement. In French law such adoption is prohibited if the children are nationals of a country which prohibits adoption (article 370-3 first paragraph French civil code²⁸). For these families, the only way in which they are able to adopt the child is if they first obtain French citizenship for the child. Under French law a child is not eligible to apply for citizenship until they have been living in France for 5 years. Accordingly the process of converting a Kafala into an adoption under French law is a very lengthy process.²⁹

However, it is considered that a full exploration of Kafala is beyond the scope of this report as the exercise of parental responsibility which is conferred on the child's carers under Kafala is capable of being automatically recognised by virtue of the Brussels IIa Regulation³⁰ and/or the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.³¹

1.2 Domestic adoption

An adoption is a domestic adoption when made pursuant to the law of the country that makes it, in circumstances where the 1993 Hague Convention³² does not apply. It is a domestic adoption because it is governed purely by the national adoption laws of the country that makes it. However, a domestic adoption can involve foreign elements and so it is important to have a clear understanding of what we mean when we are considering the recognition of domestic adoptions made by a MS throughout the EU. **Throughout this report we will use the term 'domestic adoption' to mean an adoption which is not made under the 1993 Hague Convention.**

²⁷ See her paper at page 64 of the report prepared for the Workshop commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the JURI and PETI Committees held on 1 December 2015 entitled 'Adoption: Cross-border legal issues'.

²⁸ "The requirements for an adoption are governed by the national law of the adoptive parent or, in case of adoption by two spouses, by the law which governs the effects of their union. An adoption however may not be declared when it is prohibited by the national laws of both spouses.", created by Law n°2001-111 of February 6th, 2001, pertaining to international adoption; Official Journal of the Republic of France of February 8th, 2001, p. 2316 text n°1.

²⁹ See *Harroudj v France* (Appl. No. 43631/09) 4 October 2012.

³⁰ Council Regulation (EC) No 2001/2003 concerning Jurisdiction and the Recognition and Enforcement in Judgments in Matrimonial Matters and Matters of parental responsibility

³¹ Hague Convention 34. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental Responsibility and Measures for the Protection of Children (concluded 19 October 1996).

³² Hague Convention 33. Convention on Protection of Children and Co-operation in respect of Intercountry Adoption concluded on 29 May 1993.

1.2.1 Domestic adoption with no foreign element

Most adoptions take place between adopters and children who live in the same country as each other, and the order is made by a court in that country. If the child and the adopters are nationals of that country then there is clearly no element which can be said to be international. However, it would be a mistake to define a domestic adoption in these limited terms. **A domestic adoption is defined by the law under which it is made and not by the absence of any international element within the factual matrix of the adoption itself.** A domestic adoption without any international element is just one type of domestic adoption.

Example of domestic adoption with no foreign element

- Kirsten, aged 7, lives with her mother Antka and her step-father Fabien in Germany.
- Kirsten, her mother and her step-father are all German nationals.
- Kirsten's birth father died several years ago in a car accident when she was only 2 ½ years old.
- Fabien wishes to adopt Kirsten and this is supported by both Antka and Kirsten.
- Fabien will apply to the German Court to adopt Kirsten and the adoption will be carried out in accordance with German law.
- On the basis of the limited legal research carried on the national laws governing recognition of adoption in the sample of EU MS set out in part 2 of this chapter, this adoption appears to meet the criteria for recognition in those MSs, either by operation of law or following application to courts of the MS.

1.2.2 Domestic adoptions with an international element

Subject to any limitation imposed by the national law of an individual MS,³³ a domestic adoption can also take place when, with reference to the MS in which the order is made, one or more of the following circumstances apply:

- the child is a foreign national;
- one or both adopters are foreign nationals;
- the adopters and the child are habitually resident in the same country but it is not the country making the adoption order;
- the child is habitually resident in a different country to the adopters.³⁴

³³ As set out below, when we examine the national adoption laws of a sample of MSs, most EU countries impose upon themselves limited jurisdiction to make adoption orders in relation to children living overseas or foreign national children. However, it is important to note that such restrictions are self imposed and not the result of EU regulation or international treaties and in any event are not uniform in their application.

Accordingly, there are adoptions that are governed purely by the national law of the MS in which the order is made, but which affect the status of children and adults who may be citizens of, and/or living in, another MS at the time of the making of the adoption order.³⁵ Furthermore they may relate to children who are citizens of countries outside of the EU and who do not therefore have an independent right to free movement within the EU.

³⁴ Provided that the country of the child's habitual residence is not a member of the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

³⁵ It should be noted that many EU MSs, under their national Conflicts of Laws rules, will determine the applicable law with reference to the nationality of the adopters and/or the child. However although they are applying a foreign law for the purposes of the adoption, it is a natural consequence of their national law, rather than the application of an international law which governs the choice of law. See Chapter 3 of this report for a fuller analysis of this issue.

Example 1 of domestic adoptions with a foreign element

- Rachel, aged 7, lives with her mother, Janet and her step-father Pierre in France.
- Rachel and her mother are British citizens and her step father is a French citizen.
- Rachel's birth father Robert lives in England. Rachel spends half her school holidays with Robert and has a good relationship with him.
- Pierre is the owner of a multi million Euro business with assets mainly held in France. In order to minimize Rachel's future inheritance tax liability Pierre wishes to adopt Rachel. Robert is in agreement with this proposal as is Janet. Rachel has had it all explained to her, and having regard to her age, she is in agreement with the proposed adoption.
- Although Janet and Pierre live in France at the moment because of Pierre's work commitments, they have agreed between themselves that when he retires the family will relocate to England, as Janet has never really felt at home in France and has always intended to return live in England when this is practical. For this reason Janet has been advised that she has retained her domicile of origin in England.
- Pierre and Janet could apply to the French court, where they are all habitually resident, and where Pierre is a national, to adopt Rachel. If they applied to the French court the adoption itself would be governed by French law and following the adoption Rachel would be entitled to French citizenship. The adoption would be automatically recognised in English law.
- They could also apply jointly to the English court to adopt, as Janet is domiciled in England. Under English adoption law it is not a requirement that the adopters and child live in England provided that at least one of the adopters has a domicile in the British Islands. If they applied to the English court the adoption would proceed under English law. If the English court made an adoption order, Janet and Pierre would need to make an application to the French prosecutor for registration of the adoption order so that Rachel could obtain French citizenship.

Example 2 of domestic adoptions with a foreign element

- Alice and Jennifer have lived together in England since 2007. Alice is a British citizen and Jennifer is a German citizen. They entered into a civil partnership in England in 2010. They have been approved as suitable to adopt a child aged between 3 and 5 years.
- Shazia and her parents had moved to England in 2012 as her father had obtained work in Kent. Unfortunately Shazia was subsequently removed from her parents' care by Kent County Council in October 2013 due to concerns that she was suffering significant harm in their care. Kent County Council issued child protection proceedings in the English court and in June 2014 the court made care and placement orders in favour of Kent County Council, which allow them to place Shazia with adopters of its choosing, without the agreement of the parents. The Polish Embassy were notified of the court proceedings and the dates of all hearings in these proceedings. The parents were present and legally represented at public expense for all hearings.
- Kent County Council placed Shazia for adoption with Alice and Jennifer in January 2015.
- Alice and Jennifer wish to adopt Shazia.

Alice and Jennifer can apply to the English court to adopt Shazia. Because Shazia is a Polish citizen the court will require notice of the proceedings to be given to the Polish Embassy. The English court will have regard to whether or not the adoption order will be recognised in Poland as part of the welfare balancing exercise. The parents will be notified of the proceedings and will be entitled to be heard. If they do not agree to the making of the adoption order they will need to apply to the court for permission to oppose the proceedings.

If the English court made an adoption order, then, under Polish law the English adoption order will not be recognised because Alice and Jennifer are a same sex family.

Under German law the adoption will be automatically recognised. If recognition became necessary in Spain or Portugal an application for recognition would need to be made.

Example 3 of domestic adoptions with a foreign element

- Dorethy and Felipe are married and live in England. Dorethy is a British citizen and Felipe has dual British and Spanish citizenship. They wish to adopt a child from Russia and have been approved as suitable to adopt a child from Russia by the English authorities.
- Dorethy and Felipe travel to Russia and, in compliance with Russian law, they adopt Ingrid, a child from a Russian orphanage and return to England.

When Dorethy and Felipe arrive in England with Ingrid the adoption order made in Russia is not recognised and they must therefore apply to adopt her in the English court.

Although Russia signed 1993 Hague Convention it is not yet in force in that country and therefore the adoption is not governed by the Convention and the adoption order made in Russia is not recognised under English law. Dorethy and Felipe are eligible to apply to adopt Ingrid in the English court and English domestic adoption law will apply. If the adoption order is made, then, because Dorethy is British, Ingrid will be entitled to British citizenship and will be able to move freely within the EU.

There is a bilateral treaty between Spain and Russia which means that the Russian adoption will be automatically recognised in Spain. This fact is not a relevant consideration for the purposes of English law, but it would enable Felipe to apply to the Spanish authorities for a passport for Ingrid so that she could travel freely within the EU prior to the determination of the English adoption proceedings.

1.2.3 Intercountry adoptions under 1993 Hague Convention

When an adoption takes place in circumstances where the child and the adopters are habitually resident in different countries and both countries are members of the 1993 Hague Convention, the provisions of that Treaty apply and MSs are obliged to give effect to those provisions when making adoption orders. In this sense the adoption is *not* governed purely by the national law of the MS making the adoption order. All MSs of the EU, and indeed the EU itself, are contracting states to the 1993 Hague Convention. **Accordingly in all cases of adoption carried out by an EU MS when the child is habitually resident in one EU MS and the adopters are habitually resident in another EU MS the adoption will be AN INTERCOUNTRY ADOPTION GOVERNED BY THE 1993 HAGUE CONVENTION.**

The cornerstone of the 1993 Hague Convention is that both Member States involved must agree that it is in the child's best interests that the adoption should proceed before the child can be entrusted to the adopters.³⁶ Accordingly these adoptions can be distinguished from domestic adoptions because they are governed by the national law of each contracting state and the 1993 Hague Convention.

Furthermore, save where recognition would be manifestly contrary to public policy taking into account the best interests of the child,³⁷ once a Convention adoption order has been made, and the relevant central authority has issued a certificate in accordance with Article 23 of the Convention, all Member States must recognise and give effect to the Convention adoption order as if it were an adoption order made under their own national law.³⁸ In this regard it is of note that the country in which the child is habitually resident (which may or may not be the same country of which they are a citizen) is responsible for determining whether or not the child is both available and suitable for adoption, and whether or not the proposed match is in the child's best interest. This Convention is looked at in more detail in part 2 of this Chapter.

³⁶ Article 17 of the 1993 Hague Convention.

³⁷ Article 24 of the 1993 Hague Convention.

³⁸ See Article 24 of the 1993 Hague Convention.

Example of a convention adoption

- Sam and Irene are British citizens who are habitually resident in France and they run a boutique hotel in Cannes. They have been approved as suitable to adopt a child under Article 15 of the 1993 Hague Convention.
- Lila and her sister Penny are both British citizens habitually resident in England and are subject to care and placement orders made by the English court, authorising them to be placed for adoption with adopters chosen by the local authority. Sam and Irene met Lila and Penny when the children came to stay at their hotel while they were on holiday with their foster carers in France, and in conversations between Irene and the foster carer the children's situation was discussed. After the children had returned home, Sam and Irene contacted the English local authority responsible for the children and expressed their wish to be considered as adopters for the children.
- Because the children are habitually resident in England and the adopters are habitually resident in France the adoption must proceed under the 1993 Hague Convention. The French central authority will need to send the Article 15 report to the English central authority. The English central authority will need to be satisfied that the children are suitable and available for adoption under the Convention and send a report to this effect to the French central authority in accordance with Article 16 of the Convention. The French central authority will need to review the Article 15 and Article 16 reports and determine whether or not, in its view, the welfare of these children will be promoted by the making of a Convention adoption order in favour of Sam and Irene. If it is so satisfied it must notify the English central authority. The English central authority must also review the Article 15 and Article 16 reports and determine whether or not in its view, the welfare of these children will be promoted by the making of a Convention adoption order in favour of Sam and Irene. If so it must notify the French central authority. Once both central authorities have independently agreed that the adoption should proceed, the condition of Article 17(c) is met. Only then may the local authority entrust the care of Lila and Penny to Sam and Irene who may then apply in EITHER the English or the French court for a Convention adoption order. Once the adoption order is made, the relevant central authority will complete the Article 23 certificate, and the adoption will have automatic legal recognition in all EU MSs.

1.2.4 Recognition of Foreign non-Hague Convention³⁹ adoptions by the law of one MS

This situation will occur whenever a MS recognises a foreign adoption, whether that recognition is by way of operation of its national law or as the result of a court order in recognition proceedings. Recognition of a foreign adoption order is not the same thing as making an adoption order, but the *effect* of recognising a foreign adoption may be the same for the family concerned, and is likely to mean that the family does not need to readopt the child in recognising states.

Recognition of a foreign adoption order by a MS will cause that MS to give effect to it for some or all purposes within that individual MS, depending on the national law governing the recognition. Although recognition of a foreign adoption order may not necessarily confer upon the adopters and adoptee the same rights in terms of citizenship which would accrue automatically from a domestic adoption in that MS,⁴⁰ recognition does result in the acknowledgement and acceptance of the legal status of the parent-child relationship brought about by the foreign adoption. This legal relationship confers parental responsibility and creates rights under Article 8 of the European Convention on Human Rights ('ECHR').⁴¹ So this raises the question: should an order made in a MS granting recognition of a foreign (non EU) adoption order, be accorded equal status with a domestic adoption order for the purposes of the proposed legislation? Should it matter if the recognition came about by way of a court process rather than the effect of a bilateral treaty between the MS and another non-EU country?

This issue is not straightforward, and this paper does not delve into the very fine details of a proposed legislative framework. However, it is important to note that if a scheme of mutual recognition is to be adopted by the EU, that legislation must include provisions that clarify whether or not (and if so in under what circumstances) a non-Hague Convention foreign adoption order that is recognised under the national law of an EU MS is to be given equivalent status with a domestic adoption order for the purpose of mutual recognition in all other EU MSs.

³⁹ This definition includes both intercountry adoptions where the child and adopters are habitually resident in different jurisdictions but one of these jurisdictions is not a signatory to the 1993 Hague Convention, and adoptions made in another country when both adopters and child are habitually resident in the same country at the time of the adoption.

⁴⁰ For example in England the status of the parent-child relationship created by a domestic adoption order made in another EU MS will be automatically recognised. However such recognition does not confer upon the child an automatic right to acquire British citizenship if one of the adopters is British. By contrast an English adoption order or a Hague Convention adoption order would confer that right. It is a similar situation in France – see sections 3.3 and 3.4 of this chapter.

⁴¹ Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

Example of recognition of non-hague convention adoptions by law of one ms

- Joseph and Pila live in Thailand. Joseph is British and Pila is Thai. In 2010 Joseph and Pila got married and in 2012 Pila's niece, Bonita, came to live with them following the death of Pila's sister (Bonita's mother). Pila's father was not able to care for Pila and it was agreed by the family that Joseph and Pila should adopt Bonita. In order to satisfy the Thai authorities that Joseph was not habitually resident in England, he signed a notarised declaration and obtained confirmation from the British Embassy in Thailand that he was habitually resident in Thailand. Joseph and Pila proceeded to adopt Pila under Thai law.

Under English law this adoption is automatically recognised as an overseas adoption. However, unlike an English adoption order, it does not confer on Bonita an automatic right to British citizenship. Accordingly, if Bonita wishes to travel to England she will do so on her Thai passport and she will require a visa to travel to England and to other EU countries. Joseph can apply to the UK Visa and Immigration Authority for Bonita to be made a British citizen and although it is a discretionary power, ordinarily the Home Secretary would exercise that discretion in favour of granting citizenship to the adopted child.

To the extent that other EU countries recognise the validity of the Thai adoption, which has been automatically recognised under English law, Bonita will have the right to travel with her family within the EU on her Thai passport.

To the extent that other EU countries do not recognise the validity of Thai adoption orders, Bonita will need to have a visa for each EU country that she wishes to visit if she travels with her family unless and until she acquires British citizenship.

1.2.5 The Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption

The 1993 Hague Convention is the only international treaty that considers recognition of adoption orders, and this applies only in limited circumstances, as set out in part 1 of this Chapter. The Hague Conference on Private International Law, the World Organisation for Cross-border Co-operation in Civil and Commercial Matters, ('HCCH') has this to say about the 1993 Hague Convention on its website:

The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. This Convention, which operates through a system of national Central Authorities, reinforces the UN Convention on the Rights of the Child (Art. 21) and seeks to ensure that intercountry adoptions are made in the best interests of the child and with

respect for his or her fundamental rights. It also seeks to prevent the abduction, the sale of, or traffic in children.⁴²

The 1993 Hague Convention has been ratified by all EU Member States.⁴³ In combination, the provisions of the 1993 Hague Convention impose a duty on its member states to create institutions for the purpose of internal assessment of adopters and children, cross border cooperation and mutual recognition and enforcement of the adoption orders made under it. It also sets minimum standards for the carrying out of duties and mandates that the organisations undertaking the work involved must do so without profit.

On 8 – 12 June 2015 the HCCH held its fourth Special Commission to review the operation of the 1993 Hague Convention. The Special Commission (SC) was attended by 255 participants from 74 States and 19 intergovernmental and international non-governmental organisations, including representatives from Members of the Hague Conference on Private International Law, Contracting States to the Convention, non-Contracting States that are actively exploring the possibility of joining the Convention, and interested international organisations. It is clear that this Convention has been extremely successful in bringing about real change at a global level in improving the lives of vulnerable children. Not only has the Convention been instrumental in creating effective channels of communication at an intercountry level, but it has raised standards across the world in relation to both adoption practice (domestic and intercountry) and domestic child protection measures. These themes are clear from the Conclusions and Recommendations of the Special Commission which are available on its website.⁴⁴

Although some countries may have bilateral agreements concerning the recognition of domestic adoption orders, the 1993 Hague Convention is unique in that it is the only legal instrument which provides for automatic recognition of adoption orders throughout the EU. Pursuant to Article 23, the state in which the Convention adoption is made must issue a certificate and once that has been done the adoption is recognised ‘*by operation of law*’. This means that no procedure is needed in the receiving state for recognition or enforcement. It is only possible to refuse to recognise a Convention adoption if it is manifestly contrary to the public policy of the recognising State, taking into account the best interests of the child (Article 24). This feature of the 1993 Hague Convention was reinforced at the Special Commission in June 15, and it is specifically recorded at paragraph 37 of the concluding report that: ‘*The SC reminded Contracting States that no additional procedure may be imposed as a condition of recognition.*’⁴⁵ It therefore appears that

⁴² See website at: <https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption>.

⁴³ See updated status table on HCCH website which can be downloaded here: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>.

⁴⁴ <https://assets.hcch.net/docs/858dd0aa-125b-4063-95f9-4e9b4afd3719.pdf> to download this document.

⁴⁵ Ibid at paragraph 37.

in some countries at least there may still be some resistance to the obligation of automatic recognition of such adoptions.

It is also right to acknowledge that the standards of implementation of the 1993 Hague Convention are not without flaw in some countries, as can be seen from a perusal of the responses to questionnaires collated by the HCCH in preparation for the June 2015 Special Commission. For example when asked about difficulties with the recognition procedure under Article 23 the German response said this:

In numerous cases, certificates according to Art. 23 of the Convention are not issued or are incorrect which defeats the automatic recognition of adoption decisions in other Contracting States. Mistakes in the certificates are, for example, missing dates of the agreements according to Art. 17 c of the Convention or mistakes regarding the authority that gave the agreement (e.g. the Federal Central Authority is named, although an accredited body has given the agreement). It can also be stated in some cases that the function of the certificate is not understood in certain contracting States. In Germany, certificates in the form and with the content of a certificate according to Art. 23 of the 1993 Hague Convention have been seen that were issued in cases that had not fallen within the scope of the Convention and that have therefore not been performed according to the Convention. They can be misleading in case they seem accurate because even information about dates and issuing authorities of the consents according to Art. 17 c of the Convention are included (which cannot be adequate, of course, but might reflect the consents of any authorities in two countries agreeing in an adoption). In some of these cases the State issuing the certificate apparently wanted to document that an adoption procedure followed the same rules and therefore had the same standard. But it also happened that a State of origin issued a certificate due to pressure of for example the adoptive parents who heard that they need such certificate, although an adoption was 'national' and not an intercountry adoption. In spite of continued efforts of German adoption authorities, bodies and the Central Authority to convince different States of origin of the importance of the certificate and to spread knowledge about its meaning the situation regarding these documents stays unsatisfactory.⁴⁶

However, the Hague Convention can only apply in situations when the adoptive parents and the adopted child are habitually resident in different states (Article 2). It does not cover situations when an adoptive parent and adopted child are habitually resident in one EU MS and, following adoption, move to another EU MS. The Convention's application is therefore, in that sense, limited. The Hague Convention also only applies to adoptions that create a permanent parent-child relationship (Article 2), although this would encompass both 'full' and 'simple' adoptions. Importantly, it does not cover Kafala or similar arrangements under Islamic law.

The Convention also does not apply where the sending or receiving state is not a party to the Convention, and therefore will not apply where the child is being adopted from a

⁴⁶ The German response is dated October 2014 and can be downloaded here: https://assets.hcch.net/upload/wop/adop2015q2_de.pdf and the quote is from answer to question 25 on page 13 of the report.

country in which the Convention is not in force. About half of the world's countries are not parties to the Convention. Adoptions of children from these non-contracting states are therefore not automatically recognised and are therefore subject to domestic law/bilateral agreements. For example the 1993 Convention is not yet in force in Russia.

It is not possible to know by way of percentage what proportion of all the adoption orders made within the EU each year are Hague Convention adoption orders. The HCCH requested MSs to produce statistics for adoptions between the years 2010-2014 inclusive. Not all MSs have responded, and of those who have responded the data is not entirely uniform.⁴⁷ What can be seen is that the proportion of Hague Convention adoptions as a subset of all adoptions carried out in each MS varies widely throughout the EU. What the available data from 2013 indicates is that intercountry adoptions under the 1993 Hague Convention represent a relatively small proportion of the overall number of adoptions carried out in the EU each year during that survey. Of these adoptions, only Hague Convention adoption orders have an automatic right to be recognised by all other EU MSs. For example, if we consider the fictional examples set out in part 1 of this chapter, the only children out of all the situations whose adoption is automatically recognised and must be given legal effect in every country of the EU as if it had been a domestic adoption made in their own court are Lila and Penny. All of the other children, will need to look to the different laws of each EU MS to discover whether or not their adoption is: automatically recognised; not recognised; or capable of being recognised after a legal process in the relevant MS. In the case of Shazia⁴⁸ for example, her adoption will be recognised in Germany but not in Poland. Under Polish law her birth parents will still be treated as her legal parents. This divergent approach could cause real problems for Shazia if her adoptive parents took her to Poland for a holiday and her birth family sought to reclaim custody of her.

2. Comparative European approaches to recognition of foreign adoptions⁴⁹

2.1. Belgium

The recognition of foreign adoptions in Belgium is governed by the Federal Central Authority (FCA). A Convention adoption will be recognised in Belgium provided that the adopters produce the certificate of conformity provided for in Article 23 of the 1993

⁴⁷ Please see HCCH website <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=69> for a list of all countries that have provided adoption statistics, and for the responses of each such country. See also table 3 on page 72 which provides an analysis of this data for the year 2013.

⁴⁸ Example 2 of Domestic Adoptions with a Foreign Element page 20

⁴⁹ Many thanks go to the researchers who assisted us by providing information on different jurisdictions: Nuno Gonalo Ascenso Silva, University of Coimbra; Professor Maarit Janter-Jareborg, University of Uppsala; Professor Anatol Dutta, University of Regensburg; Dr Jacek Wierciński, University of Frankfurt; Salla Silvola, Finnish Ministry of Justice; Dr Machteld Vonk, University of Leiden; Professor Velina Todorova, Plovdiv University; Dr Maria Herczog, Better Care Network; Prof. Cristina Gonzlez Beilfuss, Universitat de Barcelona, : Carolina Marn Pedreño of Dawson Cornwell Solicitors, London.

Hague Convention issued by the foreign Central Authority and all the Belgian FCA will verify before recognising the adoption, is that it is not manifestly contrary to the public policy, taking into account the best interests of the child.

If the foreign adoption is not a Convention adoption, the recognition will be granted by the Youth Tribunal if the FCA is satisfied that:

- the adoption order was made by a competent authority which had jurisdiction to make it under the law of that state;
- the adoption is not contrary to Belgian public policy taking into account the best interest of the child and the fundamentals rights afforded to the child under international law;
- the adoption has not been made for the purpose of perpetrating a fraud against the laws governing Belgian immigration or eligibility to Belgium nationality;
- the adoption is a final order.

If the adoptee is a minor, the adopter will have to have completed the necessary training (information and awareness sessions about the adoption process, attested by a certificate) and have been approved to adopt by the Youth Tribunal before adopting the child overseas.

2.2 Bulgaria

In Bulgaria a foreign adoption order is recognised unless and until it is called into dispute (Article 118, Private International Law Code). If a dispute arises, Article 117 of the Code states that judgments and authentic acts of foreign courts and authorities shall be entitled to recognition and enforcement where:

1. The foreign court or authority had jurisdiction according to the provisions of Bulgarian law, but not if the nationality of the plaintiff or the registration thereof in the State of the court seized was the only ground for the foreign jurisdiction over disputes in rem;
2. The defendant was served a copy of the statement of action, the parties were duly summonsed, and fundamental principles of Bulgarian law, related to the defence of the said parties, have not been prejudiced;
3. If no effective judgment has been given by a Bulgarian court based on the same facts, involving the same cause of action and between the same parties;
4. If no proceedings based on the same facts, involving the same cause of action and between the same parties, are brought before a Bulgarian court earlier than a case instituted before the foreign court in the matter of which the judgment whereof the recognition is sought and the enforcement is applied for has been rendered;
5. The recognition or enforcement is not contrary to Bulgarian public policy.

It is the duty of the Court to verify these facts of their own motion (Article 120). In relation to Article 117(2), a party may not invoke a violation under this subsection as a reason for non-recognition where this could have been raised before the foreign court.

2.3 England and Wales

In England, a domestic adoption carried out lawfully in another jurisdiction is automatically recognised as an 'overseas adoption' under s66 of the Adoption and Children Act 2002, if it is made in a country designated for this purpose under English Law⁵⁰. If the adoption is carried out in any other country the adoption will not be automatically recognised, but an application for a declaration of recognition can be made to the court⁵¹. Within the context of this report it is important to note that all EU MS are on the designated list. Accordingly, all adoption orders made under the law of another EU MS will have the status of an 'overseas adoption' under English law.

Under English law, 'overseas adoptions' have the same effect as domestic adoptions in terms of the status of the child and the adopters. This means it will have full effect in terms of attribution of parenthood to the adoptive parents, and the termination of all previous parental ties.

However, the British Nationality Act 1981 (BNA) s.1(5) automatically confers British nationality on a child adopted under the 1993 Hague Convention or adopted in the UK, if one of the adopters is British. No separate application for citizenship is required. By contrast, a child who has been adopted under an 'overseas adoption' does not automatically acquire British citizenship, and if this is required an application must be made under section s.3(1) BNA which provides that : *If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen.* Accordingly, if a British citizen living in another EU MS adopts a child under the domestic law of the other EU MS, the child's status will be automatically recognised in England and Wales, but the child will be treated less favourably than a child adopted in the UK, because it will not have an automatic right to British citizenship.

2.4 France

Under French law, a foreign adoption will be automatically recognised by operation of law, because it is an order which relates to the status of a person. However, although the status of the adopter and adoptee is recognised automatically, the child is not automatically entitled to:

- French nationality
- a French birth certificate or
- a French passport.

In order to obtain entitlement to French nationality etc. the adoption must be registered in accordance with the French civil statute. The application is made to the public prosecutor of the court (tribunal de Grande instance) in Nantes. The public prosecutor

⁵⁰ UK Parliament SIs 2010-Present/2013/1801-1850/Adoption (Recognition of Overseas Adoptions) Order 2013 (SI 2013/1801) contains the list of designated countries.

⁵¹ Pursuant to s.57 of the Family Law Act 1986

will consider the application on the papers to determine whether or not in his view the criteria for registration are met. Those criteria are that:

- the court of origin had a strong link with the case and jurisdiction to pronounce the adoption; and
- the adoption conforms to French public policy and has not been obtained by fraud.

If the public prosecutor is satisfied that these conditions are all met he will register the adoption and the child will be issued a French birth certificate and French passport.

If the public prosecutor is not satisfied that the conditions for registration are met, he will notify the adopter that registration has not been authorized and that it is necessary for the adopter to file an application for enforcement proceedings (*exequatur*) before the court in order to have the adoption recognised. It will then be for the adopter to establish before the court that the conditions for registration are fulfilled. The public prosecutor will be the defendant in these proceedings.

A simple adoption has no direct effect on the nationality in French law, but the child has the right to state that he or she wants to become French citizen. In this case the foreign simple adoption should have been previously enforced by the French court.

Article 370-5 of the French Civil Code⁵² also entitles the adopter to convert a simple adoption pronounced abroad into a full French adoption. To do so, the court will examine whether the foreign adoption order qualifies as a simple or a full adoption, under the conditions of the French law. A foreign adoption order will thus be recognised as a full adoption if the order has the effect of severing completely the ties with the family of origin and if it is irrevocable. If the foreign adoption does not fulfill these conditions it will qualified in France as a simple adoption and the adopter will be able to convert it into a full adoption by the French court if they are able to provide a consent of the legal representative of the child, specifically and knowingly given, in order to obtain a full adoption in France.

2.5 Germany

According to German procedural law, a foreign adoption by a court or authority is recognised *ipso iure* without the need for any special procedure (§108(1), Act on Non-Contentious and Family Proceedings (FamFG))

However, recognition can be denied by German authorities if one of the general grounds for non-recognition are present, which are regulated in §109 FamFG. These are:

⁵² "An adoption lawfully declared in a foreign country produces in France the effects of a plenary adoption if it breaks off completely and irrevocably the pre-existing kinship bond. If it does not, it produces the effects of a simple adoption. It may be converted into a plenary adoption where the required consents were given expressly and in full awareness.", created by Law n°2001-111 of February 6th, 2001, pertaining to international adoption; Official Journal of the Republic of France of February 8th, 2001, p. 2316 text n°1.

- That the foreign court did not have jurisdiction to make the order;
- That the defendant was not properly informed of the proceedings, or not informed in sufficient time to be able to exercise his or her rights;
- The judgment is irreconcilable with an earlier judgment given in a member state involving the same causes of action and between the same parties;
- That the decision is incompatible with a decision that has been handed down in Germany previously, or was previously recognised in Germany, or that the proceedings which have led to the decision to being recognised are incompatible with proceedings previously pending in Germany;
- That the recognition of the decision leads to a result that is manifestly incompatible with fundamental principles of German law, especially where the recognition is incompatible with fundamental rights.

2.6 Netherlands

Where the child and adoptive parents are habitually resident in the same (foreign) state at the time of the adoption decision, the order will be automatically recognised in the Netherlands if it was made by a competent authority (Book 10, Article 108(1)(a) of the Dutch Civil Code).

However, recognition can be refused where the foreign decision is apparently not founded on proper research or a proper administration of justice, or where recognition would be against Dutch public order. (Art 108(2)). In addition, where the adoptive parents and the child were not habitually resident in the same state, the decision will not be recognised in the Netherlands if the order is not recognised by the state where the child was habitually resident at the time of the order, or the state where the adoptive parents were habitually resident.

2.7 Poland

Under article 1145 of the Polish Civil Procedure Code, the recognition of a foreign domestic adoption order will occur automatically and by operation of law, unless there are bars to its recognition. Such bars, set out in article 1146, include:

- That the foreign judgment has not become final and binding in the state that it was issued;
- That the ruling was issued in a case that falls under the exclusive jurisdiction of the Polish courts;
- That the defendant who did not defend himself on the merits of the case was not duly served an initial pleading in due time to enable him to defend himself;
- A party was deprived of the possibility to defend himself in the course of proceedings;
- A case involving the same claim between the same parties had been brought before a court in Poland before it was brought before a court of a foreign state;
- The ruling is contrary to a previous non-appealable ruling of a Polish court or a previous non-appealable ruling of a court of a foreign state recognised in Poland, issued in a case involving the same claim between the same parties;

- Recognition of the ruling would be contrary to the basic principles of the legal order of Poland (the public order clause).

Of particular importance, article 1146(7) states that Polish family law will not recognise an adoption decision in favour of a same-sex couple.

2.8 Portugal

Under Art 978 of the Code of Civil Procedure, an adoption decision is not recognised by the Court of Appeal (Tribunal da Relação) before being given force under Portuguese law. While this Court will not review the substance of the decision, the foreign order must comply with procedural formalities, namely:

- that the document recording the judgment is authentic;
- that the decision has become final in the jurisdiction in which it was made;
- that the jurisdiction of the foreign court was not invoked in breach of the law, and the matter did not concern an issue falling within the exclusive jurisdiction of the Portuguese courts;
- that there is no claim of *lis pendens* or *res judicata*;
- that all parties have been given equal protection in the proceedings; and
- that it does not involve a decision whose recognition leads to a result that is manifestly incompatible with the principles of Portuguese law (Art 980).

In addition, article 983 provides an additional ground for non-recognition, where the judgment concerned a Portuguese citizen, and according to the Portuguese conflict of law rules, the applicable law would have been the substantive Portuguese law. In this case, if the Portuguese law would have been 'more favourable' to the applicant, then the court will not recognise the judgment.

2.9 Spain

Foreign domestic adoptions are not automatically recognised in Spain. In order to be recognised, the adoption order needs to be authorised by the court under Article 26 of Law 54/2007, and translated into Spanish.

Under Spanish law, there must be a reasonable connection between the authority ordering the adoption and the parties involved in the case, and the enforcement of the judgment must not be contrary to public policy. In addition, the judgment document must meet the necessary requirements in the nation in which it was issued to be considered authentic, as well as those required by Spanish law for it to be considered authentic in Spain.

2.10 Sweden

In Sweden, Act 1971:796 Act on International Legal Regulations Concerning Adoption applies to the recognition of foreign adoptions.

Section 3 provides that a decision on adoption given in a state where the applicant was a national or habitually resident at the time of the adoption will be automatically recognised in Sweden. As such, it will not require any further process of authorisation. However, s 6 of the Act provides an exception where the order would be obviously incompatible with the basic principles of the Swedish legal order.

3. Practical impact for citizens of current ad hoc system of recognition

3.1 Parental relationship and parental responsibility

In addition to attributing parenthood, an adoption order also confers on the adopter, the duty and the right to exercise parental responsibility for the adopted child. The acquisition of parental responsibility is a direct consequence of the adoption order. Accordingly, if a MS does not recognise the adoption order, there is no basis upon which the adopters can assert a right to exercise parental responsibility for the child.

This has the potential to cause real difficulties for a child if the family relocates to another country. We can consider those difficulties if we look at the scenario in Example 3 of Domestic Adoptions with a Foreign Element.⁵³ What would happen if Dorethy and Felipe decide to relocate to Portugal 3 years after adopting Ingrid in England? Ingrid will be entitled to travel to and live in Portugal as she will have British citizenship through Dorethy. However, the adoption is not automatically recognised in Portugal, and so she will not be entitled to be treated as the legal child of Dorethy and Felipe under the law of that country. This means that under Portuguese law, neither Dorethy or Felipe will be entitled to exercise parental responsibility for her. They would need to apply to the Portuguese court for an order giving them custody and parental responsibility in order to ensure that they have the right to manage her money, authorise medical treatment and make arrangements for her education pending determination of the proceedings for recognition of the adoption order. They will also need to apply to the Portuguese court for recognition of the English adoption order. All of these legal processes would be unnecessary if there was provision for automatic recognition of the English adoption order, by operation of EU law.

3.2 The impact of non recognition for other practical issues

It is not only difficulties with the exercise of parental responsibility that can have a serious and detrimental impact on adoptive families living in the EU. There are other significant detriments that result from a lack of recognition of an EU adoption order. Further the detriment may not be realized for many years after the making of the order if it relates to an inheritance entitlement. Furthermore, even if ultimately the adoption status is recognised and the adopted person afforded the rights and entitlements flowing from that status, the uncertainty which necessitated the litigation will have been costly in terms of the financial and emotional resources of the individuals concerned. In addition

⁵³ See page 21

to the personal costs to the litigants, the use of public resources such as judicial and administrative services will also carry a cost to the public purse.

Recognition of adoption orders by the EU MS which did not grant the adoption order may be relevant to the determination of the following important matters:

- Entitlement of the adoptee to claim nationality of either or both of their adopters;
- Entitlement to inherit land/property under the inheritance and intestacy laws of any relevant EU MS, not just from parents but from extended family members as well. For example, a will that states 'I leave my house and lands to be shared in equal proportions by my grandchildren' would exclude a grandchild through adoption if the adoption was not recognised under the law governing the grandparent's will;
- Entitlement to special treatment accruing from status as adopted child for the purpose of welfare entitlement;
- Entitlement to special treatment accruing from the status of the parent/child relationship for tax reasons [gifts/inheritance/other tax allowances].

4. Conclusion

Drawing the threads of our research together, what emerges is a confusing picture of individual MS laws and practices which vary widely across the EU. It is entirely possible that citizens are wholly unaware of whether or not their status as adoptive parents will be recognised under the law of other MS. Awareness of the problems arising out of non-recognition is only likely to arise in a case where a parent wishes to harmonize the nationality of their adoptive child with their own. In such a case, if the adoption order is not made in the country where nationality is sought they may need to formally register the adoption (as with France) or obtain a declaration (as with Spain). In England the adoptive parents do not need to register the adoption or seek a formal declaration, but a child adopted by a British citizen under a domestic adoption in another EU MS is not automatically entitled to British citizenship, a right which would flow from a British adoption order. So there is a minefield of procedures that families must currently navigate. In addition to the emotional costs involved in litigation in multiple jurisdictions, there is also a financial cost. That cost will increase with each jurisdiction in which it is necessary to obtain formal recognition. Even if a citizen is entitled to rely on their adoption being recognised automatically under the law of another MS, because the issue is governed by domestic law, they will need to instruct a lawyer in that jurisdiction to advise them in relation to that issue.

It is important to have regard to the fact that, unless an adoption is governed by the 1993 Hague Convention, it is an adoption governed only by the domestic law of the MS making it. It is a domestic adoption whether or not it involves a foreign element. To date, the EU has not enacted any legal instrument which restricts the sovereign right of a MS to determine its own law in relation to jurisdiction and applicable law in relation to domestic adoptions. Equally, there is no EU or other instrument which operates so as to compel one MS to recognise a domestic adoption order made in another MS.

Chapter 3 Potential barriers to cross border recognition of non-convention adoptions

Key findings

- Each MS has its own rules for determining Conflict of Laws and the approach is not uniform throughout the EU.
- It is not unusual for EU MS to accept jurisdiction to make an adoption order when the adopters and/or the child are habitually resident outside of their territory, provided that there is a tie to the MS making the adoption order of nationality and/or domicile.
- Many EU MS will apply the national law of the adopter and/or the child if the adoption involves foreign nationals living within their jurisdiction.
- Any system of recognition should provide a clear framework for the establishment of jurisdiction in relation to adoption when the child is habitually resident within the EU.
- The national laws of MS governing the eligibility of adopters and the suitability and availability of children to be adopted varies widely across MS. This is a factor which needs to be acknowledged and addressed within any scheme for recognition.

1. Diversity between member states in relation to the determination of Conflict of Laws issues

1.1 Why Conflict of Laws is a consideration

When a court in a MS is seized of an adoption case involving a foreign element its first consideration should be whether or not it has jurisdiction to hear the case. Only if there is jurisdiction to make the order should the court entertain the application. If the court has jurisdiction it will then identify the applicable law under which the case should be determined. However, while all MS will undertake this two stage test, the criteria by which they determine both jurisdiction and applicable law is not uniform throughout the EU.⁵⁴ Currently there is no EU law governing either the establishment of jurisdiction or

⁵⁴ Assumption based on widely differing approaches to determination of Conflict of Laws issues arising in matrimonial disputes within the EU. Please see 'European Family Law: Faster Divorce

the identification of applicable law in the field of adoption law.⁵⁵ This is a problem which will need to be addressed in any scheme for recognition as it has become clear in our research into the laws of recognition that a common and key factor in the determination of whether or not to grant recognition of a foreign adoption is whether or not the adoption was order was made by an authority with jurisdiction to do so.

One of the great successes of the Brussels IIa Regulation is that it provides a basis upon which MS identify jurisdiction. Moreover, if a MS has unequivocal jurisdiction to hear and determine an adoption order, there is greater legitimacy in arguing that such orders should be recognised and enforced in other MS. The 1993 Hague Convention also provides a clear and unequivocal basis for establishing jurisdiction for the making of Hague Convention adoptions, albeit that it does so on the basis that the adoption can be granted in either the state of habitual residence of the child *or* the state of habitual residence of the adopters.

1.2 Current Conflict of Laws approaches in adoption cases in England, Poland and France

1.2.1 England

Under the law of England and Wales the court's jurisdiction to hear an adoption application is governed by the Adoption and Children Act 2002. The court will have jurisdiction provided that the applicant(s) meet the required criteria for eligibility.⁵⁶ These criteria require that:

- a) The adopter(s) are over the age of 21; and
- b) They can establish that:
 - i) The adopter, or at least one of them if a couple is domiciled in the British Islands; or
 - ii) The adopter, or both of them if a couple, have been habitually resident in the British Islands for not less than a year at the date of the application.

It is of particular note that the jurisdiction to hear an adoption application does not depend in any way on the nationality or habitual residence of the child.

The applicable law is the law of England and Wales. When considering an application for any adoption (Convention or domestic) of any child (British or otherwise), the court's paramount consideration is always the welfare of the child throughout his or her life.⁵⁷

and Foreign Law', The Centre for Social Justice, 2009 and 'Practical Problems Resulting from the Non-harmonization of Choice of Law Rules in Divorce Matters', T.M.C. Asser Instituut.

⁵⁵ This is in stark contrast to the detailed governance of jurisdiction in matters concerning parental responsibility which are subject to Brussels IIa.

⁵⁶ See sections 49, 50, 51 of the Adoption and Children Act 2002

⁵⁷ S.1 Adoption and Children Act 2002

When the court is considering an application for the adoption of a child who is a foreign national, then, having regard in particular to Article 37 of the Vienna Convention of 1963,⁵⁸ it is required as a matter of good practice to ensure that the applicants have notified the Embassy or Consulate of the child's nationality of the existence of the proceedings so that they are able to exercise consular functions under Article 5(h).⁵⁹

It must also have regard to the effect of the adoption order on the child's nationality, and, whether or not the adoption will be recognised in the child's country of nationality. It has long been recognised that it may be contrary to the welfare of a child to make an adoption order, the effect of which is not recognised in the child's country of domicile.⁶⁰ These issues have all been the subject of recent consideration in the Court of Appeal in the case of *Re N (Children) (Adoption: Jurisdiction)*.⁶¹ The Supreme Court of the United Kingdom heard this case on 17 March 2016.⁶²

1.2.2. Poland

In his paper⁶³ prepared for the Workshop on Adoption: Cross-border legal issues, Pawel Jaros gave this summary of the application of applicable law in Poland:

In all proceedings concerning adoption where the adopter or the minor concerned is a citizen of a foreign country, the court should first investigate whether Polish courts have jurisdiction over the case and what law – Polish or foreign – shall be applicable. This is regulated by provisions of agreements to which Poland is a Party or by applicable regulations of international private law.⁶⁴ It must be then stressed that in a case of foreign adoption, Polish court, if it has jurisdiction over the case, usually does not adjudicate only on the basis of Polish Law. Application of foreign law refers also to cases when a child who is going to be adopted by foreigners is a Polish citizen, as pursuant to article 57 item 1 of the international private law adoption is governed by the domestic law of the adoptee, subject to article 58 referred to above which defines the scope of application of the domestic law of the adoptee. The new act includes also a specific standard regarding joint adoption. Pursuant to article 57, item 2 of this Act, joint adoption by the spouses is governed by their common domestic law. In case there is no common domestic law, the law of this state is applied, in which both spouses have their place of residence, and in case they do not have their places of residence in the same state – the law of this state, in which both spouses have their place of ordinary stay. If the spouses do not have their places of ordinary stay in the same state, the law of this state is applied to which they are

⁵⁸ Vienna Convention on Consular Relations 1963; Done at Vienna on 24 April 1963. Entered into force on 19 March 1967. United Nations, Treaty Series, vol. 596, p. 261

⁵⁹ *ibid*

⁶⁰ In *Re B(S) (An Infant)* [1968] Ch 204

⁶¹ [2015] EWCA Civ 1112

⁶² Details at: <https://www.supremecourt.uk/cases/uksc-2016-0013.html>

⁶³ The View of Ombudsmen for Children From the Perspective of the Polish, European and International Law

⁶⁴ Decision of the Supreme Court of 19 April 1984, III CRN 297/83, Lexis.pl no. 321113

most closely linked. Foreign law shall not be applied only in case both the child and the adopters are of Polish nationality or when, by way of exception, a bilateral agreement provides exclusive governance of the adoptee's law. It must be then remembered that rules of conflict of law may be included in bilateral agreements that Poland had concluded together with other states, particularly with the states of East-Central Europe. In principle, regulations they include regarding governing law for adoption were in line with the principle adopted in the Act of 1963 – generally speaking, the domestic law of the adopters is the governing law and with respect to child's and the child's statutory representatives' consents – the domestic law of those persons; moreover, the law of the adoptee is applied with regard to permission of relevant authority if such permission is required.

1.2.3. France

Under French private international law, the jurisdiction of the French court to determine an adoption application is governed by article 1166 of the French Code of Civil Procedure ('FCCP')). This Article stipulates that an adoption application will be heard by:

- The court in the area where the applicant is living when he or she is living in France;
- The court in the area where the adoptee is living, when the applicant is living abroad; or
- The court in France chosen by the applicant, when neither the applicant nor the adoptee is living in France.

However, it must be noted unless either the adopter or the adoptee is resident in France at the time of the adoption application, the French court will only have jurisdiction to hear an adoption if either the adopter or the adoptee is a French national. This is because there is a general rule at Articles 14 and 15 of the French Civil Code ('FCC') which grants a general jurisdiction to the French court when one of the parties is a French national. Furthermore, in international adoption matters, when the adoption concerns a child habitually resident abroad, the adoption application must be filed with a special court designated to deal with this type of application and there is one specialized court in every court of appeal jurisdiction in France.

The French rules of conflict of laws are contained in Article 370-3 of the FCC, which provides that the conditions of adoption are subject to the national law of the adopting parent, or, in the case of an adoption by a married couple, to the law governing the effects of their union (which is their national law if they have the same nationality, or the law of their domicile if not). For instance, if a Belgian couple living in France wanted to adopt a foreign child, the French courts shall apply the Belgian law to the adoption.

However, an adoption can never be pronounced if the national law of both spouses prohibits it. Furthermore, the adoption of a foreign minor cannot be pronounced if his or her national law prohibits adoption, unless the minor is born and habitually resident in France.

Finally, whatever the applicable law to adoption is, the consent of the child's legal representative is required. The legal representative of the child who will have to consent to the adoption, will be designated by application of the law of the habitual residence of the child if the child is living in a Hague 1996 convention country, or, if not, by the national law of the child.

Article 370-4 FCC⁶⁵ states that the effects of the adoption pronounced in France are the ones of the French law.

1.3 The argument for EU action to determine Conflict of Laws when the child is habitually resident in the EU

This varying approach to the determination of conflict of laws has the potential to create resistance to a scheme which imposes automatic cross-border recognition of domestic adoptions because it is possible that two countries, each applying their own rules on jurisdiction, would claim exclusive jurisdiction to make an adoption order in relation to a particular child. It is therefore recommended that if there is to be a scheme of recognition there should also be a scheme which governs both jurisdiction and applicable law in all cases where the child is habitually resident in an EU MS at the date of the adoption application.

It is suggested that the most appropriate basis for establishing jurisdiction for the making of an adoption order when the child is habitually resident in an EU country is the habitual residence of the child. The advantages of this factor being the determining factor are that:

- a) It would be consistent with the approach to jurisdiction in Article 16 of the 1993 Hague Convention which provides that the state which should be responsible for assessing the suitability and availability to be adopted should be the country in which the child is habitually resident.
- b) It would be consistent with the scheme of the 1980 Hague Convention on international child abduction that it is the country of the child's habitual residence which is most suitable to determine disputes relating to the welfare of a child.
- c) It would be consistent with the approach to determination of disputes concerning the attribution and exercise of parental responsibility under both Brussels IIa Regulation and the 1996 Hague Convention on parental responsibility.
- d) If the child is habitually resident in one EU country and the adopters are habitually resident in another EU country, the adoption would have to be undertaken under the 1993 Hague Convention. It must therefore follow that within the EU it is only possible for there to be a domestic adoption if the child and the adopters are habitually resident in the same EU MS.

⁶⁵ Created by Law n°2001-111 of February 6th, 2001, pertaining to international adoption; Official Journal of the Republic of France of February 8th, 2001, p. 2316 text n°1.

With regard to applicable law, it is suggested that this should be a matter for each MS to determine in accordance with their national law.

1.4. Conflict of Laws when the child is resident outside the EU

The arguments for restricting the sovereign right of a MS to determine the basis upon which they resolve issues of Conflict of Laws (both as to jurisdiction and to applicable law) when the child is habitually resident outside the EU are less compelling. For these reasons it is suggested that MS should be free to apply their national law without interference in these situations.

2. Diversity of cultural norms and expectations with regard to eligibility of adopters

The lawful constitution of families is perhaps the area of social interaction that has seen the most change in the last 30 years. Developments with regard to human reproduction via artificial reproduction technologies, and changing attitudes towards same sex relationships, have required individual MS to legislate around challenging moral and ethical dilemmas. As one would expect, in a geographical area as large and rich in cultural diversity as the EU, the resolution of these dilemmas has varied from state to state. This in turn has resulted in a wide variety of approaches to the criteria under which EU MS assess the suitability and eligibility of candidates who wish to be approved as potential adopters.

In Chapter 8 of her book entitled 'Children's Rights in Intercountry Adoption, a European Perspective'⁶⁶, Claire Fenton-Glynn provides a detailed analysis of the differing approaches within Europe to adoptive parents' eligibility, preparation and support. It is clear from her research that there are significant variations in different EU MS to the criteria under which these matters are determined, and the resources available to support adopters. For the purposes of this report it is not necessary to rehearse that data, since this report does not suggest that interference in the national law of MS with regard to the assessment of the eligibility of adopters is either necessary, or within the competence of the EU, and there is no proposal that such laws be harmonized.

However, it is a fact that cannot be ignored that mutual recognition of adoption orders will inevitably give rise to situations where a MS is required to recognise an adoption in favour of adopters who would not, under the law of the recognizing MS, have been deemed eligible to adopt. The most contentious of these issues is likely to be the adoption of children by same sex couples. It is acknowledged that the 1993 Hague Convention only applies to adoptions by spouses or a single person. It does not apply to unmarried couples, and its application in relation to same sex marriages has not been researched for the purpose of this report.

For reasons set out in the following chapter in more detail, in particular in section 2.2 of Chapter 4, the recommendation of this report is that these issues can and must be

⁶⁶ 2014 Intersentia, ISBN 978-1-78068-228-0

resolved in way that: acknowledges the need for mutual trust and respect for the cultural diversity of EU MS; provides clear rules around jurisdiction to make adoption orders; and places the welfare of the child at the heart of the adoption at the center of the recognition process.

3. Conclusion

One of the great strengths of the Brussels IIa Regulation is that it provides clear rules defining the circumstances under which an EU MS can assert jurisdiction to make an order concerning the attribution or exercise of parental responsibility for children. This prevents families from forum shopping in relation to custody and contact proceedings and provides a legitimate basis for mutual recognition of orders made in an EU MS with jurisdiction. The recommendation of this report is that a similar approach is taken in relation to adoption proceedings. For this reason it is suggested that any EU legislation aimed at creating a framework for the mutual recognition of domestic adoption orders should include provisions identifying the basis upon which a MS can assert jurisdiction to make a domestic adoption order.

There is precedent for mutual recognition of adoption orders in the 1993 Hague Convention, which, like the Brussels IIa Regulation relies, on the habitual residence of the child as the determining factor for jurisdiction. The proposals in this report are therefore consistent with both of these effective instruments.

For reasons which are developed more fully in the following chapter, it is the recommendation of this report that clear rules governing jurisdiction to make an adoption order, combined with the principle of mutual respect for the differing legal systems and traditions of the MS, create a legitimate foundation upon which to build a framework for the mutual recognition of adoption orders. The existence of differing social values and national laws governing adoption law should not be permitted, in and of itself, to stand in the way of such a scheme.

Chapter 4: The competencies conferred upon the EU by the treaties to take action on the cross-border recognition of adoptions

Key findings

- Articles 67 and 81 confer a shared competence on the EU to legislate for cross border recognition of adoption orders made in the EU.
- There is precedent for such legislation in both Brussels I (recast) which concerns non-Family orders and Brussels IIa Regulation which concerns family orders.
- There are no EU or international laws which currently govern the cross border recognition of domestic adoptions made by MS.
- The proposed EU legislation is necessary for the protection of citizens and compliant with the principles of proportionality and subsidiarity enshrined in the TEU and TFEU.

I – Chapter Outline

In this chapter we will consider the Consolidated Versions of The Treaty on European Union and The Treaty on The Functioning of The European Union⁶⁷ and identify those provisions which, in principle, empower the EU to implement measures to create a legal framework for recognition by all MS of domestic adoption orders made in other MS. There is nothing in these Treaties which expressly prohibits or obliges the EU to implement such measures. Accordingly, this Chapter examines whether, in the light of obligations imposed under other international and EU instruments, and having regard to the principles of subsidiarity and proportionality, such measures are necessary. Our recommendation is that there is a shared competency in this area, and that measures at an EU level are necessary.

⁶⁷ 2012/C 326/01

1. Analysis Competencies conferred upon the EU by the CONSOLIDATED TEXTS OF THE EU TREATIES AS AMENDED BY THE TREATY OF LISBON which empower the EU to take measures to bring about cross border recognition of adoption orders made in EU MS

1.1 Consolidated Version of the Treaty on European Union (TEU)

The TEU clearly envisages that citizens and goods will be entitled to move freely within its borders. While its primary objective undoubtedly remains economic unity, there is a clear expression, particularly within preambles 9 and 13 that the intentions of the Treaty with regard to creating a unified Europe are far wider than trade relationships.

The Common Provisions in Title I are of the most assistance to determining whether or not the creation of rules concerning cross border recognition of domestic adoptions is a permissible function of the EU. Article 3(2) provides that:

The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

Clearly if there is to be an area of justice without internal frontiers it is essential for MS to have respect for judgments made in other MS. Without such respect the rule of law would have no effect. The question we must ask ourselves for the purpose of this report is whether or not the objective stated in Article 3 is broad enough to encompass adoption orders? Assistance in answering this question can be found in subsection 3 of Article 3, in particular where it is states:

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

However, the EU power to legislate is tempered by the principles of subsidiarity and proportionality, expressly stated in Article 5(4).

1.2 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) U)

The TFEU identifies the specific competencies within the EU. It is clear that the issue of the administration of justice is an area over which the EU does not have exclusive jurisdiction. It is equally clear from Article 4 (j) that the Union shares competency with MS in the *area of freedom, security and justice*.

Articles 67 and 81 in Title V, Area of Freedom, Security and Justice establish a competence to facilitate mutual recognition of orders. They are relied upon for competence in Brussels I (recast)⁶⁸ which states:

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 67(4) and points (a), (c) and (e) of Article 81(2) thereof

The preamble to Brussels I (recast) explains the basis upon which the Regulation is both necessary and proportionate. Of particular note are recitals 4, 26, and 39 which read:

4. Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.

26. Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.

39. Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

Notwithstanding that Brussels I (recast) provides a framework for recognition and enforcement of certain types of civil judgements, and in particular it does not govern the status of individuals, it is respectfully suggested that the matters set out in Chapters 1 and 2 of this report amply demonstrate that these justifications apply with equal force to the need for the EU to create a legal framework for the mutual recognition of domestic adoption orders made by EU MS.

Brussels IIa Regulation was passed before the TEU and TFEU came into force. It relied in particular on Articles 61(c) and 67(1) of the Treaty establishing the European Community (TEC) to establish competence. Article 61(c) TEC is now included in Article 67 TFEU. Again it is helpful to consider the basis upon which EU measures were found to be justified in providing a framework for the recognition of a range of family orders,

⁶⁸ REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

including the dissolution of marriages and the attribution, termination and exercise of parental responsibility. The Preamble to Brussels IIa Regulation in particular states:

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

(22) Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to 'judgments' for the purpose of the application of the rules on recognition and enforcement.

(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be 'automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement'. This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.

Again it is recommended that these justifications also provide a legitimate basis for EU legislation to create a uniform system for the mutual recognition of adoption orders made by EU MS.

Accordingly, there can be no doubt the shared competence conferred under Articles 67 and 81 of TFEU permits the creation of rules to govern the recognition of family law orders, as is demonstrated by the existence of the Brussels IIa Regulation. There are no provisions which restrict the competence of the EU to legislate in relation to orders governing the status of individuals, which is a key feature of an adoption order. However, it is right to acknowledge that to date no such regulation has been created and the status of persons arising out of marriage and adoption are currently all matters of national law within the EU. This issue was considered in depth in the paper prepared by Gian Paolo Romano for the Workshop on 1 December 2015⁶⁹ and he provides a compelling case for the EU to resolve the conflicts that the current situation can cause.

It is suggested that the absence of legislation in an area does not create an obstacle to its creation. Rather the absence of any effective EU legislation to provide certainty of status for adopted children (who by definition are among the most vulnerable children in society), both while minors and into their adulthood, is a compelling reason to provide a proportionate and workable system of recognition in these cases.

⁶⁹ See his paper at page 17 of the report prepared for the Workshop commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the JURI and PETI Committees held on 1 December 2015 entitled 'Adoption: Cross-border legal issues'

The proposals set out in chapter 5 of this report do not seek to interfere with the national rules of MS for making adoption orders. Rather what is proposed is a system to provide clarity with regard to jurisdiction and for a streamlined recognition process. The power to make this proposed legislation is derived in particular from Article 67(1) and (4) together with Article 81(1) and 81(2)(a) and (c).

1.3 Protocol on the Application of the Principles of Subsidiarity and Proportionality

1.3.1. Subsidiarity

What is being proposed is a scheme under which the adoptive status of a child adopted under the law of a MS will be recognised by operation of law in all other MS. The cross border nature of this proposal means that *ipso facto* it cannot be achieved by means of national measures.

1.3.2. Proportionality

This is the issue at the heart of the issue of competency. The view of the authors is that the proposals set out in chapter 5 respect the principle of subsidiarity and are proportionate to the aims of the TEU. It is notable in the comparative law table in chapter 7⁷⁰ that all member states have a mechanism under which they will recognise foreign domestic adoption orders, including those made by other MS. In many states recognition of the status of an adopted person is automatic by operation of law, but not all – Spain and Portugal for example require a court registration process. However, even in those MS that allow for recognition by operation of law (for example France and UK) there is a requirement for a separate registration process if the adopters wish to obtain citizenship of the adopter, if the adoption order was made in another country.

The proposed legislation would overlay the domestic provisions, and would provide a uniform system under which a domestic adoption order made in one MS would be certified and once certified would be entitled to recognition and equal treatment with a domestic adoption made in the other relevant MS. Recognition of adoption orders will ensure that families have security that their familial relationships will be recognised in all relevant states as those families move across borders, and that the children they adopt under the law of any MS will be granted equality of status with any natural child born overseas. It is not possible for any one individual MS to achieve this. Only by legislation at an EU level can a simplified recognition process be achieved.

The writers have considered the issue of mutual recognition of non EU MS domestic adoption orders made overseas and do not recommend that these orders be covered by the proposed legislation. The proposed legislation is limited in its application to domestic adoption orders made by a court or other authorized body within the EU. In this way the proposed legislation does not go beyond the objectives in Article 2 of TEU, most particularly sub-paragraph 1 – 3 inclusive. It is the view of the authors that such

⁷⁰ See page 71 herein.

legislation is necessary and proportionate in particular to achieve the objective in Article 2 that:

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

2. Analysis of other EU and international instruments that may impose an obligation on the EU to create a framework for mutual recognition of adoption orders made by EU MS

As set out in Chapter 2 of this report, the only legal instrument which provides for automatic recognition across borders in the EU is the 1993 Hague Convention. **What follows is an analysis of the various international treaties and EU instruments which indicate that the rights of adopted children, not currently guaranteed throughout the EU, ought to be.** These provisions support the proposition that the proposed reforms are not merely desirable to achieve the aims of the TEU, but are both necessary and proportionate to ensure that the EU is compliant with its existing obligations under International law and EU law.

2.1 The UN Convention on the Rights of the Child⁷¹ ('UNCRC')

Although the EU as an institution is not a States Party to the UNCRC, all MS are States Parties. As set out above, Article 81(1) provides a power to bring about recognition of orders throughout the EU. To the extent MS acting alone are unable to ensure that the rights of the child enshrined in the UNCRC are protected as children and their families cross borders within the EU, a strong argument emerges that the EU has a duty to bridge that gap. It is suggested that Articles 3, 20 and 21 of UNCRC are of particular importance in this regard.

2.2. The European Convention on Human Rights⁷² ('the ECHR')

All Member States of the Council of Europe are required to refrain from infringing the human rights of any person, whether inside or outside their territory. The Convention contains nothing specifically pertaining to adoption or indeed to children. However, like the EU Charter MS will have to consider the effect of any action they take on the human rights of those affected. The rights contained in the ECHR which have most relevance to the decisions of MS to recognise or failing to recognise adoption are Articles 8 – the right to respect for private and family life – and 14 – freedom from discrimination.

⁷¹ United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with article 49

⁷² Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

The European Court of Human Rights has considered a number of cases concerning adoption and the impact of Article 8. It has held, for example, that the adoption of a child without consent amounts to interference with a parent's right to respect for family life and should only be made in exceptional circumstances (*Johansen v Norway* (1996) 23 EHRR 33; *Görgülü v Germany* [2004] 1 FamLR 894). The Court has also held that right to respect for family life implies procedural guarantees relating to placement and adoption. It involves the right of the birth parents and the child to be informed and to participate in the decision process and the right to appeal against any decision (*X v Croatia* App No. 11223/04 (17 July 2008)).

The Court has repeatedly made clear that there is no right to a child/right to adopt, and that adoption means 'providing a child with a family, not a family with a child' (*Pini and ors v Romania* [2005] 2 FLR 596). The best interests of the child will always be a primary consideration, and where the child's rights conflict the Article 8 rights of a parent/prospective adopted parent, that will very likely be sufficient grounds for interfering in the adults' Article 8 rights.

The jurisprudence of the European Court of Human Rights concerning the recognition of adoption orders across national borders is limited. It was first addressed in *Wagner and JMWL v Luxembourg*, which involved a single woman from Luxembourg who travelled to Peru to adopt a child. A full adoption order was granted by the Peruvian court, but the woman's attempt to have this recognised as a full adoption in Luxembourg failed, as only a simple adoption was available to a single parent. This meant that the child would retain a legal connection with her family of origin under Luxembourg law, even if Peruvian law did not similarly recognise that connection.

The Court found that the child had been subject to discrimination, contrary to Art 14 of the ECHR, in conjunction with Art 8 (right to respect for private and family life). While this finding was based largely on the fact that other children adopted from Peru by single parents had been granted full adoption orders in Luxembourg, there is an important discussion by the court concerning the right of the child to have formal legal ties with the person whom she was now treating as her parent. The Court held that the Peruvian judgment resulted in a complete break from the family of origin, however, because of the decision of the Luxembourg authorities, no alternative legal link had been forged with the adoptive mother, leaving the child in a legal vacuum. As such, there was a violation of the child's rights under the European Convention.

Although the adoption order in this case was made in a non-EU Member State, the relevant principles would apply in the same way in intra-EU cases. In particular, the emphasis of the court on the importance of recognising parental bonds already formed would be equally applicable.

In *Negrepontis-Giannisis v Greece* App No 56759/08 (2 May 2011) (judgment only available in French), the Strasbourg court again considered a refusal to acknowledge a foreign adoption, which had a subsequent impact on inheritance rights. The Applicant was a Greek national. In 1984, aged 20, whilst a student living at the home of his uncle, an Orthodox bishop in the United States, his uncle adopted him. An order to that effect was

made by a Michigan court. The Applicant returned to Greece in 1985. This adoptive father returned in 1996 and died in 1998 in Athens.

The Athens Court of First Instance, following an application by the Applicant, held that the American adoption order was not contrary to public policy and declared it final and enforceable in Greece. The Negrepontis family then challenged the recognition of the adoption. The Athens Court of First Instance rejected the application holding that Greek law did not prohibit adoption by a monk, as had been argued. This decision was overturned by the Court of Appeal on the grounds that monks were indeed prohibited from carrying out legal acts, such as adoption, as it was incompatible with monastic life and contrary to public policy. The Applicant's appeal to the Court of Cassation was refused, basing its decision on canon law texts from the seventh and ninth centuries.

The Strasbourg Court held that the refusal to recognise the adoption had amounted to interference with the Applicant's Article 8 rights. Such interference was unacceptable unless it was in accordance with the law, pursued one of the legitimate aims in Article 8(2), and was necessary in a democratic society. The Court concluded that the texts relied on by the Court of Cassation were ecclesiastical and medieval. National legislation had been passed in 1982 permitting monks to marry and there was no domestic legislation refusing them the right to adopt. The adoption order had been obtained when the Applicant was already of age, it was valid for 24 years, and the adoptive father had expressed his wish to have a legitimate son who would inherit his property. Accordingly, the refusal to implement the adoption order had not met any pressing social need and was disproportionate. There was therefore a breach of Article 8.

The Court further held that the difference in treatment – namely the difference in treatment of the Applicant as an adopted child compared with a biological child – was discriminatory if it had no objective and reasonable justification.

Recent cases on recognition of parenthood arising from international surrogacy also provide insight into the way that the ECtHR may approach a case concerning recognition of foreign adoption orders, should it come before the court again. This is especially the case concerning refusal to recognise an adoption based on 'public policy' or 'public order' – an exception that is present in many European jurisdictions. In the case of *Mennesson and Labassee v France*, the ECtHR found that the need to maintain 'public order' was not sufficient to justify the refusal to recognise a surrogacy arrangement that took place legally in the United States. This decision was made in spite of the fact that surrogacy is an ethically contentious issue – French law views it as a violation of the inherent dignity of the surrogate, and there is no consensus amongst the 47 Council of Europe Member States as to how to deal with artificial reproductive techniques – where there would normally be a wide margin of appreciation. While the Court held that although it is important to strike a fair balance between the interests of the state and those of the individuals directly involved, and there would generally be a wide margin of appreciation given to states to decide how to achieve that balance, the scope of this was circumscribed by the fact that the individual at stake was a child. The court held that where the issue in question involved a child, his or her interests must always prevail.

In this case, the Court found that a refusal to recognise a bond already established between parent and child was in violation of the child's rights under Article 8 of the ECHR, relying, *inter alia*, on issues such as definition of identity, lack of clarity as to legal status, uncertainty over nationality, and less favourable rights concerning inheritance.

In this light, it must also be noted that where an adoption has taken place in another EU MS – or indeed, in any foreign jurisdiction – family life under Article 8 will be established. **Following on from *Mennesson and Labasee*, domestic authorities may be in violation of this article if they failed to recognise the legal relationship validly created in such a way, as to do so would harm the interests of the child.** This is the case even where there was no question that the child would be removed from the family, and the parents retained to the ability to care, and make decisions, for the child in the same way even without the legal tie. In such cases, the Court found that the lack of domestic legal recognition for this bond harmed the child's rights, notwithstanding the lack of 'practical' consequences relating to the exercise parental responsibility.

If it is right that all MS would, if a challenge were made, be obliged to recognise the attribution of parenthood arising out of an adoption order made by a court in another MS, it must follow that it is in the best interests of citizens in all MS that such recognition is automatic and not accompanied by complex and differing rules in relation to recognition and enforcement.

2.3. The 2008 European Convention on the Adoption of Children (Revised) ⁷³

Like the ECHR, this is a Council of Europe convention. It aims to harmonize good adoption practice across Council of Europe Members, and updates and replaces the 1967 Convention on the Adoption of Children. This purpose is particularly clear in the preamble where it states:

Considering that the acceptance of common revised principles and practices with respect to the adoption of children, taking into account the relevant developments in this area during the last decades, would help to reduce the difficulties caused by the differences in national laws and at the same time promote the interests of children who are adopted;

This objective is then followed by confirmation that the Convention is intended to compliment the 1993 Hague Convention. This makes a lot of sense because although the 1993 Hague Convention provides a minimum set of standards for the assessment and approval of adopters⁷⁴ and the conditions under which a child is approved as both suitable and available for a Convention adoption,⁷⁵ there is a very wide margin of appreciation given to members of that Convention in relation to the criteria for assessment and the process of the adoption. Thus in combination these two instruments

⁷³ European Convention on the Adoption of Children (Revised) Council of Europe Treaty Series - No. 202, Strasbourg, 27.XI.2008

⁷⁴ This is governed by the provisions of Article 15 of the 1993 Hague Convention

⁷⁵ Article 16 *ibid*

provide for a more uniform approach to the assessment and matching process of adopters in both Convention adoptions and domestic adoptions throughout the EU. However, unlike the 1993 Hague Convention, Article 2 of the 2008 European Convention provides that the applicability of its principles extend only to ensuring that:

‘Each State Party shall adopt such legislative or other measures as may be necessary to ensure the conformity of its law with the provisions of this Convention’

Thus it is clear from the outset that this Convention does not, in and of itself, create a mechanism for automatic reciprocal recognition of domestic adoption orders granted in its member states. This Convention has not been universally adopted by MS, in fact it is in force in only 8 MS.⁷⁶

2.4 Regulation 2201/2003 on the jurisdiction, recognition and enforcement of matrimonial and parental judgments ('Brussels IIa Regulation')

Although this regulation mandates the recognition and enforcement of orders concerning parental responsibility, it does not include orders which govern the attribution of parenthood. This is specifically excluded at recital 10 which states: *In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons.* It is also expressly excluded by Article 2 of the Regulation. It is therefore clear that MS are not required to recognise adoption orders pursuant to their obligations under Brussels IIa Regulation. This means that the provisions relating to jurisdiction under Article 8 of Brussels IIa Regulation do not apply to adoptions.

One consequence of an adoption order is that the adoptive parents acquire parental responsibility for the adopted child and the parental responsibility of the birth parents is usually restricted or extinguished. **If the recognition of the adoption order is not mandated by the Regulation then it must follow that the rights and obligations arising in consequence of the order are likewise excluded from the Regulation.** This gives rise to a situation where there is a potential for a lack of clarity as to who has the right to make decisions for a child if the adopters move to live in a country other than that which made the adoption order. This is clearly very unsatisfactory for the child concerned as well as for the adopters.

In the event that the legislature does not agree that legislation to bring about the mutual recognition of domestic adoption orders is proportionate to the aims of the TEU, it is strongly recommended that Brussels IIa Regulation should expressly include recognition of the parental responsibility which is conferred on an adopter when an adoption order is made.

⁷⁶ The convention is in force in the following 8 MS: Belgium, Denmark, Finland, Germany, Malta, Netherlands, Romania, Spain. It is also in force in Ukraine and Norway.

2.5 The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

This Convention, which has direct effect throughout the EU, lays down obligations as regards communication between the central authorities of the Member States involved in cross-border disputes relating to parental responsibility and provide for a mechanism of transfer of jurisdiction. However, as with Brussels IIa Regulation, it does not apply to decisions in respect of adoption or the acquisition of parenthood itself, which are excluded from scope by operation of Article 4.

3. Conclusions

The proposed EU legislation in chapter 5 of this report seeks to achieve mutual recognition of adoption orders made in any EU MS throughout the EU. The power to make such legislation is specifically derived from Article 81(2)(a) TFEU which authorizes legislation for the purpose of achieving: *the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases*. It seeks to do this by way of a procedural recognition process. It does not seek to interfere with a MS right to legislate in relation to domestic adoption law in matters such as:

- the eligibility criteria for adopters;
- the conditions under which a child is approved as suitable and available for adoption including
 - the rules governing parental consent to adoption, and
 - the conditions under which non-consensual adoptions can be made.

The proposed EU legislation also seeks to provide a framework to designate jurisdiction for the making of an adoption order when the child is habitually resident in an EU MS. The proposed legislation is in line with the existing rules for jurisdiction enshrined in Article 2 of the 1993 Hague Convention, namely the habitual residence of the child. Accordingly, if a child is habitually resident in any EU MS, that MS shall have exclusive jurisdiction to make an adoption order in relation to the child. If the child is habitually resident outside of the EU, national laws shall continue to apply in relation to habitual residence. This provision will provide clarity in relation to jurisdiction and form a sound foundation for mutual recognition of orders made by the MS with jurisdiction. The power to legislate as suggested derives from Article 81(2)(c) allowing for measures to achieve *the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction*.

It respects the cultural diversity of the 28 MS, and also seeks to enhance the mutual trust and cooperation between them by the recognition of judicial decisions on the adoption of children. It does not go beyond the expectations of recognition which in varying procedures throughout the EU are currently in place and which, in any event, have been demonstrated to be the right of EU citizens under the ECHR case law. **Accordingly, the proposed EU legislation does not create a right as such, rather it provides a streamlined and simplified mechanism to replace the current byzantine labyrinth of multiple and**

varying recognitions procedures currently operating throughout the EU. This will reduce the administrative, financial and emotional costs for citizens in our increasingly mobile EU population and enhance social cohesion throughout the EU. Moreover, of key importance it will protect the rights of adopted children and provide enhanced security for their new family unit.

Although the 1993 Hague Convention provides a framework for the automatic mutual recognition of Hague adoption orders certified under Article 23 of that Convention, there is no provision within either EU legislation or international treaties setting out a mirror obligation for the automatic recognition and enforcement of domestic adoption orders lawfully made in EU MS. The proposed EU legislation also incorporates a measure which mirrors the right of a MS to refuse recognition found in Article 24 of the 1993 Hague Convention. In this way **the proposed legislation will give effect to a system of recognition which provides for recognition of domestic adoption orders made by EU MS which reflects the existing obligations to recognise and give effect to Hague adoption orders.**

There are no means by which any individual MS acting in isolation can create a legal framework to achieve this objective by way of national law. A MS can only legislate for recognition within its borders. All MS have their own legal framework. The sample of MS law examined in Chapter 2 demonstrates that most MS share core values which underpin the basis for recognition, however the technicalities involved in the procedure for achieving recognition does vary in each MS. The proposal for EU legislation to create a single harmonized framework for recognition is therefore consistent with the principles of subsidiarity and proportionality.

Chapter 5 A proposed framework the mutual recognition of Domestic Adoption Orders made by EU MS

Key findings

- There are three broad policy options for the EU to consider:
- To maintain the status quo and take no legal action other than providing non binding guidance to MS in relation to the application of their national laws for recognition of adoption orders – not recommended.
- To implement a Directive requiring MS to put in place measures for the recognition of adoption orders – not recommended
- To implement a Regulation for a procedure under which there will be automatic mutual recognition of EU domestic adoption orders – recommended.
- To implement a Regulation which seeks to harmonise domestic adoption laws AND provide for automatic mutual recognition of all domestic adoptions – not recommended.
- The proposed legislation does not seek to regulate the recognition by a MS of a domestic adoption made outside of the EU, or to require all MS to recognise such an order following recognition by one MS.
- The proposed legislation does not seek to govern Kafala.
- The proposed legislation does not distinguish between simple and full adoptions. This is an issue which will require further research and consideration.

1. Introduction

As set out in chapter 2 of this report, there is no legal framework under which EU citizens are entitled to automatic recognition throughout the EU, by operation of law, of the adoptive status created under domestic adoption orders granted to them in MS.

We have set out in chapter 3 how at any time a number of MS may be entitled, under their national law, to assert jurisdiction in relation to the making of an adoption order for a particular child. It is clear that this can give rise to a Conflict of Laws situation under which MS may consider that an adoption of a child of their nationality, or an adoption involving adoptees of their nationality, should not have been entertained by the MS that made the order. With increasing diversity in relation to issues of what is and is not appropriate in the constitution of families, this is a very complex issue. An ever mobile EU population, driven not only by purely economic motives, but also by a desire to live in a MS that shares a citizen's moral and family values, only adds to that complexity.

Such a state of affairs is manifestly contrary to the best interests of the adopted child and has real potential to make their lives more difficult in matters of civil law in another MS if

there is a challenge to their status as an adopted child, either while they are a minor or once they have become adults.

Further by allowing MS the freedom to refuse recognition of adoption orders purely on the basis of public policy, and without reference to the welfare of the child (as per Article 24 of the 1993 Hague Convention) the EU may be in breach of its duties to prevent discrimination in Article 19 of the Consolidated Version of the Treaty on The Functioning of The European Union (TFEU).

In chapter 4 we have explored the EU competencies which empower the EU to legislate for a system of law and set out our analysis of why such legislation is necessary.

In this chapter we will consider the options for achieving a harmonized system of jurisdiction, recognition and enforcement of domestic adoption orders made in EU MS.

2. Policy options

Before we examine the mechanisms under which legislation could be made, it is worthwhile considering the broader policy options which the EU has, so that what follows can be viewed within the context of the recommended policy choice.

2.1. Maintaining the status quo

One option would be to take no action and to allow the status quo to continue. The arguments in favour of this option is that it would avoid the need for any new EU legislation. However it would not resolve the difficulties identified in this report which flow from the uncertainty for families that results from the current systems of recognition. This policy approach does not provide adequate protection for citizens and represents a real and serious impediment to the free movement of families within the EU. This report does not favour that option. Neither does this report favour the introduction of non-binding guidance and/or the creation of a voluntary convention to address the situation.

2.2. EU legislation to govern jurisdiction in relation to adoption and to create a framework under which MS are obliged to recognise domestic adoptions made in other MS

This option provides a procedural framework within which MS are at liberty to apply their national laws when they have jurisdiction to make an adoption order and, following a standardized certification process, they are required by operation of law to recognise adoption orders made in other MS. It is also proposed that once recognised, such adoption orders are given equality of status for all purposes with domestic adoption orders made by the recognising MS. The disadvantages of this policy are that:

- it will require EU legislation;
- it will restrict MS national laws on jurisdiction, to cases where the child is habitually resident in either their jurisdiction or a country outside of the EU; and

- it will limit the right of EU MS to refuse to recognise adoption orders when the adoption is inconsistent with their national laws on the eligibility of adopters.

The advantages of this policy option are that:

- it will provide a streamlined recognition process, saving costs to both individual citizens as well as public purses;
- it will provide certainty of status for children and relatives of adopted families;
- it will limit the scope for discrimination against families which have been legitimately constituted under the law of an EU MS;
- it does not interfere with national laws governing adoption and leaves MS free to legislate as they see fit in relation to the suitability and availability of children for adoption, matching criteria and eligibility of adopters.

The recommendations of this report are consistent with this policy approach.

This policy approach could also be extended to include automatic recognition of non-EU, non-Hague Convention adoptions, as illustrated by the example of Joseph and Pila living in Thailand⁷⁷. However, since there is no way to regulate the certification of such adoptions, it is proposed that recognition of non-Convention adoptions made outside of the EU are not included in the scope of the proposed legislation and that it should be a matter for each relevant MS to determine whether or not they will recognise such adoptions.

2.3 EU legislation to harmonize adoption law in EU MS

In addition to providing a framework for the automatic recognition of adoption, this policy option would provide a framework under which EU MS would be required to change their national adoption laws so that there was a uniform (or more uniform) basis upon which children were assessed as suitable and available for adoption and adopters were assessed as eligible for adoption. The writers of this report are of the view that such a scheme is likely to be beyond the scope of the competencies in articles 67 and 81 of TFEU, and are inconsistent with the principles of subsidiarity and proportionality. From the limited survey of national laws for the recognition of non- Hague Convention adoption orders undertaken for this report, and set out in chapter 2, it appears that there are consistent principles underpinning the varying recognition laws. By contrast, it would appear that there are significant differences in the way in which EU MS assess the eligibility of adopters and the suitability and availability of children to be adopted. Any scheme which sought to impose a standardized criteria for this matters is likely to face insurmountable (and justifiable) resistance from MS. This report does not recommend this policy approach.

⁷⁷ See page 25 of this report

3. Non-binding, non-legislative options

It would be possible for the EU to prepare a voluntary convention for recognition. However there is no guarantee that such a Convention would be universally accepted. The low membership of the 2008 European Convention on the Adoption of Children (Revised) does not generate much hope that such a convention would be widely taken up. While the creation of another adoption Convention which member states were free to adopt if they wished may provide a framework for improved clarity for some children, unless it were universally accepted throughout the EU it would only provide a partial solution to the current difficulties. Furthermore, it may also serve to complicate matters further as it would simply be another different recognition process which citizens may need to address in addition to measures in individual MS. The potential for confusion and added complexity without the benefit of universal application makes this an unattractive option and we do not recommend it. For the same reason other non-binding voluntary options or statements of aspiration are not recommended.

4. A binding obligation on member states to put in place measures to bring about recognition of adoptions made in or formally recognised by, other MS

The EU could issue a directive requiring MS to put in place legislation to resolve conflicts of law in relation to jurisdiction between MS and to give effect to the automatic recognition and enforcement of adoption orders made in other MS. This would create a situation where there would be multiple and differing procedures to give effect to the directive. However, a directive could not achieve the objective creating a single unified process for designation of jurisdiction and automatic recognition and enforcement of domestic adoption orders made in EU MS. Accordingly, this option is not recommended.

5. Legislation with direct effect governing jurisdiction, recognition and enforcement of adoptions made in EU MS

This option can provide a harmonized and simplified mechanism for establishing jurisdiction to make adoption orders when a child is habitually resident within the EU and can ensure that all domestic adoption orders made by competent EU courts or authorities are recognised and given effect throughout the EU unless they are certified by a MS to be both incompatible with public policy AND contrary to the best interests of the child.

The writers strongly recommend that legislation with direct effect is both necessary and proportionate. Such legislation should:

- clarify issues of jurisdiction and conflict of law as between MS;
- provide for a certification process by the MS in which the domestic adoption order is made;
- require all MS to recognise the status of the adoptee as the lawful child of the adopters upon production of the required certificate;

- Require all MS to give effect to a duly certified adoption as if it were an adoption made in that MS;
- Provide for refusal of recognition on limited grounds which mirror the provisions of Article 24 of the 1993 Hague Convention.

5.1 Proposals for establishing jurisdiction to make a domestic adoption order

5.1.1 Jurisdiction to make a domestic adoption order when child and adopter(s) live in the same EU MS

The 1993 Hague Convention considered that the country best placed to assess the child and approve the child as suitable for adoption was the country of the child's habitual residence. It was also considered that the country best placed to approve the adopters was the country of the adopters habitual residence. It is therefore possible to extrapolate from these principles, which all MS have accepted by their ratification of the 1993 Hague Convention, that if the child and the adopters are both habitually resident in the same country that country should have exclusive jurisdiction to make a domestic adoption order.

It therefore proposed that the proposed EU regulation should stipulate that when the child and the adopters are both habitually resident in a single MS, that MS shall have exclusive jurisdiction to make an adoption order concerning the child.

5.1.2 Jurisdiction to make a domestic adoption order when the child is habitually resident in an EU MS and the adopters are habitually resident in a non-Convention country

This situation will only arise in a situation when the adopters are habitually resident outside of the EU in a non-Convention country, and the child is habitually resident in the EU. It is proposed that the jurisdiction would arise in the country of the child's habitual residence. Again this follows from the principle of the 1993 Hague Convention which specifies that the country which should assess the suitability of the child for adoption is the country of the child's habitual residence.

For example if a Spanish family move to live in Singapore for 3 years they will become habitually resident there. Singapore is not a member of the 1993 Hague Convention. If they wish to adopt a Portuguese child habitually resident in France, currently they can apply to a specialist French court in the area in which the child lives which will have jurisdiction to make the order and it will apply Spanish law. The couple would then need to apply to the Spanish court for a recognition order if they want to apply for Spanish citizenship for the child. Alternatively they could apply to the Spanish court to make the order. Under the proposed Regulation, the French court would have exclusive jurisdiction to make the order and, once certified, the Spanish and Portuguese authorities would have to recognise and give effect to the French domestic adoption order.

5.1.3 Jurisdiction to make a domestic adoption order when the adopters are habitually resident in an EU MS and the child is habitually resident in a non-Convention country

This situation will only arise in a situation when the child is habitually resident outside of the EU in a non-Convention country. It is not proposed that there should be any restrictions placed on a MS national law in relation to jurisdiction in inter-country adoptions of children who are habitually resident in non-Convention countries.

For example, let us consider the case of adopters who are French nationals habitually resident in England seeking to adopt a child who is habitually resident in Singapore. Currently the French adopters would be eligible to apply to either the French, English or Singapore court for a domestic adoption order. Unless the adoption were made in the French specialist court the adopters would need to apply for registration of the adoption order in order to acquire French citizenship for the child. Under the proposed legislation the adopters could still apply to adopt in any of these countries. If the adoption were made in Singapore it would be a matter for the adopters to obtain recognition in both England and/or France of their adoption order. However, if the adoption order was made in the English or the French court and duly certified, then the order would be automatically recognised in all EU MS and, even if made in England, the child would be entitled to French citizenship without the need for a separate registration process.

5.2 Applicable Law

It is proposed that the choice of applicable law be left to the determination of the national law of the MS with jurisdiction to make the domestic adoption order.

5.3 Conditions for Recognition

It is proposed that it is a requirement of recognition that prior to the making of a domestic adoption order:

- All parents and persons or bodies with parental responsibility for the child must have been given notice of the adoption application and a right to be heard in the adoption proceedings, unless their whereabouts are unknown or they lack legal capacity;
- the persons, institutions and authorities whose consent is necessary for adoption under domestic law have given their consent freely, in the required legal form, and expressed or evidenced in writing;
- Having regard to the age and maturity of the child, that he or she has given her consent to the adoption, where such consent is required by domestic law;
- If the child was a national of a country other than the MS making the order, that the provisions of Article 37 of the Vienna Convention 1963⁷⁸ had been complied with.

⁷⁸ Vienna Convention on Consular Relations 1963, Done at Vienna on 24 April 1963. Entered into force on 19 March 1967. United Nations, Treaty Series, vol. 596, p. 261

5.4 Certification

It is proposed that the Regulation provide a pro-forma certificate for completion by the Central Authority in the MS, which must:

- State the details of the adopters, the birth parents, the child and the child's date of birth;
- Confirm the country of habitual residence of the child and of the adopters;
- State the date on which the adoption order was granted and the name and address of the court or other competent body which made the adoption;
- Confirm that all parents and holders of parental responsibility for the child prior to the making of the adoption were given notice of the adoption proceedings and an opportunity to be heard before the adoption was granted, unless their whereabouts were unknown or they lacked legal capacity;
- Confirm that all necessary consents were provided freely and unconditionally and with full understanding of what was involved;
- Confirm that if the consent of a parent has been dispensed with by virtue of a court order, the date of such order and the name and address of the court which made it;
- Confirm that, having regard to the age and maturity of the child, that he or she has given her consent to the adoption, where such consent is required by domestic law;
- If the MS making the adoption is not the country of the child's nationality, confirm that in accordance with the provisions of Article 37 of the Vienna Convention 1963, the relevant Embassy/Consulate/High Commission was given notice of the adoption proceedings.

5.5 Effect of Certification

It is proposed that once a domestic adoption has been granted in a MS and a certificate produced by the central authority in that MS the adoption is recognised by operation of law in all other MS. Furthermore, once recognised all MS must give effect to the certified adoption order as if it had been made under its own domestic adoption law. This will mean that a separate recognition/registration process will be unnecessary to obtain citizenship to align the child's nationality with that of their adoptive parents. Further, it will remove any discrimination against the child on the basis of their adopted status, and place them on an equal footing with natural children of EU citizens. The central authority of the issuing MS shall be responsible, upon request from an adopter or adoptee (if over the age of 18 years) to forward to another MS a copy of the certificate.

5.6 Grounds for Non-Recognition

It is suggested that, having regard to the respect for diversity within the EU it is appropriate to allow MS limited grounds to refuse recognition. However, in order to ensure that the protection afforded to adopted children is effective it is suggested that this should be limited to the grounds for non-recognition already provided for in Article 24 of the 1993 Hague Convention, which states:

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

An adoption duly certified and sent to the central authority of the MS where recognition is required shall be presumed to confer automatic recognition of the adoption. In the event that the MS wishes to exercise its right to refuse recognition it must, within 12 weeks of being served with the certificate of adoption, notify the central authority in the issuing MS of its refusal to recognise the certified adoption. Such notification must include, in summary form, clear reasons why in the exceptional circumstances of the case, refusal is justified on the permitted grounds. It is suggested that the issuing MS then forwards this refusal notice to the adopters. This procedure has the advantage that the adopters will only ever have to liaise directly with the central authority in their own MS. It will also ensure that if a citizen wishes to bring a complaint against an EU MS for non-recognition they have a clear evidential basis upon which to take legal advice, and if appropriate, issue their claim in either the national court of the refusing MS and/or the CJEU.

6. Conclusion

The only viable mechanism for creating an effective framework for automatic recognition of adoption orders is by way of a Regulation. Legislation which is consistent with the principles of the 1993 Hague Convention for jurisdiction and recognition would grant EU citizens an equivalent degree of certainty of status that they currently enjoy when the adoption under the 1993 Hague Convention. This is the recommendation of this report.

Chapter 6 Added Value

Key findings

- Although it is not possible to provide a financial calculation of the net savings to citizens and/or the administrative costs in of recognition procedures in individual EU MS, the arguments that the proposed EU legislation will give rise to significant and tangible benefits, is clear and coherent.

As set out in the introduction to this report, it has not been possible to conduct a statistical cost/benefit analysis of the impact of the proposed EU measures to bring about the automatic mutual recognition of domestic adoptions made by EU MS. However this does not mean that it is impossible to consider in a broader sense the added value of such legislation.

1. Academic analysis of Added Value of proposed scheme

Although in theory the legislation will apply to all domestic adoptions made in each EU MS, it will only have a practical effect in relation to those adoptions in which recognition is required. Accordingly, in each case in which recognition is required the following savings will result:

- The lawyer in the MS making the order can advise the adopters on the recognition provisions throughout the EU, because they will all be governed by the same EU instrument. This will mean that adopters do not need to obtain legal advice in multiple jurisdictions.
- If requested, the court making the adoption order will be required to complete a standardized certificate which can be relied upon for all purposes of recognition in each MS. This will save citizens the cost of registration (by a court or by a civil service administration) in one or more MS. This will avoid or reduce:
 - Costs to the individuals;
 - Costs to MS associated with the civil and/or judicial process for recognition.
- It will reduce (and may eliminate) the likelihood of civil litigation in relation to intra familial: obligations; duties; and/or entitlements arising out of the adoptive status of a child.
- It may serve to improve relations between MS by eliminating disputes concerning the jurisdiction and applicable law in relation to the adoption of minors in a MS when the child is a citizen of a different MS.

The fact that these advantages have been identified on the basis of an academic analysis of the current and proposed legal frameworks set out in chapters 2 and 5, should not be viewed as a detracting feature.

2. Illustrations of Added Value

2.1 The adoption of Rachel – see factual example 1 of Domestic Adoptions with a Foreign Element

In this scenario currently both France and England would have jurisdiction to make the adoption order. Under the proposals only France would have jurisdiction. This would eliminate any litigation regarding forum. It also eliminates the possibility that England would make the order and the family would then have to apply for registration with the French prosecutor, who, if he took the view the matter was due to a fraud could require the matter to be presented to the French court. Stipulating that the adoption must take place in France and be fully recognised for all purposes under English law has the potential to halve the litigation costs incurred by both the litigators and the court system determining the applications.

Furthermore, if we complicate Rachel's situation slightly, let us say to make her a Brazilian child in a French orphanage who is adopted by Janet and Pierre jointly in France, currently in order to give her adoptive daughter British citizenship Janet would need to make an application to the British Visa and Immigration Service under s.3(1) BNA if the adoption was in France. Conversely if the adoption was in England, it would require an application to be made to the French Prosecutor. Again a saving of at least 50% of the private and public costs would flow from the proposed EU legislation and would give the family certainty of status in all EU MS.

Continuing with Rachel's situation let us say that Pierre and Rachel divorce and Pierre moves to live in Spain and makes a permanent home there. He remarries and has two children by his Spanish wife and there is a great deal of bitterness between his first and second family. When he dies he leaves his estate to be divided in equal shares by his children. His whole estate is in Spain and he has been naturalised as a Spanish citizen, having given up his French citizenship. His natural children assert that they share the whole estate and Rachel disputes this, claiming a third share. The whole cost of this litigation would be avoided under the proposed legislation because the adoption would be automatically recognised in Spain from the outset.

3. Conclusion

While it is not possible to quantify in Euros the added value of the proposed legislation, the benefits are demonstrable and real. The benefits are not merely financial but will promote the welfare of the adopted child by providing certainty and stability throughout the EU of their status in their new family. The new family will not have to suffer the stress and expenses of multiple litigation across two or more MS. The burden on EU court and administrative services will be reduced. Social cohesion and mutual trust and respect throughout MS will be enhanced. These are all real and significant benefits and support the recommendations of this report that action at an EU level as suggested is necessary.

Chapter 7 Tables

1. Definitions of Adoption

Adoption Definition	Description	Relevant Law
Domestic without international element	An adoption made between adopters and a child who are all habitually resident in and citizens of the state making the adoption order.	Domestic/national law
Domestic adoption with international elements	An adoption made under domestic law, but with an international element due to one of the following factors: a) Child is a foreign national; b) One or both adopters is a foreign national; c) The adopters or child are habitually resident in the same country, but it is not the MS making the adoption order; or d) The child is habitually resident in a different country to the adopters⁷⁹.	Domestic/national law OR Law of foreign jurisdiction depending on conflict of laws rules applicable in jurisdiction in which adoption order is sought
Intercountry Adoptions under 1993 Hague Convention	An adoption taking place where the child and adopters are resident in two different states and both countries are members of the 1993 Convention.	Domestic/national law in conjunction with provisions of the 1993 Convention.
Recognition of non-Convention Adoptions by law of one EU Member State	Recognition of an adoption order made in a foreign jurisdiction and not under the provisions of the 1993 Convention. <u>In this scenario the adoption order has been made by a non EU MS, but an EU MS has recognised that foreign adoption order.</u>	Domestic/national law, in some cases with regard to foreign law of jurisdiction in which adoption order was made ⁸⁰ .

⁷⁹ And the country is not a member of the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption. Please see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> for a list of current members. All EU Member States are members.

⁸⁰ For example, in some jurisdictions, recognition of a foreign adoption order may depend on whether the adoption is in fact valid under the law of that country. Accordingly the court deciding whether or not to recognise the adoption order will pay regard to the adoption law of the country in which it was made.

2. Illustrations of different types of adoptions with reference to factual scenarios

Adoption Type	Domestic without international element	Domestic with International Element	Intercountry Adoption Under 1993 Convention	Recognition of Foreign Adoption
Factual Scenario				
Proposed adoptive parents are German nationals, habitually resident in Germany. The child is a German national, habitually resident in Germany.	✓			
Proposed adopters are French nationals habitually resident in France. Seek to adopt Algerian national child, habitually resident in France.		✓		
Austrian proposed adopters habitually resident in France seek to adopt Austrian child habitually resident in France.		✓		
Austrian proposed adopters habitually resident in France seek to adopt Austrian child habitually resident in Austria.			✓	
Proposed adopters are UK nationals living in the UK. They seek to adopt an Italian national child habitually resident in Italy.			✓	
Dutch adoptive parents successfully adopt a Dutch child in Holland. They then move to France.				✓

Adoption Type	Domestic without international element	Domestic with International Element	Intercountry Adoption Under 1993 Convention	Recognition of Foreign Adoption
Polish proposed adoptive parents habitually resident in Poland seek to adopt a Polish child habitually resident in Poland.	✓			
Portuguese proposed adoptive parents habitually resident in Portugal seek to adopt an Indian child habitually resident in India (a 1993 Hague Convention member).			✓	
German parents successfully adopt a child from Singapore (not a 1993 Hague Convention member) in Germany. They then move to Spain.				✓
Bulgarian proposed adoptive parents habitually resident in UK seek to adopt a Belgian child habitually resident in Luxembourg.			✓	
Swedish wife and American husband habitually resident in Sweden seek to adopt a Swedish child habitually resident in Sweden.		✓		
Greek adoptive parents habitually resident in Greece successfully adopt a Greek child in Greece. They then move to the UK.				✓

3. Extract of information on adoptions provided in the adoption statistics section of the HCCH website.

This table analyzes the information contained in the responses the EU MS which provided statistics for adoptions in their jurisdiction in the year 2013.⁸¹ Unfortunately only 8 MS responded.

Country	Fully completed 2013 Hague Questionnaire?	Domestic Adoptions	Intercountry Adoptions	Hague Adoptions	Total Adoptions*	% Hague Convention Adoptions vs Total Adoptions
Austria	No					
Belgium	Yes	348	219	100	567	17.64
Bulgaria	Yes	705	407	407	1112	36.60
Croatia	No					
Republic of Cyprus	No					
Czech Republic	No					
Denmark	No					
Estonia	No					
Finland	No					
France	No					
Germany	Yes	3793	289	195	4082	4.78
Greece	No					
Hungary	No					
Ireland	No					
Italy	No					
Latvia	Yes	112	131	131	243	53.91
Lithuania	Yes	107	80	80	187	42.78
Luxembourg	Yes	2	17	8	19	42.11
Malta	No					
Netherlands	No					
Poland	No					
Portugal	No					
Romania	Yes	752	7	7	759	0.92
Slovakia	No					
Slovenia	Yes	28	15	2	43	4.65
Spain	No					

⁸¹ See tables on HCCH website at: <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=69>

Sweden	No					
UK	No					

4. Comparative Law Table

Country	Automatic Recognition?	Formalities/conditions for Automatic Recognition	Exceptions to Automatic Recognition	Legal Procedure for Formal Recognition
Belgium	No, unless under Hague Convention	Certificate of conformity produced to Federal Central Authority for Hague Convention adoptions	If the adoption is 'manifestly contrary to public policy'	For adoptions pronounced in non-HCC member states, the adoption must: Have been pronounced by a competent jurisdiction and following the principles/rules of the state of origin; Not be contrary to public policy; Not have been pronounced by fraud to the law on access to the Belgium territory or nationality; Be a final adoption; and The adoptee must be a minor and the adopter must have followed training and must have been admitted to adopt.
Bulgaria	Yes	None, unless disputed (<u>Article 118 Private International Law Code</u>)	The foreign adoption order will be recognised unless and until it is 'called into dispute' under <u>Article 118 of the Private International Law Code</u>	<u>Article 117 Private International Law Code</u> states a disputed foreign adoption will be recognised where: The foreign court had jurisdiction according to Bulgarian law; The defendant was served with the statement of the action, the parties were duly summonsed and fundamental principles of

Country	Automatic Recognition?	Formalities/conditions for Automatic Recognition	Exceptions to Automatic Recognition	Legal Procedure for Formal Recognition
				Bulgarian law are not compromised; If there is no effective judgment given by or proceedings before a Bulgarian court involving the same parties and facts; Recognition/enforcement is not contrary to public policy.
England and Wales	Yes	None, automatic and by operation of law.	N/A	N/A
France	Yes	None, automatic and by operation of law.	No automatic entitlement to French birth certificate/passport. A simple adoption has no direct effect on nationality under French law.	If a French birth certificate/passport is required, a request must be made to the Public Prosecutor of the Tribunal De Grande Instance in Nantes to register the adoption under the civil statute. The prosecutor will register the adoption if the court of origin had a strong link to the case and jurisdiction to pronounce the adoption, the adoption conforms to French public policy, and it is not fraudulent. If the prosecutor does not consider these criteria fulfilled, he will inform the adopters to issue enforcement proceedings by which they must prove the conditions listed below are fulfilled. In order for a simple foreign adoption to be converted to a full

Country	Automatic Recognition?	Formalities/conditions for Automatic Recognition	Exceptions to Automatic Recognition	Legal Procedure for Formal Recognition
				adoption under French law, consent from the child's representative must have been obtained in full understanding that the adoption would later be so converted in France with a full severing of the link with the biological family.
Germany	Yes	None, automatic and by operation of law (<u>s108(1) Act on Non-contentious and Family Proceedings</u>)	Recognition can be denied (s109 Act on Non-contentious and Family Proceedings) if: The foreign court had no jurisdiction; The Defendant was not properly informed/did not receive adequate notice of proceedings; The adoption judgment is irreconcilable with an earlier judgment of a member state based on the same cause of action between the same parties; The decision is incompatible with a previous German decision, pending proceedings in Germany or manifestly incompatible with fundamental principles of German law, especially	N/A

Country	Automatic Recognition?	Formalities/conditions for Automatic Recognition	Exceptions to Automatic Recognition	Legal Procedure for Formal Recognition
			fundamental rights.	
Netherlands	Yes	Automatic if: Child and adoptive parents have been habitually resident in foreign state at the time of adoption; and The decision has been made by a competent authority (<u>Book 10, Article 108(1)(a) Dutch Civil Code</u>).	Under Article 108(2) Dutch Civil Code recognition can be denied where the foreign decision is not founded on proper research or proper administration of justice or recognition would be against Dutch public order. Furthermore, if the child and adoptive parents were not habitually resident in the same state the adoption will not be recognised unless it recognised by the state of either the child's or the adoptive parents' habitual residence at the time of the order.	N/A
Poland	Yes	None, unless bars exist (<u>Article 1145 Polish Civil Procedure Code</u>)	<u>Article 1146 of the Polish Civil Procedure Code</u> sets out the bars to automatic recognition: Foreign judgment has not become final and binding; Adoption ruling issued in a case over which Poland has exclusive jurisdiction;	N/A

Country	Automatic Recognition?	Formalities/conditions for Automatic Recognition	Exceptions to Automatic Recognition	Legal Procedure for Formal Recognition
			A defendant who did not defend the action was not served with an initial pleading in due time, or a party was deprived of the opportunity to defend themselves; A case on the same claim between the same parties had already been brought before the Polish courts; The ruling is contrary to a previous non-appealable ruling of a Polish or recognised foreign court involving the same claim/parties; Recognition of the ruling will be contrary to the basic principle of the legal order of Poland. <u>Article 1146(7)</u> states that Polish family law will not recognise an adoption order in favour of a same-sex couple.	
Portugal	No	N/A	N/A	Under <u>Article 978 of the Code of Civil Procedure</u> , an adoption decision is not recognised by the Court of Appeal until given force under Portuguese Law. The

Country	Automatic Recognition?	Formalities/conditions for Automatic Recognition	Exceptions to Automatic Recognition	Legal Procedure for Formal Recognition
				foreign order must comply with the following formalities: The document recording the judge is authentic; The decision has become final in its jurisdictional origin; The matter did not fall within the exclusive jurisdiction of the Portuguese courts; There is no claim of <i>lis pendens</i> or <i>res judicata</i>; All parties have been given equal protection in the proceedings; The recognition does not lead to a result manifestly incompatible with principles of Portuguese law (<u>Article 980</u>). Furthermore, <u>Article 983</u> provides that the decision will not be recognised if: the judgment concerned a Portuguese citizen; under Portuguese conflict of law rules, Portuguese law would have been the applicable law; and that Portuguese law would have been more favourable to the applicant Portuguese citizen.
Spain	No	N/A	N/A	The adoption order must be recognised by the Spanish court and translated into Spanish.

Country	Automatic Recognition?	Formalities/conditions for Automatic Recognition	Exceptions to Automatic Recognition	Legal Procedure for Formal Recognition
				There must be a reasonable connection between the foreign court and the parties, the judgment must meet the criteria to be considered authentic in both the foreign and Spanish court, and enforcement of the judgment must not be contrary to public policy.
Sweden	Yes	None, automatically recognised under <u>s3 1971:796 Act on International Legal Regulations Concerning Adoption</u> .	An exception applies where the order would be obviously incompatible with Swedish legal order (<u>s6 1971:796 Act on International Legal Regulations Concerning Adoption</u>).	N/A

This European Added Value Assessment (EAVA) presents a qualitative analysis of possible policy options and quantitative estimates on the possible additional value of taking legislative action at EU level related to cross-border recognition of adoptions.

The paper identifies economic and social costs, and notably the costs related to the incomplete protection of rights of mobile EU citizens, which come as a result of the absence of regulation on automatic recognition of adoption decisions at EU level. The substantive scope of the paper is limited to issues related to the recognition of adoptions in EU Member States. The substantive family law issues, as well as issues related to the recognition of convention adoptions, within the meaning of the 1993 Hague Convention on Intercountry adoptions, are not covered in this assessment.

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