

STUDY
for the JURI committee



Private International Law in a Context of Increasing International Mobility: Challenges and Potential

Legal Affairs

Directorate General for Internal Policies of the Union

Policy Department for Citizens' Rights and Constitutional Affairs
PE 583.157 - June 2017

DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, will be presented during a Workshop dedicated to potential and challenges of private international law in the current migratory context. While Private International Law governs private relations between persons coming from or living in different States, migration law regulates the flow of people between States. The demarcation between these two areas of law seems clear, but in practice it is not. Rights related to migration are often linked to private relations (marriage, parentage) or personal status (age). The EU should have a coherent approach in these areas, both internally and in relations with third States. Authorities active in the different areas must coordinate their work.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Legal Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

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LINGUISTIC VERSION

Original: EN

Manuscript completed in June 2017.
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LIST OF ABBREVIATIONS

- 1996 Hague Convention** Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and measures for the Protection of Children
- CJEU** Court of Justice of the European Union
- Dublin Regulation** Regulation no. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
- ECHR** European Convention of Human Rights
- EU** European Union
- GRC** Geneva Refugee Convention (1951)
- Hague Conference** Hague Conference on Private International Law
- MS** Member State(s) of the European Union
- PIL** Private International Law

EXECUTIVE SUMMARY

Background

This study on private international law (PIL) in a context of increasing international mobility was requested by the Committee on Legal Affairs to be presented during a workshop dedicated to the potential and challenges of PIL in the current migratory context.

The research paper examines the difficulties faced by judicial and administrative authorities in EU MS when they are called on to apply PIL tools in the current migratory context, with a view to providing an overview of the challenges that PIL faces nowadays, in its interaction with migration law, in particular refugee and asylum law.

Chapter one considers issues of personal status in a cross-border context, and more specifically the recognition of personal status acquired abroad. Personal status is of crucial importance in a migration context: the protection of unaccompanied children depends on proof of age and requires the identification and tracing of possible family members; the right to family reunification depends on proof of marriage and parentage; the existence of family ties determines which MS is responsible for asylum applications, etc. In all these situations, migration law, including refugee and asylum law, interacts with PIL. However, the way those two sets of rules interact may have different effects: in some situations compliance with PIL rules is a necessary precondition for acquiring a residence status in a MS, while in other situations it does not have any effect on the migration status. The study will adopt this twofold structure as a basis to elaborate on several issues: missing and absent authentic documents, fraudulent documents, child marriages, polygamy and *kafala*/adoption. Without being exhaustive, the paper provides examples from several MS highlighting the challenges of PIL in the current migratory context and the search of more coordination/harmonisation in the EU, as well as coordination with other organisations such as the Hague Conference and the International Commission on Civil Status.

Chapter two pinpoints specific difficulties in the migration context regarding the application of foreign law. While the issue of access to, and treatment of, foreign law is generally considered in PIL from a judicial perspective (i.e. when a question brought before a court is governed by foreign law and the court has to apply that law), a different focus is needed in the context of migration. First, particular attention must be paid to the assessment of foreign law by non-judicial authorities. Secondly, the main issue is not the application of foreign law by the courts but the access to, understanding and treatment of, foreign law within the context of the migrant's personal status *recognition*. Such recognition often requires assessing whether a foreign civil status (and, where available, foreign civil status documents) are to be recognized, which implies the understanding and treatment of foreign law by administrative and judicial authorities.

Chapter three looks into a very specific but important issue, the PIL rule in Article 12 of the 1951 Geneva Refugee Convention. This provision states in its first paragraph a classic conflict of laws rule: the refugees' personal status is governed by the law of the country of their domicile or, if they have no domicile, by the law of the country of their residence. The second paragraph provides for protection of rights previously acquired, subject to an *ordre public* reservation. This rule applies in all MS, except Sweden which made a reservation to Article 12. The practical application of this provision is diverging in the MS as to the following four questions: Who is a refugee? What is personal status? What is domicile? And is the application of the rule mandatory? Moreover, since the change of the connecting factor carried out by Article 12 may entail a change, or even multiple changes, of the applicable law, the question arises as to how rights previously acquired should be

protected. There is an urgent need for consistent interpretation and application of this important Article.

Aim

The aim of the present study is to provide an overview of the interactions between PIL and migration law (including refugee and asylum law) and recommendations that could address the ineffective interplay between these two sets of rules and the subsequent impact on the right to respect for refugees' and migrants' family life.

In developing this study, the authors drew on their expertise in the field of PIL and migration law, relevant literature and case law in the area and a limited number of very recent interviews with the National Red Cross Services, Guardianship Services, Central Authorities and asylum and migration authorities in Belgium, France, Germany, Italy and the Netherlands to further identify the interplay between the two sets of rules.

The recommendations have a two-fold objective. First, they present action points for the EU (and more specifically for the European Parliament) including promoting uniform and effective practices among MS regarding the interpretation and application of existing instruments. Secondly, they call for further empirical research in the field. A summary of the recommendations appears in the "key findings" at the beginning of each chapter.

GENERAL INFORMATION

The major policy challenge is to improve the interactions between migration law (including asylum law) and private international law (PIL) in the current context of global migration. These interactions – and more specifically the recognition of facts and documents concerning migrants' and refugees' personal status (such as birth, marriage and death) – were clearly highlighted by the European Group for Private International Law in its [Declaration](#) on the Legal Status of Applicants for International Protection from Third Countries to the European Union (September 2015).

Even though both PIL and migration law belong to the Area of Freedom, Security and Justice, there is no actual unity of approach: each field has its own rules and (almost) no links exist between them. A better interplay and coordination, in the two directions, is necessary.

International migration entails many private law issues, such as the protection of children (especially unaccompanied children), age assessment, marital or parental ties and their consequences on family reunification. In this context, the PIL issue of foreign documents recognition is of crucial importance. The potential of PIL in this respect is twofold.

First, adopting a private law perspective will imply a focus on migrants as individuals rather than on the State's interests. States often focus on ideas of burden-sharing and fraud prevention. They manage international migration from a very distant and even statistical perspective (flows of people and figures), while consideration of migrants and their family members' interests requires a more concrete approach.

Secondly, PIL offers specific instruments, tools and methods, which may prove efficient for a better governance of the increasing international mobility of persons. This potential of PIL is to be further explored regarding the following three problems: the recognition of foreign documents, the application of foreign law and the scope of application of Article 12 of the 1951 Geneva Refugee Convention. However, for all three topics, it is crucial to overcome the traditional public-private law divide.

In order to get a clear view of the practical reality of these problems, it is necessary to adopt a twofold comprehensive approach:

The in-depth analysis focuses not only on people seeking refuge from persecution and conflict in their home countries (asylum and subsidiary protection), but also on migrants seeking family reunification or migrants moving to Europe for economic or environmental reasons. Whereas the first category of migrants may decrease if the political situation in the countries of origin improves or may at least strongly fluctuate over time, the second category will probably be of a more long-lasting nature and must not be overseen in the context of the current refugee crisis.

The in-depth analysis elaborates on the challenges faced by judicial and administrative authorities. Problems arise in the daily practice of 'civil judges' who are often called upon to recognize foreign documents (such as birth and marriage certificates) and apply foreign law. However, sufficient attention must also be paid to the practice of 'administrative' authorities, such as civil servants, asylum and migration authorities.

1. RECOGNITION OF PERSONAL STATUS ACQUIRED ABROAD

KEY FINDINGS

- The EU should promote cooperation between national authorities responsible for civil law matters (civil registry authorities, child protection (Central) authorities) and asylum and migration authorities, while respecting their specific responsibilities.
- The EU should promote unification of practices within and across MS to combat fraud relating to personal status documents in an efficient manner without depriving migrants of their right to family life.
- Bilateral negotiations between the EU, on the one hand, and specific third States, on the other hand, should be initiated, with the objective of ensuring the authenticity of personal status documents through bilateral agreements. The European cooperation mechanism should be adapted to the particular situation of each country of origin. Moreover, the cooperation procedure needs to be accompanied by policies to help the country of origin develop reliable registration systems.
- The EU is encouraged to support EU MS in developing alternative methods to replace missing documents.
- Urgent attention should be given to the implementation of Art. 25(5) of Directive 2013/32/EU (so-called Asylum Procedures Directive) across the EU, and further efforts, inspired by recent practice and law reforms in some MS, should be made to improve uniformity of age assessment across the EU. In particular, a guardian should assist the child and when the reliability of age assessment techniques is not scientifically established, it is necessary to investigate whether the possibilities of appeal are sufficient.
- Recognition of child marriages lawfully concluded in third States should be decided throughout the EU on a case-by-case basis taking into account the best interests of the child and all circumstances.
- The EU is encouraged to spread awareness of the 1996 Hague Convention, which is in force in all EU MS, and the obligations it imposes on EU MS in respect of migrant children, including those subject to a *kafala* arrangement. In case of recognition of a *kafala* under the 1996 Hague Convention rules, children should be granted visa or residence permits if their right to respect for their family life so requires.
- In-depth (empirical) research is necessary to see how private international law and migration law, including refugee and asylum law, interact. This research should be comparative, comparing both law and practice of MS.

1.1. Identification of cross-border personal status issues in a migration context

1.1.1. Interactions between private international law and migration law

The registration and recognition of facts and documents concerning migrants' personal status immediately brings migration into the field of private international law (PIL), and more specifically of the rules on the recognition of foreign decisions and authentic acts (marriage and birth certificates, dissolutions of marriage, etc.).

Personal status is of crucial importance in a migration context: the protection of unaccompanied children depends on proof of age and requires the identification and tracing of possible family members; the right to family reunification depends on the proof of marriage and parentage; the existence of family ties determines which State is responsible for asylum applications, etc.

In all these situations, **migration law, including refugee and asylum law, interacts with PIL.** However, the way those two sets of rules interact may have a different effect: in some situations, compliance with PIL rules is a necessary precondition for acquiring a residence status in a EU MS (1.1.2), while in other situations this compliance does not have any effect on the person's migration status (1.1.3). As recognized in several interviews with national authorities, **cooperation between national authorities responsible for civil law matters** (civil registry authorities, child protection (Central) authorities) **and asylum and migration authorities is crucial.**

1.1.2. Recognition of personal status under PIL as a prerequisite for migration status

Most commonly, the recognition of personal status under PIL is seen, from the perspective of migration law, as **a precondition for acquiring a specific migration status** (e.g. obtaining refugee status, subsidiary protection status or other residence statuses). For instance, the recognition of a foreign marriage has a decisive impact on migration matters: visas or residence permits are granted on that basis, family reunification becomes possible, transfers under the Dublin Regulation¹ are performed, etc. The rules on family reunification between spouses seem to be relatively clear, but in practice major problems exist due to the fact that sufficient evidence of marriage is often lacking. The person applying for family reunification bears the burden of proof. If official documents cannot be obtained from the administration of the country of origin, alternative methods have to be found. The same tension between migration rules and PIL rules is visible in the field of parentage, e.g. in the situation where a unaccompanied child is granted refugee status in a MS and applies for family reunification with a parent still staying in a refugee camp in another MS or in the country of origin. Under Article 10(3) of the Family Reunification Directive (2003/86/EC), any MS shall authorize the entry and residence of his or her "first-degree relatives in the direct ascending line". The reverse situation is common as well, where a parent is granted refugee status and applies for family reunification, in order to allow the children left behind to join the parent in a MS.

Yet, migrants regularly find themselves confronted with the impossibility of submitting a document to provide evidence of their family relationship (see 1.2.1). In many countries, birth or marriage certificates do not exist or are unreliable. Even if migrants can produce the necessary documents, they are often confronted with non-recognition of their personal status acquired abroad (see 1.2.2). The impossibility for migrants to prove the accuracy of

¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

their personal status or to have their foreign personal status accepted in the host country has an enormous impact on their family life and may even lead to the destruction of their family unit. Respecting the right to family life (protected e.g. by Article 8, ECHR, and Art.7 of the EU Charter of Fundamental Rights) however is a key premise for the successful integration of migrants and refugees into a host society.

Not only does the evidence of family ties constitute a problem in asylum and migration procedures, but it is also an often-raised obstacle within the **family tracing process**. Hence, this study cannot ignore the issue of family tracing. In order to get some insights from practice, the National Red Cross in Belgium, France, Germany, Italy and the Netherlands were interviewed (see below 1.4). The National Red Cross or Red Crescent Societies are contacted by hundreds of families who have lost contact with their relatives somewhere within or on their way to Europe. The Tracing Services of the National Societies try to help these families find their family members. Personal status issues often complicate the work. For unaccompanied children, family tracing begins at the early stage of the preliminary procedure of taking into care. If family reunification is possible and lies in the best interest of the child, it can be effectuated, but in practice tracing may be a lengthy process, and reunification still presupposes that the family ties are properly proved.

1.1.3. No migration status despite recognition of personal status under PIL

In other instances, the recognition of personal status under PIL is not sufficient from the perspective of migration law, in the sense that the recognition of personal status under civil law (i.e. under PIL) is not necessarily followed by the issuance of an adequate status under migration law. Different explanations exist for this **ineffective interplay between PIL and migration law**.

In some cases, the foreign personal status does not fit into the categories of migration law of the State of destination. The Islamic institution of *kafala* is a well-known illustration (see below 1.3.2).

In other cases, the migration authorities' discretionary power over the entry and stay of non-nationals may lead to an insufficient interplay between PIL and migration law. For instance, even though foreign adoption is recognized under the national rules of PIL, the issuance of a visa allowing the child to access the territory of the adopting parent is not necessarily automatic in all MS and may take a long time. In France, in case of an *adoption simple*, the child can become French by mere declaration.² However, in practice, to make the declaration, the child has to be in France, and in some cases the entry of the child in France is delayed/the visa is denied implying that the child often has to wait for years in his/her country of origin.

Finally, there are also cases where migration law has developed specific rules, which derogate from general PIL rules. For instance, under the PIL of the MS, foreign polygamous marriages may have some legal effects. Yet, when spouses invoke their polygamous marriage for a migration purpose, specific, overriding migration rules exist (see below 1.3.1).

² Art. 21-12 Code civil.

1.1.4. Burning questions at two levels

All these interactions between PIL and migration law have led to several burning questions concerning the different aspects of personal status: marriage, marriage dissolution, parentage, adoption, *kafala* and age.³

The study will take the above-mentioned twofold structure as a basis:

- Recognition of personal status under PIL as a precondition for migration status (1.2)
 - o **Documents:** Foreign (authentic) personal status documents are missing or are (considered to be) fraudulent and alternative methods have to be found to prove personal status and family ties (1.2.1);
 - o **Personal status per se:** Personal status acquired abroad cannot be recognized/accepted in EU MS (1.2.2). This study will take **child marriages** as a case.
- Recognition of personal status under PIL without consequences upon migration status (1.3)
 - o **Polygamous marriages** (1.3.1)
 - o ***Kafala* and adoption** (1.3.2)

Without being exhaustive, the paper provides examples from several MS highlighting the challenges of PIL in the current migratory context and the search for more coordination/harmonisation in the EU (coordination with other organisations such as the Hague Conference and the International Commission on Civil Status).

1.2. Recognition of personal status under PIL as a precondition for migration status

1.2.1. Documents

1.2.1.1. No authentic documents

Migrants often only have copies or affidavits (sworn statements) of their personal status documents. This may generate problems, as the submission of 'authentic' documents is the first step towards recognition in a MS of a personal status acquired abroad.

Personal status documents (like all foreign decisions or authentic acts) must be legalized or apostilled in order to certify the authenticity of the signature and the capacity in which the person signing the document has acted. The foreign personal status document must be legalized in the country of origin and by the MS competent consular post for that country. For some countries, such legalization is completely impossible because they are in war or there is no functioning administration (e.g. Somalia). **Further research will be necessary to map in a more coherent way whether procedures/exceptions exist in MS to overcome this force majeure situation, whether these procedures are uniform within any MS and are uniform (portable) across the EU.**

³ For an overview, see J. Verhellen, « La portabilité transfrontalière du statut personnel des réfugiés. Situer les interactions entre le droit international privé et le droit international des réfugiés », Rev.crit.dip 2017, n° 2 (forthcoming).

1.2.1.2. No documents

The absence of 'authentic' documents is one thing, the absence of 'any' document another. Civil registrars and judges in EU MS are often confronted with people who are unable to deliver a marriage or birth certificate.

People who fled their country with the fear of being persecuted often had no time to collect important documents. In many countries, marriage and birth certificates are not issued or individuals were unable to access the official authorities at the time of marriage or birth.

1.2.1.3. Fraudulent/false documents

In some countries, in order to obtain a certificate people have to wait until the authorities come to their village, which occurs for instance twice a year. As a result, birth certificates from those countries only have January or June as birth months, which may lead to suspicion of fraud, discussion whether a person is still a minor or not and thus entitled or not to a guardian, etc. Similar problems can occur when people come from countries that use another era (for instance the Persian calendar).

As personal status has a decisive impact on the legal condition of third State nationals under migration law, fraud with respect to civil status documents has become a major problem for receiving MS.⁴ In order to combat fraud, restrictive legislations have been adopted in many MS during the last decades (e.g. legislative measures to fight against marriages of convenience). As a result, migrants from countries whose birth and marriage certificates are notoriously unreliable are facing today a systematic suspicion of fraud. Alternative methods of proof are not always available and therefore migrants regularly find themselves confronted with the impossibility of proving the accuracy of their civil status. In practice, this leads to the destruction of family unity and constitutes a violation of the right to respect for family life, guaranteed by Art. 8 ECHR and Art. 7 of the EU Charter of Fundamental Rights.

Innovative approaches are urgently needed, recognizing that it is a complex issue, **allowing host countries to combat fraud efficiently without depriving the right to family life of its effectiveness** due to a mere factual impossibility to provide full proof.

Cooperation with the State of origin, if possible, is certainly the best approach. However, countries of origin are very heterogeneous. Their public administration structures have to be sufficiently developed to allow the development of international cooperation. The way forward should be realistic, advancing on an experimental basis with a limited number of countries of origin.

EU Regulation n° 2016/1191 on the circulation of public documents, which is applicable only between EU MS, should be used as a model for the relationships with a few selected third States, such as the Balkan States and Morocco, which are big countries of origin for the EU and have well-functioning civil status authorities. Article 14 of the Regulation provides a very promising procedure for cooperation between MS: where an authority has a reasonable doubt as to the authenticity of a public document, such as a birth certificate, it can submit a request for information, through the Internal Market Information System or the relevant central authority, to the authority that issued the document.⁵ International

⁴ See D. Macniven, « Fraud with respect to civil status », Note requested by the EP's Committee on Legal Affairs, 2012 (PE. 462.499).

⁵ Regulation (EU) 2016/1191 of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012:

« Article 14 Requests for information in cases of reasonable doubt

1. Where the authorities of a Member State in which a public document or its certified copy is presented have a reasonable doubt as to the authenticity of that public document or its certified copy, they shall take the following

agreements with selected third States could be modelled on this provision, so as to facilitate circulation of foreign documents.

1.2.1.4. Alternative methods

If no (authentic) documents exist, many questions arise both at the level of migration procedures and at the level of civil status procedures. The lack of documents may block migration files, but also has an impact on the migrants' family life in the host country. What are the alternative procedures/methods to replace missing personal status documents? Are these procedures adequate? Are there sufficient procedural guarantees, e.g. in case of age assessment procedures? Are such procedures uniform within any EU MS? Are they uniform across the EU: in particular, is Article 25(5) of Directive 2013/32/EU applied in a uniform manner? According to this provision, minority is presumed when, after exploring all age assessment methods available in the individual case of an unaccompanied minor, age determination with sufficient certainty is not possible. This presumption is not really applied in all MS, as attested by the illustrations below.

Several alternatives are available in the absence of (authentic) documents:

a) Supplementary judgments

A first alternative may be to produce a supplementary judgment concerning birth or marriage performed abroad. Such supplementary judgments are generally rendered in the country of origin, where the birth or marriage took place, and therefore are an alternative only in so far as the law of the country of origin provides for them. The supplementary judgment may replace a missing document or a non-authentic document. If it pertains to birth abroad, it may prove age and parentage; if it pertains to marriage abroad, it may prove marriage and sometimes also parentage (e.g. paternity presumption based on marriage). Its probative value is recognized, unless the judgment itself lacks authenticity or fraud is suspected.

b) Proof of minority: age assessment procedures

Correct age assessment is important in two regards: on the one hand, all children need to be given protection; on the other hand, adults posing as minors should be prevented from being admitted into child/youth care facilities as that may not serve their needs and also endanger the welfare of the other children placed there.

It is crucial for unaccompanied children to have a guardian appointed: without proper representation they cannot act legally, and especially not apply for asylum/act in asylum

steps to dispel their doubt: (a) check the available models of documents in the repository of IMI as referred to in Article 22; (b) if a doubt remains, submit a request for information through IMI: (i) to the authority that issued the public document or, where applicable, to the authority that made the certified copy, or to both; or (ii) to the relevant central authority.

2. A reasonable doubt as to the authenticity of a public document or its certified copy as referred to in paragraph 1 may relate, in particular, to: (a) the authenticity of the signature; (b) the capacity in which the person signing the document acted; (c) the identity of the seal or stamp; (d) the document having been forged or tampered with.

3. Requests for information made under this Article shall set out the grounds on which they are based.

4. Requests for information made under this Article shall be accompanied by a copy of the public document concerned or of its certified copy, transmitted electronically by means of IMI. Such requests and any replies to those requests shall not be subject to any tax, duty or charge.

5. The authorities shall reply to requests for information made under this Article within the shortest possible period of time and in any case within a period not exceeding 5 working days or 10 working days where the request is processed through a central authority. In exceptional cases where the time limits referred to in the first subparagraph cannot be adhered to, the requested authority and the requesting authority shall agree upon an extension of the time limit.

6. If the authenticity of the public document or of its certified copy is not confirmed, the requesting authority shall not be obliged to process them. »

proceedings. A guardianship should, therefore, be named as quickly as possible (see in more detail the study 'Children on the move: a private international law perspective'). This may involve complicated prerequisites, such as proof of age.

If no birth certificate exists or if the foreign birth certificate is not legalized or is considered to be unreliable, it is necessary to consider other **age assessment procedures**. The examples below from France, Belgium and Germany illustrate how asylum and migration authorities deal with the lack of documents and search for alternative methods, or how they have adopted restrictive practices showing a general suspicion of fraud towards third country nationals.

In **France**, the new Article 388 of the French *Code civil*, as amended in 2016, provides that minority should be presumed until the contrary is proven.⁶ Bone tests have to be authorized by the court and need the child's prior consent; moreover, they must indicate the margin of error. Examination of pubertal status is forbidden. This provision should change the practice of French migration authorities, which so far have not followed such legal presumption. Previous solutions were considered to be in breach of Article 8, ECHR, and the right to family life established therein.⁷

Unaccompanied children have, first of all, a right to an emergency shelter as soon as they declare they are minors. The age assessment procedure comes afterwards. A ministerial ruling clarifies the evaluation procedure.⁸ The evaluation is based on documents and interviews with the migrant. If doubts remain, the president of the county council (*conseil départemental* in charge of the child welfare services) can contact the service in charge of combating fraud⁹ or seize the juvenile Court. The implementation of this provision, while still in the initial phase, shows that a well-done evaluation results in avoiding the need for medical tests. This is particularly important since those tests do not clear up any possible doubts. In the family reunification process, however, the competent authority (the *Préfecture*¹⁰ on the one hand, the French consulate on the other) can deny the age minority without seizing the juvenile Court. The decision can be challenged before the administrative courts. Should they apply Article 388 of the *Code civil*? In our view, the answer should be positive, even though the exact scope of application of this provision is not completely clear regarding children holding a foreign nationality and not present in France.

In **Belgium**, there is no such legal presumption of minority. However, under the Guardianship Law, the Federal Guardianship Service within the Federal Public Service Justice, which is responsible for designating guardians for unaccompanied minors, decides whether or not a person has attained the age of majority. If the Guardianship Service or the asylum and migration authorities have reasonable doubts as to the age of the person concerned, the Guardianship Service immediately orders a medical (skeletal and dental age) examination by a doctor¹¹ in order to verify whether or not the person is younger than

⁶ Law n° 2016-297 of 14 March 2016.

⁷ See for instance, ECHR, 10 July 2014 (4 decisions) n° 52701/09, n° 2260/10, n° 19113/09, and n° 23851/10, D. 2015. 455, F. Jault-Seseke, Rev. crit. DIP 2015 p. 373, S. Corneloup.

⁸ Arrêté du 17 novembre 2016 pris en application du décret n° 2016-840 du 24 juin 2016 relatif aux modalités de l'évaluation des mineurs privés temporairement ou définitivement de la protection de leur famille, JORF n°0269 du 19 novembre 2016

⁹ For the verification of documents, in each Prefecture (the home office in each county), there is a service dedicated to the documentary fraud. The matter can also be referred to the central department of the border police. The process is long (long-waiting time), costs are important and it is questionable whether it furthers the child's best interests.

¹⁰ In France, the *Préfecture* is an administrative authority, forming part of the Ministry of Home Affairs and representing it locally.

¹¹ The costs of these medical tests are at the expense of the requesting authority (e.g. the Guardianship Service, the migration authorities).

18 years old.¹² In case of doubts as to the result of the medical examination, the youngest age has to be taken into consideration. Once the Guardianship Service has decided on the age assessment, the Office of the Commissioner General for Refugees and Stateless Persons and the Immigration Office must respect the assessment.

It is important to mention here a decision of 18 July 2013 of the Constitutional Court clarifying that the age determination procedure with a view to the possible appointment of a guardian is an application of a police and security law.¹³ Pursuant to Article 144 of the Constitution, however, civil courts are exclusively competent for legal actions concerning civil rights. Consequently, if the child wishes to have his or her name and date of birth confirmed with *res judicata* effect, he or she has to initiate legal proceedings before the competent civil court.¹⁴ An interesting example can be found in a case before the court of first instance in Hasselt (25 February 2008).¹⁵ The case concerned a child who arrived in Belgium on 19 December 2004 and subsequently asked for asylum. Since the child was unable to hand over any document proving his age, the Guardianship Service ordered an age assessment. The result of the test showed that the child was 17,5 years and therefore had to be treated as a minor. During his stay in Belgium, the child was able to obtain three documents: 1) his *taskara* (Afghan identity card), 2) a document from the Afghan embassy proving his date of birth which had been legalized by the Belgian Public Service Foreign Affairs and 3) an Afghan passport. Since the Guardianship Service refused to take note of the child's date of birth mentioned in these document, the child initiated proceedings before the court. Bearing in mind that the child, due to the war and the communication problems in his country of origin, could not obtain an original birth certificate, the court decided that the child could prove his birth by all legal means. The court concluded that preference should be given to the information provided in the documents handed over by the child.¹⁶ The fact that the court decided to award more weight to the (non-authentic) documents than to the medical age assessment is important especially since the use of medical procedures for age assessment is considered to be controversial.¹⁷

In **Germany**, the youth welfare office (*Jugendamt*) has an emergency competence and duty to provisionally take into care (including the right to act as their interim representative) all foreign unaccompanied minors, defined as those under the age of 18.¹⁸ This is followed by an age assessment procedure.¹⁹ The youth welfare office is not bound by the age assessment given by the asylum authorities. Guidelines for the age assessment procedure have been developed by the national working group of state youth welfare offices.²⁰ Under these guidelines, which seem to be applied uniformly across Germany, the assessment will be based primarily on the documents (especially identity documents) provided by the child. According to the Bavarian state youth welfare office,

¹² The Council of State explicitly decided *that the only aim of the medical examination is to verify whether the person is younger than 18. The Guardianship Service cannot replace the date of birth in the foreign birth certificate by a new date based on a medical examination* (Council of State 31 March 2015, n° 230.704, available at <http://www.raadvst-consetat.be>).

¹³ Constitutional Court, 18 July 2013, n° 106/2013, available at <http://www.const-court.be>.

¹⁴ Article 569 of the Judicial Code, Article 46 of the Civil Code and Article 27 of the Belgian PIL Code.

¹⁵ Available in Dutch at <http://www.kruispuntmi.be/rechtbank-van-eerste-aanleg-van-hasselt-2008-02-25>.

¹⁶ In accordance with Article 47 of the Belgian Civil Code and Article 27 of the Belgian PIL Code.

¹⁷ See V. Feltz, „[Age assessment for unaccompanied minors. When European countries deny children their childhood](#)”, 28 August 2015, p. 17.

¹⁸ For a general overview of the youth welfare office's role competences, see Lack, K., "Die Rechte unbegleitet in die Bundesrepublik eingereister Minderjähriger", in: Heilmann, S. / Lack, K. (eds.): *Die Rechte des Kindes*, Cologne 2016, 85-114, and Veit, B., "Das Gesetz zur Verbesserung der Unterbringung, Versorgung und Betreuung ausländischer Kinder und Jugendlicher", *FamRZ* 2016, 93-98.

¹⁹ Lack, K., cited, at 102 ff.; critical analysis Veit, B., cited, at 96 f.

²⁰ Bundesarbeitsgemeinschaft Landesjugendämter, „Handlungsempfehlungen zum Umgang mit minderjährigen Flüchtlingen“, 2014, http://www.bagljae.de/downloads/118_handlungsempfehlungen-umf_2014.pdf, 15 f.

documents/certificates are accepted as a basis for age assessment if they appear “reasonably dependable” which is the case for most documentation.²¹

If documents are not available or inconclusive, a “qualified inspection” of the child is conducted by two experienced pedagogical staff of the local youth welfare office who also have knowledge of the child’s cultural background. This inspection includes an examination of the outward appearance (criteria are e.g. voice, hair/beard, crease lines) as well as the content of the interview conducted with the child with the help of a language mediator/interpreter (e.g. whether the child’s description of his role within his family at home matches the role typically assumed by boys of that age in his cultural background). Additionally, witnesses and experts may be questioned and further documents (e.g. from asylum authorities) taken into consideration. The age assessment decision is based upon the individual appreciation of the combination of the various factors in each case.

In case doubts remain, a medical examination may take place (upon the child’s request or an order by the youth welfare office). However, there seem to be regional differences as to the cases, in which this examination is carried out. This is due to the unprecise results of the medical examination which is only reliable where the young person is at least 21 years old.²² The examination requires the consent of the child and his/her guardian. This causes a problem, as an official guardian has not yet been appointed at this stage. If minority cannot be excluded with certainty, the youth welfare office will usually take the person into preliminary care and can then consent to the examination based on its emergency competence – but this leads to a conflict of interest. In practice, the youth welfare offices will assume minority whenever the age remains unascertainable.

The youth welfare office’s decision as to age is not legally binding upon other authorities and courts. However, it has become established practice for other authorities to respect the youth welfare office’s assessment in order to avoid conflicts between authorities.²³ The youth welfare office’s decision can be contested in the administrative court (this may entail a detailed expert opinion). For this reason, proper documentation of the assessment procedure is of paramount importance.

In **Italy**, the new Statute on Protection of Foreign Unaccompanied Children (Law No 46 of 7 April 2017) has extended to all children the procedures already envisaged by Ministerial Decree No 234/2016 on Assessment of Age of Children Subject to Human Trafficking. Under the present legal frame, judicial or administrative assessment of age should only be made when age cannot be ascertained through a document containing proof of age, if possible, in cooperation with the diplomatic or consular authorities of the child’s alleged place of residence. Diplomatic channels should not be used when the child asks, or could ask, for international protection. When such documents are not available, age is assessed by public authorities, firstly, through an interview with the child in the presence of a cultural mediator and a (provisional) guardian. The child and his legal representative are

²¹ If however criminal investigations point to a type of documents (e.g. Afghan *taskara*) being faked in a multitude of cases and it is difficult to ascertain their authenticity, these documents are seldom used as the (sole) basis of age assessment decisions.

²² The youth welfare offices seem to take a slightly different approach here. In Westphalia, the examination is only conducted when the young person seems to be way older than he or she claims to be, and far beyond the age of majority. In any other doubtful cases the young person is treated as a minor. In Bavaria, the examination is taken more often. Depending on the individual case, methods include e.g. an examination of the clavicle bone or dental examinations. It is currently debated how far the use of x-ray examinations is admissible (see e.g. OLG Hamm 30.1.2015 – 6 UF 155/13, FamRZ 2015, 1635; OLG München 12.3.2012 – 26 UF 308/12, FamRZ 2012, 1958; OLG Köln 28.6.2012 – 25 WF 107/12, MDR 2013, 286). More advanced methods (use of methylation marker set for forensic age estimation) are not used in practice yet.

²³ E.g. there was a case where a person assessed to be an adult by the youth welfare office and accordingly placed in adult asylum seekers’ accommodation claimed again to be a minor towards the Federal Office for Migration and Refugees who transferred him back to the youth welfare office.

informed of the need to ascertain the age and the consequences thereof. In case of doubt on the child's declared age, authorization can be asked to the Prosecutor to order social-health checks to assess the child's age. The child and his legal representative are informed of the need to ascertain the age through medical checks and the legal consequences thereof, and the right to oppose such procedure.²⁴ Results are notified to the foreign child in a manner compatible with his age, maturity and level of literacy, using a familiar language. Moreover, results are notified to the person who holds parental responsibility as well as to the judicial authority which requested the assessment.

c) Proof of parenthood: genetic tests

If (legalized) documents cannot be obtained from the administration of the country of origin, the only option left is to resort to the method of factual **proof by a genetic paternity/maternity test**. This is not exactly in accordance with the rules on legal parenthood in several MS' substantive family law, which do not necessarily correlate with genetic kinship. While it can often help, it can also create problems as will be illustrated below.

In **Germany**, when a parent is granted refugee status and applies for family reunification with his or her children, the German embassy in the country where the children are present is responsible for issuing the visa. If the child cannot present sufficient certificates, the refugee may try to prove genetic parenthood by presenting the results of a genetic paternity test. This method, which must be fully paid for by the refugee, is regularly used.²⁵ With regard to unaccompanied minors entering Germany, family reunification is seen as one of the tasks of the youth welfare office (see above). As soon as the minor is granted refugee status, the guardian will investigate whether family reunification is reasonable and can be performed. However, the child must prove parenthood if the necessary documents cannot be presented. Here, again, the genetic testing method is used.

In **Belgium**, the lack of documentary proof can create frictions between the asylum and migration authorities' decisions and the National Register authorities' ones. When e.g. a Syrian man is granted refugee status, he will seek family reunification with his wife and children still living in Syria or in a refugee camp in Turkey. The current practice is that the man's family members will be granted a visa to come to Belgium, but to satisfy the requirements of registration into the National Register they will need to produce legalised marriage and birth certificates. If they cannot provide these documents, they will be registered as 'unrelated' to the man, with all kinds of negative consequences (e.g. no child or other family benefits). The pragmatic solution is to make those family members also apply for asylum in Belgium.

In **France**, the 20 November 2007 Act allowed DNA evidence but under very restrictive conditions.²⁶ It could only be used with regard to maternity proof. However, the decree which was necessary to implement the test was never passed because biological

²⁴ Medical age assessment is made by a multidisciplinary team, and includes a psychological and auxological interview that shall be conducted with due regard to the child's vulnerable situation and right to privacy; only as a last resort a wrist X-Ray examination is performed. All officers are advised of the error-rate of this exam and in doubt they shall apply a presumption of minority. Accompanying literature and real practice show that XR-results often do not assess the real age, not only because of the technical uncertainty of this exam, but also because the comparison tables are drawn on human-typo (typically North-Western population) that do not reflect the typical social-medical growing environment of Middle-East population.

See also https://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf.

²⁵ The DNA sample of the child (and the other parent) is generally taken under the witness of a member of the staff of the Embassy and sent to a German clinic, where it will be compared to the DNA of the parent who is in Germany.

²⁶ Law n° 2007-1631; Art. L. 111-6 Code for Entry and Residence of Foreigners and the Right of Asylum (CESEDA).

identification established for foreign nationals only generated a lot of reactions leading to the solution being dropped. Therefore, the Council of State denied applications for genetic tests made by migrants who sought such tests in order to establish parentage and therefore obtain family reunification.²⁷ Criticism was based on different arguments, such as the fact that in civil law parentage is not necessarily based on genetics, and that genetic tests are extremely intrusive. Moreover, it was feared that they might be used as a means to prevent migration, and regrettably their usefulness for migrants themselves, when they are not able to prove their parenthood otherwise, was not sufficiently put forward. Children's best interests are obviously awaiting a reform.

In **Italy**, Article 29 of the Consolidated Text on Immigration²⁸ provides that where:

- a) family relationship cannot be proven with certainty by certificates or attestations by the competent foreign authorities,
 - b) there are no recognized authorities, or
 - c) there are reasonable doubts as to the authenticity of the abovementioned documents,
- the Italian diplomatic or consular representatives shall issue certificates on the basis of DNA tests.

The rule applies to all foreigners who have a residence permit in Italy and are seeking family reunification for their relatives. In relation to refugees, however, Article 29-*bis* further provides that proof may also be given by any other means that may show the existence of a family bond, including elements drawn by documents and reports adopted by international organizations that are considered suitable by the Italian Foreign Ministry. Furthermore, the law stresses that an application for family reunification shall not be refused on the sole ground of lack of documentary proof. DNA test is done through saliva testing and is voluntary. The costs (ca 230 euro/per person) are normally born by the person resident in Italy and seeking to show the family relation for the purpose of reunification. However, in regard of those who have been granted international protection (refugee status or subsidiary protection) and who are in proven financial difficulties and for whom it is objectively impossible to cover the costs, these are covered by the Italian State. DNA sampling is performed in Italy, in front of public officers so as to ensure the identity of those who take the test, while family members are tested in their country of residence, at the Italian Embassy or Consulate. DNA samples are sent to Italy and compared at a genetics laboratory in Rome.

- d) No proof of marriage

Unlike parenthood, **missing marital status documents cannot be replaced by medical tests**. This is often problematic in family reunification files.

In **Germany**, a couple in asylum proceedings claiming to be married will be interviewed separately about their relationship. If their answers are plausible, they will be deemed to be married. Also, if the couple has a child and tests of genetic parenthood show that both are the child's parents, this will be taken as proof of marriage.

In **France**, the asylum authority OFPRA establishes documents in lieu of civil-status records for persons granted international protection.²⁹ The Office issues a marriage certificate after

²⁷ Conseil d'Etat, 2 Jan. 2009, n° 323129. Currently, a right to DNA tests exists in French family law in order to prove parentage (see Civ. 1re, 28 March 2000, Bull. n° 103), but this right presupposes French law to be applicable (which is not the case when the mother holds a foreign nationality, see Art. 311-14 *Code civil*) and requires a court order.

²⁸ Legislative Decree No 286/1998, as modified by Legislative Decree No 5 of 8 January 2007, implementing Directive No 2003/86/EC on the right to family reunification.

²⁹ Art. L. 721-3 Code for Entry and Residence of Foreigners and the Right of Asylum (CESEDA).

interviewing the person concerned and, if necessary, after investigations in cooperation with its information mission abroad. The document replaces the missing foreign marriage certificate. This procedure is only available for refugees and beneficiaries of subsidiary protection.

A similar procedure exists in **Belgium** where the Office of the Commissioner General for Refugees and Stateless Persons (CGRS) issues a marriage certificate to recognized refugees - however, this procedure only applies provided that both spouses reside in Belgium.³⁰

1.2.2. Personal status per se

1.2.2.1. General

Legalization or apostille does not certify the 'content' of the underlying document itself. To evaluate its content, PIL provides for **specific grounds for non-recognition**. One of those grounds is **public policy**. A Syrian couple, for instance, might be confronted with a 'substantive' ground for non-recognition, e.g. the fact that one of the spouses is a minor. Child marriages are considered to be contrary to public policy in most EU MS. In a similar way, polygamous marriages will undergo the test of the public policy exception.

How does this public policy exception function in a migration context, for instance towards child marriages which are concluded in extreme circumstances to protect girls from sexual violence in refugee camps?³¹

There is no uniformity among EU MS regarding the recognition of (the validity of) marriages entered into other States (whether EU MS or third States).³² In most EU countries no formal marriage recognition procedure exists, implying that recognition of foreign marriages has to be effected by each authority that has to register the marriage (e.g. civil registry, asylum and migration authorities).

From a private international law perspective, the fact that a foreign marriage is not accepted/recognized in an EU MS implies that such a marriage may be deprived of its legal consequences. This non-recognition will have a huge impact on migration files: no family reunification visa or residence permits will be granted, no transfers under the Dublin Regulation will be performed, etc.

This paper will focus on the **currently much-discussed topic of child marriages**. The issues that arise relate, firstly, to the legal recognition of such marriages: should their recognition be banned, in an effort to prevent forced marriages, or is it possible to undertake a case-by-case analysis of the circumstances of each marriage in order to determine what, in practice, is in the best interest of the child? The issue becomes even more complex when we take into account the fact that several MS allow underage nationals to get married (either from a certain age, or with specific types of authorisation, or both). In some cases, children on the move claim that they married of their own free will; in other cases, girls are encouraged to get married in order to protect them from the risk of being raped during the journey bringing them to Europe. How is the best interest of the child

³⁰ See <http://www.cgrs.be/en/documents>.

³¹ See the European Commission Communication on the protection of children in migration, [COM\(2017\) 211](#), 12 April 2017, p. 2.

³² The 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages only applies in Luxemburg and The Netherlands. EU wide ratification of this Convention which deals with the recognition of the validity of marriages entered into *any* foreign State (not just contracting States) would bring much needed harmony in this respect throughout the EU.

assessed in such cases? From a practical point of view, the issue also arises as regards accommodation - should child spouses be accommodated together, like a family, or not?

1.2.2.2. Recognition of foreign marriages: the case of child marriages

In many EU MS a distinction is made between formal and substantive requirements to determine whether the marriage was validly created abroad. As a rule, the law of the State where the marriage was celebrated governs the formal requirements, and the national law (in the UK and Ireland, the law of the domicile) of each spouse will determine the substantive requirements.

Under this rule, in **Belgium**, the substantive validity of a marriage concluded in Iran between a 15-year-old Iranian girl and an 18-year-old Iranian boy is determined by Iranian law, under which the marriage is valid.³³ However, the public policy exception allows Belgian authorities to refuse the recognition of such marriages if this would result in a violation of fundamental values. In general, it is widely accepted that child marriages fall under the notion of forced marriages since children lack the capacity to take a fully informed and consensual decision that may have consequences on their legal status. This does not, however, mean that the recognition of all child marriages should be refused. The Belgian minister of Justice recently (June 2016) stated in Parliament that the use of the public policy exception in cases of child marriages requires an *in concreto* balance of interests.³⁴ Taking into account the fact that it is also possible for Belgian citizens to enter into marriage without having attained the age of majority (through a procedure before the family court, Article 145 Belgian Civil Code), a foreign child marriage cannot automatically be declared contrary to public policy.

Although no recent case law with regard to the recognition of foreign child marriages is publicly available, questions raised in the Belgian Parliament show that the issue is very much alive. The subsequent discussion revealed that in April 2016, 24 children were registered in asylum centres as being under-aged and married. In most cases, the child is separated from his or her partner/spouse. In practice this means that the person who already attained the age of majority will be referred to one asylum centre, while the child will be referred to another centre for unaccompanied minors. Only in exceptional cases - namely if the age of majority is soon to be attained, the age difference with the partner is limited and a socio-affective bond exists - will the partners be allowed to reside in the same asylum facility.

During the discussion in Parliament, the importance of figures was also emphasized. Although such data would be of crucial importance to comprehend the problems encountered by children on the move, Belgian authorities do not keep track of statistics with regard to foreign child marriages. Taking into account the absence of statistical information, the fact that the decision is made *in concreto*, that the Belgian authority has the right to examine each request independently, and in the absence of general guidelines for authorities confronted with foreign marriage certificates (involving a minor), it is - at this stage - impossible to draw up general conclusions with regard to the current practice in Belgium. Further empirical research is needed.

The situation in **France** is generally similar to the one in Belgium. For a French child to marry in France, a prior authorization by the *procureur de la République* for serious reasons is required (Art. 145 *Code civil*). Regarding child marriages celebrated abroad, though, the

³³ <http://www.girlsnotbrides.org/child-marriage/iran/>

³⁴ Question n° 1021 de madame de la députée An Capoen du 3 mai 2016 au ministre de la Justice (*Enfants mariées dans les centres d'asile*), Parliamentary Record of the Belgian Chambre of Representatives, 2015-2016, QRVA 54 077, p. 336-337.

French approach is rather tolerant and, applying a criterion of reasonableness, France admits the validity of a child marriage celebrated by a foreign authority abroad, if the age is not below the age of natural puberty, provided that the requirements of the national law of the spouses are met.³⁵ No recent case law is publicly available, and no political debate exists so far in France.

In our view, such a non-dogmatic approach is to be supported: actually, if the objective of combating forced marriage may advocate for a stricter attitude towards child marriage, the child's best interest *in concreto* may lie in the recognition of the marriage, in particular in the context of asylum.

In **Germany**, married children are in any case considered unaccompanied minors so they are taken into care by the youth welfare office, which usually means a separation from their spouse. The issue of recognition of marriages concluded by children is currently under reform (see below). The basic principle is that a marriage that is invalid under the spouses' national law can never be recognized as valid in Germany. This applies to a great number of marriages concluded by minors in refugee camps or shortly before leaving their home country. Even if the marriage was validly concluded under the law of nationality, its recognition might be denied if contrary to public policy. Irrespective of the spouses' age, a marriage that was concluded without the free consent of one or both spouses is always contrary to public policy.

As for the general marriage age, marriages of children under 14 years are contrary to German public policy and will not be recognised. On the other hand, it is mostly agreed that (as German law currently permits marriages from age 16 onwards in exceptional cases), if the spouse was 16 at the time of marriage, this points towards recognisability. The age bracket from 14 to 16 causes the greatest difficulty, especially when the child still belongs to such age group at the time of recognition. Such a marriage is rather not in accordance with German public policy. However, when dealing with children, the child's best interest must also be considered when applying the public policy exception. Therefore, the marriage of a child who entered it before the age of 16 may sometimes be recognised. Whether the full validity of the marriage is in the child's best interest will be determined in each individual case after careful scrutiny of all circumstances.³⁶ In a highly publicized case, the Bamberg Higher Regional Court decided after careful deliberation that it was in the child's best interest to recognize the marriage of a now 15-year-old girl who had married at the age of 14 in Syria.³⁷ An appeal to the Federal Court of Justice is pending.

The ensuing heated public debate related to this case has led the Federal Government to propose a draft law aimed at preventing underage marriages.³⁸ The law was voted on the 1st of June and sets the minimum age for marriages under German law at 18 years, with no possible exceptions. These rules are to be applied not only to marriages concluded in Germany, but also - through a modification of the PIL rules - to child marriages concluded under foreign law. The strict recast rules leave very little room for the recognition of child marriages. The draft law has been criticized as its very restrictive approach disregards general principles like the protection of acquired rights and leaves no room for individual

³⁵ See for instance, I. Barrière-Brousse, *JurisClasseur Civil*, App. Art. 144 to 227, Facs. 10, *Mariage. – Conditions de fond*, 2014, n° 95.

³⁶ For further information, see Andrae, M., "Flüchtlinge und Kinderehen", *NZFam* 2016, 923-929; Antomo, J., "Kinderehen, ordre public und Gesetzesreform", *NJW* 2016, 3558-3563; Coester, M., "Kinderehen in Deutschland – Stellungnahme der Kinderrechtskommission des Deutschen Familiengerichtstags e.V. (DFGT) v. 29.11.2016", *FamRZ* 2017, 77-80.

³⁷ OLG Bamberg 12.05.2016 – 2 UF 58/16, *FamRZ* 2016, 1270, with notes by Mankowski, P., *FamRZ* 2016, 1274 und Majer, C., *NZFam* 2016, 1019.

³⁸ https://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/DE/Bekaempfung_Kinderehe.html with various official responses.

decisions taking into consideration the child's best interest.³⁹ Additionally, treating these marriages as never having existed legally entails negative consequences concerning maintenance, succession, paternity and social law which may well result in children being ultimately given less protection, even though the draft provides that such non-recognition is not to have negative consequences in terms of family, asylum or residence permits.

1.3. Recognition of personal status under PIL without consequences upon migration status

1.3.1. Polygamous marriages in a migration context

In several MS (Belgium, France, Germany, Italy) each spouse's national law is decisive for the question of whether he or she has validly entered into a polygamous marriage. As a result, a polygamous marriage is impossible when one spouse has (inter alia) a EU nationality and is only possible if both spouses come from legal backgrounds that allow polygamous marriages. Even in such cases, however, recognition of polygamous marriage may be refused on the grounds of public policy.

From a PIL perspective, **a particular aspect of the public policy exception** becomes important here: **the proximity of the marriage** to the MS. For instance, when a man comes to Germany from Iraq with his two wives and it turns out he had validly married the second wife with the judge's permission in Mosul many years ago, the second marriage will usually not infringe German public order. This is due to the fact that there was no connection with Germany at the time of the marriage. It would be quite different if a man had returned to his home country from his habitual residence in Germany in order to marry a second wife in Iraq. In PIL a distinction can be made between recognizing a foreign polygamous marriage in general terms (something that will fall into the public policy exception) and recognizing the *effects* of a situation that was lawfully created abroad (which would affect less the common values underlying public policy, the so-called *effet atténué* - and that could, in specific cases, be acceptable). Based on such distinction, courts in several MS (such as France, Belgium, Italy, Germany) have already accepted various effects of polygamous marriages, for example in regard of maintenance obligations, widows' pension, some social security benefits, etc. The main, and probably only consistent, exception to accepting the effects of polygamous marriages is to be found in the field of migration, in particular with regard to family reunification. It remains impossible for a married man to have a second wife come to a EU MS. In particular, polygamous marriages are excluded from the right to family reunification Europe-wide,⁴⁰ and residence permits, for instance, are systematically denied to polygamous spouses under national migration laws (e.g. Belgium⁴¹, France⁴², Italy⁴³).

In a migration context the question arises whether it is still really about the incompatibility of polygamy and its effects with regard to public policy, or whether it boils down to finding ways to control the flow of immigrants from certain countries. This can be illustrated by the complicated immigration (policy) constructions created by the Belgian Immigration Office: through the non-recognition of foreign marriage dissolutions, the person(s) involved are

³⁹ See, e.g. Coester, M., "Kinderehen in Deutschland – Stellungnahme der Kinderrechtskommission des Deutschen Familiengerichtstags e.V. (DFGT) v. 29.11.2016", FamRZ 2017, 77-80; Antomo, J., "Verbot von Kinderehen?", ZRP 2017, 79-82.

⁴⁰ Directive n° 2003/86/EC of 22 Sept. 2003 on the right to family reunification, Art. 4 (4).

⁴¹ Article 10, § 1 al. 2 of the Belgian Immigration Act of 15 December 1980 on entry, stay, establishment and removal of foreigners, according to which family reunification of a spouse is impossible to a polygamous foreigner when the foreigner already has another spouse residing in Belgium.

⁴² Article L. 314-5 Code for Entry and Residence of Foreigners and the Right of Asylum (CESEDA).

⁴³ Article 29, par 1-ter of Legislative Decree No 286/1998.

considered to be polygamous and family reunification is denied. Indeed, Article 57 of the Belgian PIL Code provides a specific and severe recognition rule for foreign marriage dissolutions based on the will of the husband. The basic principle of Article 57 is non-recognition of repudiation. Two elements are definitive in this: the unilateral character of the marriage dissolution and the fact that the repudiation is the husband's prerogative. When these two elements are present, recognition is not possible, unless a number of restrictive conditions are cumulatively met. In practice, this provision - which aims at protecting the equal rights of women and men - is in danger of being used as a tool for a restrictive migration policy at the expense of the fundamental right to family life. When Belgian embassies and consulates for instance legalize foreign divorce documents, they tend to qualify marriage dissolution documents from Islamic countries rather pro forma as repudiations; this, even in the case of documents from countries where repudiations do not exist, e.g. Tunisia.⁴⁴ This qualification results in the application of article 57 and the use of the 'article 57 sticker' in the framework of legalization. This sticker has a huge impact. The 'Article 57 sticker' or the stance of the Ministry of Foreign Affairs under which the embassies and consulates fall, takes the form of a binding opinion which other administrations, such as the immigration office and local authorities in Belgium, then simply take over. Civil servants rarely question the embassies' and consulates' judgment, as they are considered to be in the best position to assess these matters locally. Based on this qualification the recognition of a divorce/repudiation of a Moroccan man, for instance, is easily refused. When this man marries again with another Moroccan woman and this woman requests a family reunification visa, this visa will be easily denied for reasons of polygamy (the man being considered still to be married to this first wife when he remarried in Morocco). **Recognition of foreign marriages/marriage dissolutions under PIL are one thing, the way these PIL rules are used (instrumentalized) in a migratory context another.**

1.3.2. Recognition of *kafala*/adoption without consequences for migration

The unsatisfactory interaction between PIL and migration law has also given rise to difficulties under the 1996 Hague Convention, which is in force in all MS. The Convention applies to measures aimed at protecting children and to foster care, including *kafala*, but not to decisions on the right of asylum and on immigration. This causes difficulties: States are supposed to recognize the foster care arrangements obtained abroad (i.e. in third countries), but they do not necessarily (and often do not) allow children to enter their territory (refusal of visa or residence permit). The recognition of the *kafala* is a well-known illustration of insufficient coordination between the two sets of rules. **While under PIL, the *kafala* brings about several civil law effects in EU MS, it is not systematically followed by the possibility for the child to legally enter/reside in the EU territory.**

The Chbihi Loudoudi case⁴⁵ shows that although Article 8 of the ECHR does not guarantee non-nationals with the right to enter or reside in a particular State, the Convention doesn't allow Member States to deny a child placed under *kafala* the right to enter and reside on its territory without having examined the interests of the parties concerned. In practice, this means that Member States must strike a fair balance between the child's interests and those of his/her *khafils*, and of society as a whole. A MS that refuses a child access to its territory might violate Article 8 of the Convention if the refusal creates disproportionate

⁴⁴ Henricot, C., « L'application du Code marocain de la famille, à la croisée des jurisprudences belge et marocaine en matière de dissolution du mariage », *Journal des Tribunaux*, 2011, 648-650 ; Verhellen, J., "Real-life international family law. A Belgian empirical research on cross-border family law" in K. Boele-Woelki, N. Dethloff and W. Gephart (eds.), *Family law and culture in Europe: developments, challenges and opportunities*, ed. Cambridge, Intersentia, 2014, 328-330.

⁴⁵ ECtHR 16 December 2014, n° 52265/10, Chbihi Loudoudi and Others/Belgium.

repercussions on the private or family life of the individual(s) concerned. In some Member States (e.g. Germany), the idea of protecting the *de facto* family under the ECHR and the German constitution (Art. 6 GG) is applied, if the child has really lived together with the *khafils* as a family. However, it is unclear whether these standards are fully implemented with regard to applications for family reunification. If the child has never lived with the *khafils*, the prevailing opinion is that the protection of the family does not apply and that a *kafala* cannot be used as a basis for a family reunification.

Although the existence of rights is undebatable in theory, the situation in practice shows that children placed under *kafala* and their *khafils* often face a long legal battle before being granted any form of recognition and right to reside on a MS' territory. The EU should spread awareness of the existence of the 1996 Hague Convention and the obligations it imposes on EU MS in respect of migrant children, including those subject to a *kafala* arrangement. MS should be made aware of the fact that the *kafala*, although unknown in their own legal system, creates certain rights for migrant children. More information on the *kafala* can be found in the paper "Children on the move: a private international law perspective" (at 3.2.4).

In some MS similar difficulties exist with regard to certain foreign adoptions. Despite a foreign adoption judgment, **French authorities** for instance often do not issue a visa allowing the child to enter the French territory. These difficulties exist in particular for intra-family adoptions, for example the adoption of the child by an aunt (suspicion of adoption of convenience) and adoptions from specific countries of origin (for instance Benin and Congo). In these cases, PIL rules on the recognition of the foreign adoption conflict with the discretionary power of visa authorities. In **Germany**, the distinction between full and simple adoptions is decisive: a visa for family reunification will always be issued in the case of full adoptions (when the adopting family entirely replaces the previous family), but may be problematic in simple adoption cases (when the family ties with the previous family are not severed by the adoption so double family relationships exist).

1.4. Family Tracing

1.4.1. Family Tracing – Belgium

The interview with the Belgian Red Cross emphasised the importance of the 'Trace the Face' website. Families can have their photo published on this website (<https://familylinks.icrc.org/europe/en/Pages/publish-your-photo.aspx>) in the aim of tracing and restoring families. Nevertheless, major problems remain. First, family tracing authorities are often confronted with the fact that a person is registered under different names due to language differences. When confronted with a name that contains symbols unknown to the Latin alphabet (e.g. a name written in Pashtun), the authority concerned needs to adapt the name in order to fit into the Belgian registers. As a result, it becomes very difficult to trace people by name. The interview revealed that throughout the years the organization gained knowledge on the way foreign names are being 'converted' into the Belgian registers. The Red Cross cooperates very closely with the National Register and the Immigration Office. Secondly, problems remain with regard to a migrant's date of birth, as mentioned above (1.2.1.3).

The interview with the Belgian Red Cross further revealed the contradiction which exists between the mission of the Red Cross to trace and restore families, on the one hand, and family reunification procedures, on the other hand, with regard to the concept of 'family'. In the eyes of the (Belgian) Red Cross, the concept of family encompasses not only people who share a biological tie, but also people who have built up a socio-affective bond with each other in the absence of biological ties. In many countries it is not uncommon to take care of

family members' children or in extreme circumstances of neighbours' children (the interviewee gave the example of a child from Somalia taken in when the neighbours were killed by Al Shahaab). This transmission of parental authority and responsibilities is seldom officially registered. The absence of biological ties or any official documents which may prove existing family ties leads to problems in the event of a family reunification request. Belgian migration authorities have shown little flexibility with regard to the interpretation of the notion of 'family member'. If no authentic documents exist, DNA tests will be carried out leaving little room to balance the interests at stake. As a result, families are denied the possibility to live together in a safe country (apart from the psychosocial impact of these family reunification rules - for instance, in the case of a child discovering that he/she is not a biological child of the family that has taken care of him/her, and that he/she therefore is not allowed to follow them abroad).

1.4.2. Family Tracing – Germany

The Red Cross actively conducts searches for relatives in 190 countries worldwide, cooperating with the United Nations High Commissioner for Refugees (UNHCR) and the International Social Service. A major problem is posed by the loss or lack of documents as (legalized) birth and marriage certificates are needed by the Embassies and the requirements for authenticity are strict; for children, DNA tests are commonly used instead. Additionally, the analysis and application of foreign law proves problematic for the diplomatic missions involved. The Red Cross also advises the guardian who may be less specialised and gives information on the prerequisites and chances of such unification.

Problems arise when parents are not in Germany or Europe, but still in the country of origin. They will then only be authorised to enter Germany if the minor has been granted refugee status (§ 36 German Residence Act). Currently, it seems to be a major impediment that only the parents, but not the siblings, of the minor may be authorised to enter Germany. The law allows exceptions only in cases of exceptional hardship, which are very rare.

1.4.3. Family Tracing – France

Family tracing essentially relies on the child's declarations.

Family tracing is done by the *Préfecture* when children claim asylum. *Préfectures* work mainly with consular and diplomatic services. In those instances, family tracing is done in order to determine which State is responsible for the asylum claim and not at a child's request. The notion of family is narrow.

In other cases, family tracing requires a request from the child and is done by children welfare services in cooperation with associations like the Red Cross. The notion of family is then broader.

1.4.4. Family Tracing – Italy

Family tracing in Italy is mainly carried out through the Red Cross and the International Organization for Migration. The latter cooperates since 2001 with the General Department for Immigration Policies (a governmental entity under the Ministry of Labour and Social Policies). Family tracing and assessment is carried out directly in the minor's family's place of residence through local staff. Once concluded, the assessment report is sent to Italy, finalized and sent to the Ministry of Labour and Social Policies, which in turn forwards it to the local authorities that are in charge of the minor. The final outcome of the assessment is a relevant tool not only when the child explicitly requires to be reunited with the family and the responsible authorities consider such an option to be in the child's best interest, but

also for the definition of the child's integration and reception path in Italy by the competent social services.

2. APPLICATION OF FOREIGN LAW

KEY FINDINGS

- The migratory context has its specific difficulties regarding the application of foreign law: 1) the assessment of foreign law by non-judicial authorities requires more attention and 2) the application and understanding of foreign law also arises in the context of recognition of personal statuses acquired abroad.
- There is a clear need for empirical research, such as interviews with civil registrars and asylum and migration authorities and the thorough collection of figures and practical data on the application of foreign law.
- There is a clear need for a EU initiative in order to improve the access to and the treatment of foreign law at a global level, both for administrative and judicial authorities. Action should be taken by the EU to follow up on the conclusions and recommendations of the Joint Conference of the European Commission and the Hague Conference of 2012.

The application of the law of foreign States is a well-known PIL issue which has already been the object of extensive research,⁴⁶ both within the EU and in the Hague Conference.⁴⁷ How do judges and administrative authorities access and treat the law of foreign States? How do they ensure that the law they are applying is up-to-date and accurate (both regarding its substance and, where applicable, its translation), and that their interpretation is in line with the interpretation given by the authorities of the relevant foreign State?

This in-depth-analysis is not the place to repeat the research and work already done so far, but to focus on specific migration-related issues.

2.1. Identification of specific migration-related issues

In the context of migration, specific difficulties regarding the application of foreign law arise in particular from the perspective of non-judicial authorities, such as civil status registrars and administrative authorities competent in the area of migration including asylum. Indeed, while the issue of access to, and treatment of, foreign law is generally considered in PIL

⁴⁶ See in particular: Esplugues, C., Iglesias, J.L. and Palao, G., Application of foreign law, Sellier, 2011; Schweizer Institut für Rechtsvergleichung, The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future, JLS/2009/JCIV/PR/0005/E4, (http://ec.europa.eu/justice/civil/files/foreign_law_en.pdf). See also, in alphabetical order: Corneloup, S., L'application de la loi étrangère, Rev. int. dr. comp. 2014, p. 361-388; Corneloup, S., Rechtsermittlung im Internationalen Privatrecht der EU: Überlegungen aus Frankreich, *Rebels Zeitschrift* 2014, p. 844 ff.; Fentiman R., Foreign Law in English Courts, 1998; Hartley T., Pleading and Proof of Foreign Law: The Major European Systems Compared, *ICLQ* 45 (1996) 271; Jantera-Jareborg, M., Foreign law in national courts. A comparative perspective, *Recueil des Cours de l'Académie de Droit International*, 2003; Kieninger E.-M., Ermittlung und Anwendung ausländischen Rechts, in: Leible/Unberath (Hrsg.), *Brauchen wir eine Rom 0-Verordnung?*, 2013, 479; Lalani S., Establishing the Content of Foreign Law: A Comparative Study, in *Maastricht Journal of European and Comparative Law*, vol. 20, n. 1, 2013, p. 75 ss.; Lalani S., A Proposed Model to Facilitate Access to Foreign Law, in *Yearbook of Private International Law*, 2011, vol. 13, p. 299 ss.; Pauknerova M. Treatment of Foreign Law in a Comparative Perspective" *RHDI* 2011, 5-25; Trautmann, *Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren*, 2011; Verhellen, J., Access to foreign law in practice: easier said than done, *Journal of Private International Law*, 2016, Vol. 12, No. 2, 281-300.

⁴⁷ On access to foreign law, several studies have been published by the Hague Conference on its website: <https://www.hcch.net/en/publications-and-studies/studies/access-to-foreign-law1>.

from a judicial perspective (i.e. when a question brought before a court is governed by foreign law and the court has to apply that law), a different focus is needed in the context of migration. More precisely, the PIL issue of access to and treatment of foreign law has two specific features in a migration context, which need to be further explored.

First, attention must be paid more specifically to **the assessment of foreign law by non-judicial authorities**. Indeed, when a private law dispute regarding a migrant is brought before a court (for instance, to obtain a divorce), no particularities exist as to the ascertainment and correct application of foreign law, compared to other PIL cases. A specific issue arises, on the contrary, when foreign law has to be applied by different migration-specific authorities.

- For instance, when a migrant arrives at the border, the border police may have to assess the authenticity of personal status documents or, for unaccompanied children, the proof of age minority.
- In case of family reunification, the competent administrative authorities may have to decide over marriages celebrated abroad under a foreign law. While this has become much easier since Art. 4(4) of the Family Reunification Directive (Council Directive 2003/86/EC) introduced a clear rule for polygamous marriages – stating that just one spouse’s entry may be authorised – there may still remain doubts concerning the validity of a monogamous marriage.
- Visa authorities may have, for instance, to decide whether a foreign adoption of a child (or a foster care arrangement, including *kafala*) is to be recognized, allowing the child to apply for a visa in the adopting parents’ or the foster parents’ country of origin (*khafils*).
- Asylum authorities applying the Dublin Regulation have to ascertain whether there are family members in other MS, with the consequence of conferring on that State the responsibility to decide on the asylum claim, which here again may require the application of the foreign law governing parentage and other types of family relationships. Moreover, asylum authorities generally issue national civil status documents to refugees, once international protection is granted, which may imply the need to transpose foreign civil status documents into national equivalents, or in the absence of foreign documents, to establish national documents relating to facts, which occurred abroad under a foreign law.

Secondly, as the first point already illustrates, the main issue is not the *application* of foreign law by a court, but the access to, understanding and treatment of, foreign law within the context of **the recognition of the migrant’s personal status**. Such recognition often requires assessing whether a foreign civil status, and where available, foreign civil status documents, are to be recognized (see also Chapter 1). In other words, in such cases, access to foreign law is not necessary for the purpose of applying this law to a dispute, in the stricter sense, but rather for the recognition of a personal status acquired abroad, which implies the understanding and treatment of foreign law.

In such instances several burning questions arise:

- Do the migration/asylum authorities have an obligation to apply foreign law?
- If so, do these authorities systematically apply the governing PIL conflict of laws rules and other PIL tools, or more generally are they aware of this PIL issue?
- How do these authorities ascertain the content of foreign law?

To the best of our knowledge, **no scientific research exists** on these burning questions.

2.2. Illustrations from different Member States

2.2.1. Examples from France: proposed extension of the definition of 'family members' to siblings under the Dublin Regulation and law applicable to consent to marriage

The European Commission, in its proposal to recast the so-called Dublin Regulation ([COM \(2016\) 270](#)), has proposed to extend the definition of family members under Art. 2 (g) of the regulation to "the sibling or siblings of the applicant", which would become a binding criterion to determine responsibility for asylum claims introduced by unaccompanied children. The Explanatory Memorandum states that "siblings are a rather targeted but important category where the possibility to prove and check the family relation is relatively easy and thus the potential for abuse is low".⁴⁸ If the proposal is adopted, which is to be hoped, parentage has to be established in order to assess whether the MS is responsible for examining the asylum application under the regulation. In France, the competent administrative authority is the « *préfet* ». ⁴⁹ In case of doubt, the *préfet* has to check whether the legal requirements of the applicable law are met. According to Art. 311-14 Civil Code, parentage is governed by the mother's national law, which leads to the applicability of a foreign law in almost all asylum cases. Given the important number of asylum applications and the strict time limits for the applications to be processed, is the *préfet* obliged to apply the conflict of laws rule of Art. 311-14? How does the *préfet* access the law of foreign States? How can he ensure that the law applied is up-to-date, and that his interpretation is in line with the interpretation given by foreign courts?

Courts can also have difficulties applying foreign law. This has led the French legislator to adopt a new provision over consent to marriage.⁵⁰ Consent to marriage is governed by the French Civil Code, regardless of the nationality of the spouses and of the place of its celebration. The conflict of law rules which designate the national law of each spouse do not play a role anymore.

Such examples demonstrate that PIL rules may not always fit, and that **autonomous and harmonized EU concepts** may sometimes be preferable. Such autonomous definitions of the concept of 'family members' could, for instance, explicitly prohibit any discrimination against children whose parents are not married, determine the age of majority⁵¹, exclude the recognition of forced marriages, etc.

2.2.2. Example from Germany: assessment of foreign law by administrative authorities

Public administration, such as the youth welfare offices, must often apply foreign law. This is mainly due to the fact that under the German conflict of laws rule, the law of the nationality is applicable to many personal or family related issues. We informally interviewed the heads of several authorities/departments and it seemed that they were in general very well informed about the need to apply foreign law. They do not have means to investigate foreign law, though. In order to ascertain the foreign law on the age of majority (which is not the 18th birthday in all countries) they often keep lists or registers, which they try to update whenever they get reliable information (e.g. when an international expertise was obtained in a court judgement).

⁴⁸ See European Commission, Child-specific provisions in the CEAS package, p. 19 f.; http://ec.europa.eu/justice/fundamental-rights/files/rights_child/ceas_provision_on_children_table_updated.pdf.

A similar extension to siblings should be considered in the context of related reform proposals such as that contemplated for Regulation 2003/109/EC on standards for the qualification of third-country nationals and stateless persons as beneficiaries of international protection.

⁴⁹ Art. L. 741-1 ff. Code de l'entrée et du séjour des étrangers et du droit d'asile.

⁵⁰ Article 202-1, Code civil (Law n° 2014-873 of 4 August 2014).

⁵¹ Article 2 the 1996 Hague Convention can serve as model.

Concerning refugees, the problem is often shifted because certificates are lacking. In a family reunification context, it might then be uncertain whether two people are married at all and even the kinship between parent and child may need to be ascertained. In such cases, it is not the application of foreign law that causes the difficulty but the lack of proof (see Chapter 1). However, cases remain where certificates can be obtained and the problems are caused by the foreign law itself.

For instance, foreign rules often need to be investigated when refugees claim to have concluded a traditional form of marriage in their home country and it must be decided whether this marriage is considered to be valid. The registry offices use a particular collection of foreign marriage laws.⁵² However, the Embassies, which are in charge when the spouses apply for family reunification, often judge the law on the basis of their own expertise. One example that was brought to our knowledge by the Red Cross is the situation in Eritrea. Here, the assumption used to be that there were three different types of marriage: state marriage, religious marriage with state registration, and purely religious marriage. However, the Embassy apparently does not accept religious marriage certificates at the moment, because they believe that such marriages are not valid under the law of Eritrea.

2.2.3. Example from Belgium: parenthood and the application of foreign law

In family reunification procedures, the asylum and migration authorities often decide on the validity of parental ties created abroad. In Belgium, this implies a control of the applicable foreign law, also in the context of recognition of foreign birth certificates or documents relating to parenthood (Article 27 PIL Code).

Empirical research in Belgium revealed that courts and administrative bodies frequently have to apply foreign law on the basis of the conflict of law rule over parentage; indeed, art. 62 of the Belgian PIL Code refers to the national law of the person whose parenthood has to be established/is being disputed. Interviews with judges (2010-2012) made it clear that they often manage to find the statutory provisions of the foreign law, but that it is virtually impossible for them to find recent changes in the law, foreign jurisprudence and the functioning of these provisions in the foreign legal system.⁵³ This burden must be as huge for asylum and migration authorities, but **figures do not exist** on the application of foreign law by those administrative authorities. The interview with the Red Cross revealed – very generally – that the understanding of foreign law in migration and asylum files is of crucial importance.

When it comes to parental ties, the Belgian asylum and migration authorities frequently ask for DNA testing, often not taking into account parental ties acquired abroad according to the applicable foreign law (see Chapter 1). This is different for the Civil Registry, which takes the foreign document as a starting point for updating civil status records.

2.3. Need for further research

No empirical data is currently available as regards access and treatment of foreign law in such migration-related contexts. Therefore, in order to get a comprehensive understanding of the reality, it is necessary to start by conducting **interviews with different non-judicial authorities involved in migration in several MS**. In particular, interviews with civil

⁵² Bergmann/Ferid/Henrich which is regularly updated.

⁵³ Verhellen, J., *Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, die Keure*, 2012, 80-178 (The Belgian Code of Private International Law in family matters. Field-test research of legislative intentions and the actual practice of courts and administrations)– for a brief overview in English, see Verhellen, J., *Access to foreign law in practice: easier said than done*, *Journal of Private International Law*, 2016, Vol. 12, No. 2, 281-300.

registrars and administrative migration and asylum authorities are needed. Without such prior empirical research, it is not possible to draw any conclusion, or to make any recommendation.

Regrettably, the time frame for the present in-depth-analysis did not allow us to **collect reliable and comprehensive empirical data**, which would have taken several months. However, all members of our research team are convinced that further research would be extremely valuable.

2.4. Need for further action: desirability of an EU initiative for improving access to, and treatment of, foreign law at a global level

As pointed out above, the issue of access to, and treatment of, foreign law is a general issue that arises in all fields of civil and commercial law. Authorities, including courts, throughout the EU, are struggling with this issue. The principal instrument available to provide information on foreign law is the out-dated, geographically limited, and often slow-operating 1968 European Convention on Information on Foreign Law (known as the London Convention).⁵⁴ In intra-EU cases the European Judicial Network may provide relief. But there is an obvious need for a modern, multilateral, global legal framework to assist authorities, including courts, in accessing foreign law and treating it correctly. Thorough, practical proposals to that effect have been developed in the context of the Hague Conference, and were the object of an in-depth global Joint Conference of the European Commission and the Hague Conference in 2012.⁵⁵ So far, however, no action has been taken to follow up on the conclusions and recommendations of this joint conference.

The issues relating to the assessment of foreign law arising in the context of migration, including migration for economic purposes, will subsist, and this reinforces the urgency of **the need of global work on access to, and treatment of, foreign law for both administrative and judicial authorities.**

⁵⁴ See <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/062>.

⁵⁵ See <https://assets.hcch.net/docs/b093f152-a4b3-4530-949e-65c1bfc9cda1.pdf>.

3. ART. 12 GENEVA REFUGEE CONVENTION (GRC)

KEY FINDINGS

- The EU should adopt a common understanding of the personal scope of application of Art. 12 GRC. The provision should be applied not only to refugees in the Geneva Convention sense, but also to beneficiaries of subsidiary protection.
- The EU should adopt a common list of matters included in the category of personal status under Art. 12 GRC.
- The EU should adopt a common understanding of the concepts of domicile and residence within the scope of Art. 12 GRC. Such autonomous definition should not be based on an intentional element, but rather on a factual ground, coinciding with the place of the person's principal home.
- The application of the law of the domicile/residence according to Art. 12 GRC should not be imposed on the refugee. The EU should allow a choice between the law of nationality and the law of domicile.
- The EU is encouraged to consider harmonizing the temporary scope of application of Art. 12 GRC, in order to avoid divergent national interpretations, on the one hand, and multiple changes of the applicable law due to the high mobility of many refugees, on the other hand.
- The EU is encouraged to promote better information to refugees on the change of the law applicable to their personal status, as well as on the main substantive rules becoming applicable under the new law. Such information could be provided through a brochure for refugees, to be distributed by national asylum authorities.

3.1. Introduction to the Geneva Refugee Convention

The 1951 Geneva Refugee Convention provides for a PIL rule in its Art. 12, which states as follows:

Personal status.

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.
2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

The first paragraph states a classic conflict of laws rule: the refugees' personal status is governed by the law of the country of their domicile or, lacking domicile, by the law of the country of their residence. The second paragraph provides for the protection of rights

previously acquired, subject to an *ordre public* reservation (para. 2). This rule applies in all EU MS except Sweden, which made a reservation to Art. 12.⁵⁶

To understand the practical relevance of this provision and its interaction with PIL rules, it is to be kept in mind that the GRC was adopted in 1951, at a time where personal status was still governed by the person's national law in many European countries. This is not true anymore to the same extent, because in modern PIL, nationality as a connecting factor has widely been replaced by habitual residence. Therefore, applying Art. 12 to refugees does not necessarily entail a general derogation from PIL rules. This is only the case in States where personal status matters are governed by the law of nationality.

This being said, the rules of Art. 12 take precedence over the contracting States' national PIL rules, while at the same time they have to be used in conjunction with national and/or European PIL rules. This means that their practical application is in fact diverging. Indeed, divergent interpretations can be observed as to the following four questions: who is a refugee? (3.2); what is personal status? (3.3); what is domicile/residence? (3.4); and is the application of the rule mandatory? (3.5). Moreover, the change of the connecting factor effected by Art. 12 GRC may entail a change of the applicable law (*Statutenwechsel* or *conflit mobile*). Therefore, the protection of rights previously acquired is needed, provided that they are compatible with the public policy of the protecting State. But here again, divergent national approaches exist (3.6).

3.2. Who is a refugee?

In and of itself, Art. 12 GRC is applicable only to persons who are "refugees" according to the Convention definition in Art. 1 GRC. Opinions diverge on whether the rule of Art. 12 GRC should also be applied to persons who are not refugees in the Convention sense but have been granted subsidiary protection status. This category of migrants comprises a significant number of current migrants to the EU, e.g. civil war refugees. A total of 258 000 persons were given subsidiary protection status in the EU-28 in 2016, while 366 000 were granted refugee status.⁵⁷ As subsidiary protection was introduced much later than the 1951 Convention, Art. 12 GRC does not, by itself, extend to this category *per se*. However, some MS have decided to extend the Art. 12 GRC rule in their national PIL codifications while others take a more restrictive approach. This is not satisfactory.

In **France**, the *Cour de cassation* applies the law of the country of the refugee's domicile not only to refugees in the Geneva Convention sense, but also to refugees who enjoy protection under national rules.⁵⁸

As to the persons who were granted subsidiary protection, in the absence of any specific provision on the law applicable to the personal status of beneficiaries of subsidiary protection, the French Office for the Protection of Refugees and Stateless Persons (OFPRA) considers French law to be applicable, provided that the person is domiciled in France and that his/her civil status has been established by the OFPRA.⁵⁹ Consequently, if such a person wants, for instance, to get married in another State, he/she has to comply with the substantive requirements of French law. Otherwise, the marriage would be deprived of any legal effect in France.

⁵⁶ According to the reservation made by Sweden, the Geneva Convention shall not modify the rule of Swedish PIL under which the personal status of a refugee is governed by the law of his country of nationality.

⁵⁷ Eurostat, Asylum statistics, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

⁵⁸ Cass. 1re civ., 25 June 1974, Martini, Rev. crit. DIP 1974, p. 678, A. Ponsard, JDI 1975, p. 330, F. Deby-Gérard.

⁵⁹ <https://www.ofpra.gouv.fr/fr/protection-etat-civil/mariage>

In **Germany**,⁶⁰ Art. 12 GRC is understood to apply directly only to persons who are refugees according to the GRC's own definition. German asylum law then extends GRC refugee status to persons entitled to (political) asylum under Art. 16a Basic Law (§ 2.1 German Asylum Act): they are given the same legal position as GRC refugees, including Art. 12 GRC, once their application for asylum has been granted (§ 3.4 German Asylum Act).⁶¹ The question whether the asylum authority's decision to grant asylum and legal refugee status is binding for the purposes of Art. 12 GRC (§ 6 German Asylum Act) is debated. The majority opinion is that a positive decision is binding so that, once asylum is granted, no further investigation of the refugee status is needed.⁶² On the other hand, a negative asylum decision or a pending asylum application procedure does not have any binding effect on the application of Art. 12 GRC.⁶³ In these cases, for the purposes of PIL the court/authority (e.g. the civil registry office) has to determine independently whether the person is a refugee under the GRC definition. This entails various problems. However, decisions diverging from those of the administrative authorities are rare.⁶⁴

Art. 12 GRC is not extended by German law to persons who are granted subsidiary protection (§ 4 German Asylum Act) or no protection at all (e.g. economic migrants). While the analogous application of Art. 12 GRC for persons who were granted subsidiary protection status has been suggested,⁶⁵ subsidiary protection in itself currently does not entail any modification of the national or European PIL rules.⁶⁶ Unless the PIL court/authority independently decides that the person also fulfils the GRC's refugee criteria, the connecting factor remains the person's nationality.⁶⁷

In **Austria**, according to § 9.3 PIL Act (1978), the law of the State of domicile (in the absence of domicile, habitual residence) is applicable to the personal status of refugees as well as persons "whose relations with their home State are broken off for similarly severe reasons".

In **Poland**, Art. 3.2 of the PIL Act (2011) replaces the connecting factor of nationality with domicile (or, where domicile is not established, habitual residence) for persons to whom protection was granted because of fundamental human rights violations in their country of nationality.

§ 28.4 of the **Czech Republic** PIL Act (2012) extends the application of "provisions of international agreements" (including Art. 12 GRC) also to persons who were granted subsidiary protection and to persons who have applied for international protection (but not granted it yet).

In **the Netherlands**, under Book 10 Art. 10:17 Civil Code, domicile (or, in the absence of domicile, habitual residence) is used as a connecting factor for persons who have been granted a residence permit for an indefinite or long term period.

⁶⁰ For an overview of the PIL status of refugees and other migrants under German law, see Lass, C., *Der Flüchtling im deutschen internationalen Privatrecht*, Munich 1995 (pre-Dublin-regulations); Mankowski, P., "Die Reaktion des Internationalen Privatrechts auf neue Erscheinungsformen der Migration", IPRax 2017, 40-49; Baetge, D., "Gewöhnlicher Aufenthalt und Personalstatut von Flüchtlingen", StAZ 2016, 289-295. Very critical of Art. 12 GRC and suggesting its reduced application Majer, C.F., "Flüchtlinge im internationalen Privatrecht – Vorschlag für eine teleologische Reduktion des Art. 12 GRC", StAZ 2016, 337-341.

⁶¹ J. von Hein, in: Münchener Kommentar zum BGB, vol. 10, Munich 6th ed. 2015, annex II to Art. 5 EGBGB no. 72; K. Thorn, in: Palandt, Bürgerliches Gesetzbuch, Munich 76th ed. 2017, annex to Art. 5 EGBGB no. 15.

⁶² Mankowski, IPRax 2017, 40, 41f.; Thorn, in: Palandt, annex to Art. 5 EGBGB no. 22.

⁶³ Mankowski, IPRax 2017, 40, 45; Baetge, StAZ 2016, 289, 290f.; von Hein, in: Münchener Kommentar, annex II to Art. 5 EGBGB no. 72.

⁶⁴ Mankowski, IPRax 2017, 40, 47; Majer, StAZ 2016, 337, 339; von Hein, in: Münchener Kommentar, annex II to Art. 5 EGBGB no. 75; Thorn, in: Palandt, annex to Art. 5 EGBGB no. 22.

⁶⁵ Mankowski, IPRax 2017, 40, 44.

⁶⁶ Thorn, in: Palandt, annex to Art. 5 EGBGB no. 20.

⁶⁷ Mankowski, IPRax 2017, 40, 46; Thorn, in: Palandt, annex to Art. 5 EGBGB no. 5.

The EU should adopt **a common understanding of the personal scope** of application of Art. 12 GRC. The provision should be applied not only to refugees in the Geneva Convention sense, but also to beneficiaries of subsidiary protection. Such modification would be in line with the general trend in PIL (within the EU and at a global level) to replace nationality by habitual residence as the connecting factor. Moreover, in migration law, the general trend over the past years has been to treat the various kinds of international protection increasingly similarly, aligning the subsidiary protection status with that of refugees. Such extension would avoid discrimination at the PIL level and further promote the migrant's integration in the protecting State.

3.3. What is personal status?

The consequences of the application of Art. 12 GRC depend largely upon the understanding of the term 'personal status'.

Despite the increasing use of habitual residence over nationality as a connecting factor, several MS still use nationality in their PIL for many family law questions as well as for other matters concerning the person, like legal capacity, capacity to contract or name.

For instance, in **France**, nationality is a connecting factor *inter alia* in matters of parentage. Art. 370-3 Code civil provides that the adoptive parent's national law governs the requirements for an adoption. In a case where the adoptive parent was a recognized refugee in France, the Court of appeal of Paris applied French law as the "national law of the adoptive parent who was granted refugee status in France by the OFPRA"⁶⁸.

It is debated whether all PIL rules using nationality as a connecting factor are 'personal status' rules in the sense of Art. 12 GRC, or whether 'personal status' should be interpreted narrowly to include only questions of family and succession law.

In **Germany**, while it is strongly argued that when applying Art. 12 GRC 'nationality' should generally be replaced by 'domicile',⁶⁹ some courts interpret personal status narrowly to include only questions of family and succession law.⁷⁰ The difficulties resulting from this can be illustrated by the example of legal capacity. Applying Art. 12 GRC to legal capacity (Art. 7 Introductory Act to the German Civil Code) means that the refugees' legal capacity is determined according to their domicile/habitual residence – so that refugees living in Germany will reach majority at the age of 18 (§ 2 German Civil Code). However, for persons granted subsidiary protection or no protection, legal capacity is still determined by their national law – which may have a higher age of majority than 18. Whether legal capacity is reached or not will in many cases depend on the somewhat arbitrary decision of whether refugee status/asylum or subsidiary protection is granted. For example, under Algerian law majority is reached at age 19 – an 18-year-old from Algeria will be considered to be of age (under German domicile law) if he is a refugee, but considered to be a minor (under Algerian national law) if he is granted subsidiary or no protection. On the other hand, excluding the question of legal capacity from the scope of application of Art. 12 GRC means that it is always determined according to the national law. This narrow interpretation avoids a distinction between refugee and subsidiary protection status – for example, an 18-year-old Algerian will always be considered a minor. This may in some instances be more advantageous for young refugees, who might prefer to be treated under the law of their

⁶⁸ Court of appeal Paris, 23 Oct. 2003, n° 2003/04398, JurisData n° 2003-231214 (all requirements of the French law were met and the adoption accepted).

⁶⁹ Baetge, StAZ 2016, 289, 291f.; Majer, StAZ 2016, 337, 337f.; von Hein, in: Münchener Kommentar, Art. 5 EGBGB no. 6; Thorn, in: Palandt, annex to Art. 5 EGBGB no. 23.

⁷⁰ See OLG Karlsruhe 23.7.2015 – 5 WF 74/15, FamRZ 2015, 1820. This decision was strongly criticized, e.g. by von Hein, J., critical note on OLG Karlsruhe 23.7.2015, FamRZ 2015, 1822, 1823 and Baetge, StAZ 2016, 289, 291f.

nationality and be considered to be minor (like those young persons who are not refugees in the sense of the GRC). Even within Germany, divergent interpretations on this issue exist,⁷¹ and it is doubtful that a uniform interpretation at the EU level could be reached without a EU legislative initiative.

3.4. What is domicile/residence?

Art. 12.1 GRC replaces the refugee's national law with the law of his/her domicile or, lacking this, the law of residence. However, the GRC does not provide what domicile is, or what residence is.

In PIL, domicile and residence are well-known connecting factors, but the national understanding of these concepts may diverge from one MS to another, in particular, according to the weight given to the intentional element (intention of settling / intention to make a place their permanent home). Consequently, no guarantee exists that these concepts are uniformly interpreted across the EU.

Moreover and most importantly, for the purpose of applying Art. 12 GRC, domicile and residence are not interpreted in several MS according to PIL standards. A widely shared view is rather that these terms need to be interpreted autonomously in the context of the Geneva Convention.⁷²

In **Germany**⁷³ and **Belgium**⁷⁴, for instance, the understanding of "domicile" under the GRC corresponds to the "habitual residence" connecting factor, which is popular in modern European PIL, while "residence" under the GRC is interpreted as "simple residence".

In **France**, the asylum authority OFPRA makes no explicit distinction between domicile, habitual residence and residence. Regarding Art. 12 GRC, it refers merely to the refugee's "residence"⁷⁵.

These interpretations are to be supported. The concepts of domicile and habitual residence cannot be understood in the traditional PIL sense, in particular because of the intentional element both terms require - while people seeking asylum do not necessarily have the intention to make the protecting State their new permanent home. They fled persecutions, but often hope to be able to return to their country of origin once the political situation has improved. The intention of settlement, required for domicile (and to a lesser extent also for habitual residence) under PIL, is often lacking in such situations, which would lead to the application of the law of the country of origin and deprive Art. 12 GRC of its very purpose.

3.5. Is the application of the law of the domicile mandatory?

It is debated whether the replacement of the law of nationality by the law of domicile is mandatory or whether Art. 12.1 should be applied with some flexibility, allowing a choice between the two laws.⁷⁶ At the Conference of Plenipotentiaries, the non-governmental

⁷¹ The Bavarian state youth welfare office is of the opinion that once children live in Germany, German law should always be applicable to questions of majority. On the contrary, the Westphalian state youth welfare office follows the narrow interpretation and does not apply Art. 12.1 GRC in guardianship cases as it would be disadvantageous for young refugees - leading them to apply the law of the nationality in all cases.

⁷² V. Chetail, "Les relations entre droit international privé et droit international des réfugiés," in *Journal du droit international*, v. 141 (2014).

⁷³ Mankowski, IPRax 2017, 40, 41; Baetge, StAZ 2016, 289, 290; Majer, StAZ 2016, 337, 338; von Hein, in: Münchener Kommentar, annex II to Art. 5 EGBGB no. 62 et seq.

⁷⁴ In Belgium, Art. 12 GRC has been confirmed in Art. 3, § 3 of the Private International Law Code; Art. 3 only makes a reference to the habitual residence.

⁷⁵ <https://www.ofpra.gouv.fr/fr/protection-etat-civil/mariage>.

⁷⁶ J.-Y. Carlier, « Droit d'asile et des réfugiés : de la protection aux droits », *Collected Courses of the Hague Academy of International Law*, Brill, Nijhoff, vol. 332, 2008, p. 314 ; J. Verhellen, « La portabilité transfrontalière

concern was expressed that greater deference should be paid to the preferences of the refugees themselves about how their personal status should be determined.⁷⁷

Practices therefore may not be uniform across the EU. However, scholars generally agree that the purpose of Art. 12 is not to deprive the refugee from the application of other conflict of laws rules, if these rules are more favourable to him/her.⁷⁸ This interpretation is also in line with Art. 5 of the GRC, providing that "nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention".

3.6. The change of the applicable law, the protection of rights previously acquired and the public policy reservation

3.6.1. General presentation of the problem

An additional problem encountered when applying Art. 12.1 GRC is that of the change of applicable law, or *Statutenwechsel/conflict mobile*. This problem arises whenever a change of connecting factor takes place through the application of a different PIL rule compared with before. It is hence fundamentally inherent to the connecting factor replacement rule of Art. 12.1 GRC which replaces "nationality" by "domicile" (or residence) for those States that apply nationality as a connecting factor for personal status (and have not made a reservation to Art 12 as Sweden has).

There may even be a series of *Statutenwechsel* when refugee status ends, so that the application of Art. 12.1 GRC ceases and the national law is again applied, or when recognized refugees after their initial arrival in one MS change their habitual residence within Europe. In these cases, they will undergo multiple *Statutenwechsel*.

The effects of this can be far-reaching. Take for example a refugee couple from a country where separation of property is the default matrimonial property regime, who now live in a country where community of property is the default regime (or vice versa). Replacing the "nationality" connecting factor used for matrimonial property law, e.g. in Art. 15 Introductory Act of the German Civil Code, by "habitual residence" under Art. 12.1 GRC changes the applicable law, which may entail more or less fundamental changes to the spouses' rights and duties in regard to their property. Depending on the situation, solving *Statutenwechsel* issues in individual cases may prove difficult and highly technical. These problems are even more serious as the parties are often not aware that *Statutenwechsel* has taken place.

Its effects can however be mitigated to a certain extent, but a distinction needs to be made between a change of applicable law due to the recognition of refugee status and a change of applicable law due to a change of domicile after refugee status has been recognized.

3.6.2. Rights acquired before the recognition of refugee status (Art. 12.2 GRC)

Art. 12.2 GRC provides for the protection of previously acquired rights, so that retroactive effects of *Statutenwechsel* are limited or can be avoided altogether: "[r]ights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State". This provision expresses the

du statut personnel des réfugiés. Situer les interactions entre le droit international privé et le droit international des réfugiés », Rev.crit.dip 2017, n° 2 (forthcoming).

⁷⁷ J.C. Hathaway, *The rights of refugees under international law*. Cambridge, Cambridge University Press, 2005, p. 222.

⁷⁸ V. Chetail, « Les relations entre droit international privé et droit international des réfugiés », JDI, vol. 141 (2014), p. 469.

principle of 'acquired or vested rights'. The drafters of the GRC agreed that the operation of the general rule in Article 12 couldn't deprive refugees of their status-based acquired rights.

For instance, in countries like **France** where « rights previously acquired » also include matrimonial property regime, the regime of the country of origin at the time the refugee left his/her country continues to be applicable.⁷⁹ Subsequent legislative reforms in the country of origin are not taken into account (doctrine of petrification of the refugees' matrimonial property regime). If the refugee later acquires the French nationality and thereby loses his/her refugee status, the GRC is not applicable anymore. In that case, under French PIL, rights previously acquired nevertheless continue to apply, allowing the former refugee to rely on matrimonial property rights acquired under the rules in force in his/her country of origin before becoming a refugee.⁸⁰

The respect for previously acquired rights, however, is not absolute. Article 12.2 provides for a public policy limitation: the right in question must be "*one which would have been recognized by the law of that State had he not become a refugee*". States should not be required to respect rights previously acquired by a refugee when these rights are contrary to their own law,⁸¹ such as rights resulting from a polygamous marriage.⁸²

3.6.3. A change of domicile after the recognition of refugee status

Art. 12 of the GRC does not explicitly provide for a similar protection of rights previously acquired in the event that a recognized refugee changes his/her place of domicile at a later stage. Indeed, as Art. 12.1 GRC does not contain any temporal specification, a change of domicile also leads to a change of applicable law, but it is not clear from the wording of Art. 12.2 whether the protection of rights previously acquired also applies in that case.

Take for instance a Syrian couple whose asylum application was initially accepted in Italy, where the couple lived for many years. One day, they decided to move to France. Art. 12.2 preserves the rights acquired under Syrian law, but does it also address the rights acquired under Italian law after the recognition of their refugee status and before moving to France? This clearly needs further research.

Could defining the point in time when *Statutenwechsel* under Art. 12.1 GRC takes place help clarify its application? For example, making the application of Art. 12.1 GRC dependent upon an asylum application or an asylum status decision means that *Statutenwechsel* is likely to take effect at a more or less arbitrary point in time, potentially long after the refugee's arrival at his/her new domicile. Making the PIL decision about the refugee status independent from the asylum proceedings would on the contrary allow for the application of Art. 12.1 GRC directly from the time of fleeing/taking refuge onwards. In such a way, *Statutenwechsel* would be synchronized with the change of habitual residence and a later change of applicable law while already in the host country could be avoided. **At this stage of our research, clear answers cannot be provided.**

If the personal scope of application of Art. 12.1 GRC is extended to beneficiaries of subsidiary protection, they will undergo similar *Statutenwechsel* with all its consequences (see above, 3.2). The practical implications of this should be borne in mind when considering the extended application of Art. 12.1 GRC.

⁷⁹ Cass., 1er Dec. 1969, Panayotti, Rev. crit. DIP 1970, p. 95, P. L., JDI 1970, p. 306, Ponsard.

⁸⁰ Cass, 28 Nov. 2006, Grangé v. Nachim, Rev. crit. DIP 2007, p. 397, P. Lagarde.

⁸¹ V. Chetail, cited, at pp. 471-472; J.C. Hathaway, cited, at pp. 225-227.

⁸² In France, for instance, a 10-years residence card was denied to polygamous refugees, who were granted only a temporary residence permit: Administrative Court of Appeal Lyon, 29 Sept. 2005, n° 00LY01274.

Finally, it is indispensable that those affected by *Statutenwechsel* are not only informed about the change of applicable law but also about the substantive law now relevant to them – this will also further the goal of integration in the host state.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, will be presented during a Workshop dedicated to potential and challenges of private international law in the current migratory context. While Private International Law governs private relations between persons coming from or living in different States, migration law regulates the flow of people between States. The demarcation between these two areas of law seems clear, but in practice it is not. Rights related to migration are often linked to private relations (marriage, parentage) or personal status (age). The EU should have a coherent approach in these areas, both internally and in relations with third States. Authorities active in the different areas must coordinate their work.

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Print ISBN 978-92-846-1153-9 | doi:10.2861/218081 | QA-01-17-608-EN-C
PDF ISBN 978-92-846-1152-2 | doi:10.2861/47092 | QA-01-17-608-EN-N