LEGISLATIVE ACTIVITIES OF EUROPEAN UNION VERSUS FUNDAMENTAL PRINCIPLES OF PATERNITY AND MATERNITY IN MEMBER STATES

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I. INTRODUCTION

It is common knowledge that the the European Union's competences are of limited scope.[2] One limitation is that th EU is not entitled to act in the field of substantive family law. Since private international law is not substantive, it would follow that EU institutions, acting within their competence, should not affect the national understanding of marriage or parentage, for example, as it concerns the origin of the child, filiation, and ancestry. Nonetheless, a detailed examination of some recent legislative measures initiated by the European Union in field of private international law—in EU terminology: "judicial cooperation in civil matters"[3]—shows that it could affect the substantive family laws of member states. These legislative measures are the subject of this article.

It should be noted at the outset that in many EU Member States, the legal concept of parentage is understood, following biology, as maternity combined with paternity. Such an approach is recognized as a fundamental principle of law. Under Article 18 of Polish Constitution of 2007, "Marriage, being a union

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[2] *See* Ruth Lamont, *Evaluating European Values: The EU's Approach to European Private International Law*, 5 J. PRIV. INT'L L. 371–72 (2009); Sylvaine Poillot Peruzzetto, *The Exception of Public Policy in Family Law within the European Legal System*, *in* INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION 281, 301 (Johan Meeusen ed., 2006); Wulf-Henning Roth, *Europäische Kollisionsrechtsvereinheit-lichung: Überblick—Kompetenzen—Grundfragen* [*European Conflicts-of-Law: Overview—Skills—Fundamental Issues*], *in EUROPÄISCHE KOLLISIONSRECHTSVEREIN-HEITLICHUNG* [EUROPEAN CONFLICTS OF LAW] 17–27 (Eva-Maria Kieninger & Oliver Remien eds., 2012).

[3] *See* Roberto Baratta, *Short Remarks on EC Competence in Matters of Family Law*, *in* THE EXTERNAL DIMENSION OF EC PRIVATE INTERNATIONAL LAW IN FAMILY AND SUCCESSION MATTERS 189–194, STUDI E PUBBLICAZIONI DELLA RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [STUDIES & PUBLICATIONS OF THE JOURNAL OF PRIVATEINTERNATIONAL LAW AND PROCEDURE.] no. 71 (Alberto Malatesta, Stefania Bariatti & Fausto Pocar eds., 2008).

of a man and a woman, as well as the family, motherhood, and parentage, shall be placed under the protection and care of the Republic of Poland."[4]

The Polish Constitutional Tribunal stressed that:

> Marriage, being the union of a man and woman, has acquired a distinct constitutional status within the domestic law of the Republic of Poland, on the basis of Article 18 of the Constitution. Any modification of this status would be possible only by the way of an amendment of the Constitution. Such a modification is neither possible by way of a ratified international agreement nor by EU secondary law.[5]

The Polish Supreme Administrative Court clarified[6] that Polish law doesn't recognize the notion of "same-sex parents." It does not provide for legitimate sanction of such a family unit. The Court stressed, inter alia, "The term 'same-sex parents' constitutes *contradictio in se*, since—not only legally—a child cannot be conceived in the same-sex relationship," and, "The consequence of the Polish legal system is the inability to recognize a female person [who did not give birth to the child]—or who by the nature of things is not a biological father—as a 'father' or even a second 'parent.'"

In the explanation of this decision it was added—significantly, for transnational situations—that the registration of two same-sex persons in a birth record would be not only contrary to the legal order in Poland, but could also mean certifying untruths by a public official.[7] Similarly, in the ruling of the Supreme Administrative Court,[8] it was emphasized that: "Polish family law does not recognize the institution of 'same-sex parents' or 'surrogate mother' and does not accept 'surrogate maternity contracts' that are invalid."

A similar principle as to the natural understanding of parentage is in force in many Member States of European Union, which are not international organizations with uniform substantive family law.[9]

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[4] English translation published at www.trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland

[5] Case K 18/04, May 11, 2005, English translation published at www.trybunal.gov.pl/en/case-list/judicial-decisions/art/5851-czlonkostwo-polski-w-unii-europejskiej-traktat-akcesyjny

[6] Case II OSK 1298/13, Dec. 17, 2014. Polish administrative court judgments are published at: https://www.orzeczenia.nsa.gov.pl

[7] See also judgments of regional administrative courts (WSA): WSA in Łódź, case III SA/Łd 1100/12, Dec. 14, 2013; WSA in Gliwice, case II SA/GI 1157/15, Apr. 6, 2016; WSA in Kraków, case III SA/Kr 1400/15, May 25, 2016.

[8] Case II OSK 2419/13, May 6, 2015.

[9] On parental rights and duties under international conventions influencing the domestic legal systems of Member States, see Jane Adolphe, *"New Rights": What International Law Actually Says?* 10 AVE MARIA L. REV. 159–61 (2010).

II. THE LIMITED COMPETENCE CONFERRED ON THE EUROPEAN UNION

The European Union has no competence to enact substantive family law, that is, to define generally the parentage and origin of a child (ancestry). Under Article 4 of the Treaty on European Union,[10] expressing the fundamental Treaty principle of the conferred powers "1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States," and "2. The Union shall respect the equality of Member States before the Treaties as well as their national identities … ."

Additionally, according to Article 5,

> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

Theoretically, European Union law could not lead to any modification of the domestic idea of marriage or parentage (for example, of the legal concept of the origin of the child). Given these principles, to speak of the "European Union's family law," as the literature sometimes does, is to misuse terminology. This phrase cannot precisely describe the current or proposed rules of substantive family law unified in Member States (for example, the Uniform Family Code issued by EU regulation), because such rules do not exist at present and may not function in the future. Nor could "European Union family law" be understood to refer to the non-substantive rules of private international law[11] or as a

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[10] Consolidated Version of the Treaty on Functioning of the European Union arts. 4 & 5 (June 7, 2016), 2016 O.J. (C 202) 13 [hereinafter TFEU]; European Union law is published at www.eur-lex.europa.eu

[11] *See* Piotr Mostowik, *Beginning of the Twenty-First Century—The Age of Common European Private International Law Has Commenced? Some Remarks from V4 Countries' Point of View*, *in* THE ROLE OF INTERNATIONAL LAW AND EUROPEAN LAW IN THE TWENTY-FIRST CENTURY IN V4 COUNTRIES 32 (Trnavska Univerzita v Trnave 2009); Piotr Mostowik & Monika Niedźwiedź, *International Conventions Concluded by the European Union after the ECJ "Lugano II Opinion" of 2006: An Alternative or Complement to EU Regulations' Path to Unification of Private International Law?* 1 POLISH REV. INT'L & EUR. L. 9–53 (2012).

description of proposed rules of a non-binding but doctrinal character (proposals *de lege ferenda*).[12]

Separate issues are raised by the fact that the European Union is entitled to exercise competence in the field of private international law *sensu largo*, that is, including choice-of-laws principles and rules of international civil procedure. In the European treaties, this branch of law is referred to as "measures of judicial cooperation in civil matters."[13] Generally speaking, the aim of private international law and civil procedure is to regulate which state's courts are empowered to hear a case and render judgment (for example, in a case of filiation); which state's substantive law should be applied (for example, to determine the origin of a child); and what consequences in one state result from decisions given in another (for example, concerning records of civil status). One of the classic solutions, included in the general part of this branch of law, is the public policy clause (Fr. *orde public clause*, Ger. *Vorbehaltsklausel*). Under this clause, another jurisdiction's law can be not applied by the forum, and a foreign judgment may not be recognized in the forum, if the effect would be contrary to its public policy.[14]

The EU regulations adopted on this legal ground are called "Brussels regulations" in the case of procedural rules[15] and "Rome regulations" in the

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[12] E.g., so-called "principles" published by a group of researchers from the Commission on European Family Law (CEFL) in the area of divorce and maintenance between former spouses and parental responsibilities and property relations between spouses (www.ceflonline.net). One objective of CEFL is to survey the role of potential European EU Member States in pursuit of harmonizing family law. *See* Dieter Martiny, *Is Unification of Family Law Feasible or Even Desirable*? *in* TOWARDS A EUROPEAN CIVIL CODE 440–42 (Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud Hondius, C Mak & Edgar Du Perron eds., 2010).

[13] TFEU, art. 81 (June 7, 2016), 2016 O.J. (C 202) 47.

[14] *See* NYNKE ANNA BAARSMA, THE EUROPEANISATION OF INTERNATIONAL FAMILY LAW 284 (2011); Adair Dyer, *Case Law and Co-Operation as the Building Blocks for Protection of International Families*, *in* FAMILIES ACROSS FRONTIERS 28–29 (Nigel V. Lowe & Gillian Douglas eds., 1996); L. Fumagalli, *EC Private International Law and the Public Policy Exception*, 6 Y.B. PRIV. INT'L L. 171 (2004).

[15] *E.g.*, Regulation 1215/2012 of the European Parliament and the Council of Dec. 12, 2012, Jurisdiction, Recognition, and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L 351) 1, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF; Council Regulation 2201/2003 of Nov. 27, 2003, Jurisdiction, Recognition, and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility (repealing Council Regulation 1347/2000, 2003 O.J. (L 338) 1), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML

case of choice-of-law rules,[16] and generally prevail over domestic provisions.[17] They are not in force in Denmark because this state has not transferred its competence in the field of private international law to the European Union. The regulations are optional in the United Kingdom and Ireland, because of their special opt-in status. Some of these regulations were adopted during a process of enhanced cooperation between a group of Member States, and so they are in force only in limited parts of the European Union.[18]

III. THE ISSUE OF RECOGNITION OF THE SUBSTANTIVE EFFECTS OF FOREIGN REGISTRATION OF CIVIL STATUS REGISTRATION (ORIGIN OF THE CHILD, ADOPTION, MARRIAGE)

A. The Proposed Green Paper of 2010

A third legislative measure, the Green Paper of 2010, purportedly concerns the EU regulation on reducing bureaucracy.[19] It contains several conclusions

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[16] *E.g.*, Regulation 593/2008 of the European Parliament and the Council of June 17, 2008, Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2008.177.01.0006.01 .ENG&toc=OJ:L:2008:177:TOC; Regulation 8642007 of the European Parliament and the Council of July 11, 2007, Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2007.199.01.0040.01.ENG&toc=OJ:L:2007:199:TOC. *See* Marcin Czepelak, *Would We Like to Have a European Code of Private International Law*, 4 EUR. REV. PRIV. L. 705 (2010).

[17] *E.g.*, Polish law—*see* Marcin Czepelak, *The Experience Concerning the Application of Community Instruments in the Recent EU Member States*, *in* LATEST DEVELOPMENTS IN EU PRIVATE INTERNATIONAL LAW 49–62 (Beatriz Campuzano Díaz, Marcin Czepelak, Andrés Rodríguez Benot & Ángeles Rodríguez Vázquez eds., 2011); Andrzej Mączyński, *Polish Private International Law*, 6 Y.B. PRIV. INT'L L. 203 (2004); Tomasz Pajor, *Introduction to the New Polish Act on Private International Law of 4 February 2011*, 13 Y.B. PRIV. INT'L L. 381 (2011).

[18] E.g., sixteen Member States participated in Council Regulation 1259/2010 of Dec. 20, 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, 2010 O.J. (L 343) 10. *See* Elena Júdová & Piotr Mostowik, *Should We Stay or Should We Go In? Advantages of Enhanced Cooperation Aimed to Unification of Conflict of Laws Rules in Divorce and Separation Matters*, 1 POLISH REV. INT'L & EUR. L. 67 (2012); Tadeusz Zwiefka, *Draft Report on the Proposal for a Council Regulation Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation* 28, (Dec. 26, 2010), Committee on Legal Affairs, 2010/0067 (CNS).

[19] European Commission Green Paper, *Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records*,

relating to the identity of parents. Point 4.3, titled "Mutual Recognition of the Effects of Civil Status Records," reads:

> This would mean that each Member State would accept and recognize, on the basis of mutual trust, the effects of a legal situation created in another Member State. In the examples mentioned above, the child's name and the filiation should be recognized by the authorities of the Member State of origin of that child, even if the application of that State's law would have resulted in a different solution. … Harmonization of the conflict-of-law rules might be another possible way of allowing citizens to exercise fully their right to freedom of movement while providing them with greater legal certainty in relation to civil status situations created in another Member State. … In principle, citizens in cross-border situations might be allowed to choose the law applicable to a civil status event. This possibility could satisfy the legitimate interests of citizens who, in making this choice, would express their attachment to their own culture and Member State of origin or to another Member State.

B. The Declared Goal versus the Content of the EU Uniform Rules Proposed in the Green Paper of 2010

Notably, some of the rules proposed by Commission raise doubts about understanding of marriage, paternity, and maternity. Many objections were raised by Member States and NGOs in comprehensive reviews during public consultation about the Green Paper of 2010.[20]

First, although legislative initiatives at the EU level purport to be aimed at reducing bureaucracy and promoting the free movement of persons, some may have effects far beyond their declared purposes. They may, inter alia, affect the juridical expression of parentage. In particular, these initiatives include official recording of maternity and paternity, which is typically recorded as a part of civil status registration organized under the internal law of each Member State.[21]

European Dignity Watch started its contribution with an accusation:

COM (2010) 747 final (Dec. 14, 2010), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF

[20] The contributions are published at www.ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm

[21] *See* Walter Pintens, *Civil Status Registration*, *in* 1 MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 200 (Jurgen Basedow, Klaus J. Hopt, Reinhard Zimmermann & Andreas Stier eds, 2012); Walter Zeyringer, *The Registration of Civil Status*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. 4 PERSONS AND FAMILY 149–65 (1995).

> The Commission's analysis is superficial and incomplete. It risks misinforming the debate. … However, there is reason for serious doubt with regard to the definition and analysis of the problems to which the Green Paper purports to present possible solutions. Indeed, the Commission's analysis and understanding of these problems appears incomplete, simplistic, superficial, and, to some extent, misguided.[22]

Also, the Commission of the Bishops' Conferences pointed out in its contribution that:

> Some of the options mentioned in the Green paper, in particular as for the mutual recognition of the effects of civil status records, call for an extremely careful approach, as they give rise to a number of legal and ethical concerns. Some of the documents involved are closely linked with matters of high sensitivity that stand at the core of the Member States' national sovereignty, in areas in which ethical implications and national sensibilities and peculiarities come into play (e.g., marriage, civil/registered partnerships, adoption). We are concerned that some of the solutions suggested by the Green paper would devalue such national sensibilities and legal traditions (if not divest them of particular significance). The richness of Europe is also in its diversity. This diversity should be preserved and not questioned or crushed by levelling exercises at the EU level. Full respect for the diversity of national legal orders and for the different Constitutional traditions, as well as for the Member States' public policies, should guide the EU actions on this matter.[23]

C. Encroachment upon the Competence of Member States in Substantive Family Law

In light of excerpts from the contributions concerning the Green Paper of 2010, the question of the competence of the European Union should be raised in the context of proposed legislative attempts. One of the solutions contemplated by the Commission in future regulation was recognition in the European Union of the substantive effects of foreign civil status registration.[24] The German contribution emphasized:

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[22] European Dignity Watch, *General Comment on the Green Paper* 1–3, April 2011, www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/european_dignity_watch_en.pdf

[23] Commission of the Bishops' Conferences of the European Community, *A Submission Concerning the Consultation, "Less Bureaucracy for Citizens: Promoting Free Movement of Pubic Documents and Recognition of the Effects of Civil Status Records," COM (2010) 747 final* 1–2 (Apr. 29, 2011), www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/comece_en.pdf

[24] *See* Dagmar Coester-Waltjen, *Anerkennung im Internationalen Personen-, Familien- und Erbrecht und das Europäische Kollisionsrecht* [*Recognition in International Personal, Family, and Inheritance Law and European Conflicts of Law*], 4 PRAXIS DES

> The question of whether, for example, a particular institution should be created in family law, how a family-law relationship is established or annulled, and what effects it produces is the subject of—often politically controversial—decisions by the legislature. As examples one might mention: the registered civil partnership or marriage of persons of the same sex, the filiation of a child in the case of a "surrogate mother," the introduction of presumptions of filiation in favour of the mother's registered female partner, [and] the admissibility and effects of adoption (full adoption, "partial" adoption, admissibility of adoption of adults, adoption by same-sex couples, etc.). The EU has no legislative powers in this area. Neither can it therefore require a Member State's legislature to place its family law at the disposal of the 25 other Member States without restriction, allowing the persons concerned to have a family-law relationship that exists under the law of another Member State to be registered in that State even though they have no close ties with that state's legal order.[25]

The Dutch contribution pointed out:

> In principle, the Netherlands welcomes the fact that the Commission has initiated a major consultation on how to remove obstacles encountered by citizens in the field of the law of persons and civil status in cross-border situations. … However, this does not necessarily imply that the EU should simply enact legislation, as such action must also satisfy the demands of proportionality and subsidiarity (Art. 5(1) TEU). The Netherlands believes that subsidiarity is the key principle in this context: Any issue that can be regulated more effectively by the member states should not be decided in Brussels. We accordingly welcome the Commission's observation that the EU has no competence to intervene in the substantive family law of Member States, for example, as regards the attribution of surnames in the case of adoption and marriage. However, this does not alter the fact that the Netherlands will continue to push for the multilateral recognition of same-sex marriages and registered partnerships in the EU.[26]

INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [PRACTICE OF INTERNATIONAL PRIVATE AND PROCEDURAL RIGHTS] 392–400 (2006); Rolf Wagner, *Inhaltliche Anerkennung von Personenstandsurkunden—ein Patentrezept?—Überlegungen aus internationalprivatrechtlicher Sicht [Content Recognition of Civil Status Documents—A Patent Recipe?—Considerations from International Private Law Point of View*], 18 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [PRACTICE OF INTERNATIONAL PRIVATE AND PROCEDURAL RIGHTS] 609–15 (2011).

[25] Germany, *Federal Government Observations on the Commission Green Paper, "Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records," COM (2010) 747 final* 10–11, www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/germany_minjust_en.pdf

[26] The Netherlands, *Dutch Response to Green Paper: "Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records," COM (2010) 747 final April, 2010* 2–4, www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/netherlands_minjust_en.pdf

European Dignity Watch noted in its contribution:

> The automatic recognition of the legal effects of civil status records presupposes full convergence of the relevant national legislations. It is best left to Member States to decide whether or not they want to automatically recognise the effects of another Member State's civil records. In some instances, this will be the case while in others it will not. … Where there is no full convergence of national legislation (as is notably the case with marriage, civil partnership, and adoption), the adoption of a principle of mutual recognition would clearly have bearing on substantive family law in the Member State that is asked to grant such recognition.[27]

In addition to these arguments, a formal issue appeared. The EU Commission proposed to adopt the Green Paper of 2010, not in the proper legislative process requiring unanimity (that would not have been achievable)—a process that should be mandated in private international law in family matters. Instead, the EU Commission proposed to adopt the Green Paper in a procedure that required only the majority vote of Member States in the EU Council. The Commission explained that this instrument not only covered issues of evidence, that is, proving that a particular foreign registration took place, but also had a substantive effect concerning family matters. The consequence would be a general importing into each EU country the foreign concept of the marriage and parentage registered abroad.

The German contribution emphasized that:

> If the legal act is concerned predominantly or exclusively with civil status documents or the matters documented therein, then it would in principle be subject to the decision-making procedure provided in the first subparagraph of Article 81(3) TFEU, since these are matters concerning family law.[28]

Also, European Dignity Watch pointed out in its comment:

> For any measures or efforts aimed at legal harmonization that affect family law, Article 81.3 of the TFEU requires unanimity of all Member States. No EU law that entails a change of family law in a Member State can be passed by a simple majority but needs the consent of all 27 Member States.[29]

The construction of recognition of substantive effects of foreign registration would de facto cause recognition of alien family law effects regarding the legal origin of a child. It would, for example, create the legal fiction of a child's

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[27] European Dignity Watch, *supra* note 22, at 7–8.
[28] Germany, *supra* note 25, at 1.
[29] European Dignity Watch, *supra* note 22, at 2.

origin from persons of the same sex—for example, two men as the primary parents of a child (after adoption or as a result of a contract with a so-called surrogate mother), or two women as the primary parents (when the maternity of the one is legally registered due to marriage with the other, who gave birth to the child). Such an effect would be manifestly incompatible with the public policy (*ordre public*) of some of Member States.[30]

IV. REJECTION OF THE INITIAL PROPOSAL AND THE FINAL CONTENT OF THE EU REGULATION

The Green Paper of 2010 met many critical voices coming from Member States and NGOs. For example, the above-mentioned German contribution was very negative: "The Federal Government therefore believes 'automatic recognition' to be the wrong approach, for all family-law relationships, without exception."[31]

Many critical remarks were presented in Dutch contribution, for example:

> On the face of it, applying automatic recognition to civil status matters seems like an attractive idea, but it is certainly not without problems. For example, it would mean that all Member States would in principle have to recognize adoptions, marriages, filiations, and recognitions carried out in other Member States, despite the fact that such matters are subject to significant cultural diversity between and differences in social attitudes within the Member States. … [T]he Netherlands can imagine, as suggested in the Green Paper, that it will ultimately be necessary to distinguish between different categories of legal facts relating to civil status. For example, automatic recognition might be appropriate in the case of the attribution or changing of surnames, which is mentioned in the Green Paper and is now the subject of ECJ case law that tends towards mutual recognition, and death. In the Netherlands' view, however, it should not currently apply to adoptions, due to the many different safeguards that still surround intercountry adoption within the EU. The same applies to filiation and recognition.[32]

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[30] A general overview of this problem is precisely presented by Margaret Somerville, *Children's Human Rights to Natural Biological Origins and Family Structure*, 1 INTL J. JURIS. FAM. 49–52 (2010). On the important reasons for desirable coexistence between natural (biological) and legal provisions, see Scott T. FitzGibbon, *The Biological Basis for the Recognition of the Family*, 3 INT'L J. JURIS. FAM. 1–36 (2012).

[31] Germany, *supra* note 25, at 10–11.

[32] The Netherlands, *supra* note 26, at 11. The German contribution was also very critical of the general presumptions announced by the EU Commission:

> The Federal Government would like to point out that the descriptions in the introduction to the Green Paper take a one-sided view, presenting any and every demand for evidence as an obstacle to the exercise of rights and *prima facie* unjustified. That is totally unrealistic and gives the regrettable impression that the Member States' authorities and the legislation on

The Commission of the Bishops' Conferences similarly recommended the rejection of:

> … the extreme solution of automatic recognition, as it would bring about legally and practically absurd results and unwanted/undesirable consequences, in particular as to the area of family law. First of all, the risk of marriage/partnership tourism is also all too evident: Couples who do not have access to marriage or civil/registered partnerships (this can be the case for opposite-sex and/or same-sex couples) in their own Member State would easily get round the perceived "obstacles" contained in the relevant national legislations by first entering into marriage or civil partnership in another Member State, where such types of unions do exist, and subsequently forcing their own Member State to recognise them, as well as their civil effects. Secondly, it is hard to see how Member States could be legitimately required to *accept* what according to their legal systems might be *not acceptable* and merely constitute an artificial construction created by other national legal orders—unless chaos is deemed to be a legitimate goal. In general, it is important to ensure that an initiative aimed at helping EU citizens does not have the direct *or indirect* effect of creating interference with the Member States' family law systems and the relevant national competence, as well as with their options concerning the benefits deriving from civil status. [33]

On the other hand, the LGBTQ+ organizations, who are in the minority, expressed in the debate a positive assessment of the activities proposed by EU Commission. For example, the International Lesbian, Gay, Bisexual, Trans and Intersex Association of Europe noticed that that only seven Member States provide same-sex partners the right to adopt and only eleven countries allow the non-biological same-sex partner to adopt a partner's child.[34] It also noted that:

> While respecting the principle of subsidiality [*sic*] the trend in Central and Eastern Europe should be taken into account by the Commission and directly addressed when formulating future initiatives on the recognition of the effects of civil

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> which their actions are based are condemned in advance. … Moreover, many of the fears expressed by the Commission seem exaggerated. It is doubtful whether the mere fact that a citizen has to provide evidence of a particular legal status to an authority of another Member State will seriously deter him from making long-term, life-changing decisions such as marriage or going to work in another Member State. The European Union (EU) should concern itself with aspects that are typical of cross-border matters and simply seek to remove the difficulties that the cross-border dimension entails.

Germany, *supra* note 25, at 1**.**

[33] Commission of the Bishops' Conferences of the European Community, *supra* note 23, at 7–9.

[34] ILGA-Europe, *Contribution to the Green Paper, April 2011* 22, http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/ilga_en.pdf

> documents. Otherwise it is highly probable that some of the Member States in question will use their domestic legislation to limit or nullify existing legal ties of same-sex couples as [well as] their children while within their national territory.[35]

Commenting the Green Paper of 2010, this organization demanded that

> … respect for fundamental rights of LGBTI families must be ensured each time that rights and benefits are attached to family members for any given purpose. Under the present fragmentation, the division of competences within the EU, with its emphasis on national sovereignty over family matters, could even provide a favourable competitive environment. Neither Member States nor the European Union should feel uncomfortable with a system where EU citizens are allowed to make use of the law that best recognises their rights and to make these rights portable. … Parental links established in one Member State should be valid throughout the whole of the European Union without exception. Children should not see their parental ties and important relations of care stripped away from them simply on the basis of their birth status, or their parents' sexual orientation or gender identity. [36]

The critical comments presented by the Member States and many who actively contributed to public consultation resulted in the significant reduction of the scope of the original proposals of the Commission. In the 2013 amended proposal,[37] the scope of the regulation was limited to abolishing the legalization of certain documents and similar formal requirements. Article 15, paragraph 2, of the proposal noted that EU multilingual forms, which attest the content of civil status registration, do not have a substantive effect on the legal recognition of their content in another member state.

Finally, EU Regulation 2016/1191,[38] adopted in July 2016, applies only to the formal aspects of the evidentiary value of foreign documents issued by registry offices. Its scope is limited in the manner just described. According to the Article 2, paragraph 4, "Regulation does not apply to the recognition in a

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[35] *Id.* at 14.

[36] *Id.* at 21, 36. A similar positive evaluation was presented by the Campaign Against Homophobia Poland, a Polish NGO, noted in its contribution (www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/poland_campaign_against_homophobia_en.pdf) that "the person, that they [she or he] marry, would then also appear as a spouse in the unified EU civil status document and Polish authorities could no longer deny the fact that same sex unions exist" (at 1). This organization was "definitely in favor of full recognition of marriages and children's status—adoption" (at 2).

[37] European Commission, *Proposal for Regulation of The European Parliament and of the Council on Promoting the Free Movement of Citizens and Businesses by Simplifying the Acceptance of Certain Public Documents in the European Union and Amending Regulation (EU) No 1024/2012*, COM (2013) 228 final.

[38] Commission Regulation 2016/1191, 2016 J.O. (L 200) 1.

member state legal effects related to the contents of official documents issued by the authorities of another Member State."[39]

Adoption of the legislative plans announced by the Commission in 2010 would de facto have affected fundamental principles of personal and family law in most Member States. The changes, which would have been unwelcome in many Member States, included rejecting the definition of a child's origin and parenthood in terms of motherhood and fatherhood, as well as rejection of the concept of marriage as the union between a man and a woman. These provisions would have had substantive effects contrary to public policy of some Member States.

V. FINAL REMARKS

Although the legislative initiative represented by the proposed EU Commission Green Paper of 2010 purported to aim at "reducing bureaucracy" and "promoting the free movement of persons," it would have gone far beyond these declared purposes. In particular, this initiative included extraterritorial effects of official registration of a child's origin and parentage, which is information typically contained in civil status records currently organized under the internal law of each Member State. One of the solutions contemplated by the EU Commission was the principle of recognition of the substantive effects of foreign civil status registration. Its result would have been a general importing into one EU country of a foreign concept of parentage or filiation from a second state, where the maternity or paternity of the child was registered. The Member State would have had to accept the substantive effects of foreign registration, without control nor influence on the scope of actual circumstances in which the registration of civil status takes place, for example, in a case of the paternity of two men and no woman.[40] The uniform solutions considered in Green Paper of 2010 raised doubts in many Member States about how parentage was to be understood.

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[39] The proposed 2013 content of art. 15 ¶ 2 of was omitted in the final text of the regulation, probably because it was redundant to the chapter on multilingual forms provided by the general part of the regulation.

[40] The foreign state administration can in fact register anything that reflects its understanding of civil status. In some situations, that would be evaluated as excessive exercise of powers in relation to foreign citizens. For example, foreign law governing the organization of civil status registration and its competences may provide an opportunity to register on the formal grounds of the temporary residence or citizenship of one of the future spouses, regardless of habitual residence.

For this reason, some excerpts of the Green Paper of 2010 raised the question of the competence of the European Union. Importantly, despite the lack of European Union's competence to regulate substantive family law, which was confirmed in official documents accompanying these initiatives, the solutions proposed by the EU institutions could lead in many Member States to a change in fundamental domestic legal principles. The greatest concerns are raised by provisions that, despite the lack of EU competences in field of family law, in practice not only amend private international law, but also cause unwelcome changes to substantive rules of family law.

The EU Commission in the Green Paper of 2010 contained serious inaccuracies and contradictions. For example, point 4.3 read:

> It is important to stress that the EU has no competence to intervene in the substantive family law of member states. Therefore, the Commission has neither the power nor the intention to propose the drafting of substantive European rules … to modify the national definition of marriage. The Treaty on the Functioning of the European Union does not provide any legal base for applying such a solution.

Despite this clear statement of the law, it was proposed inconsistently on the same page of the document: "Several solutions could be considered to ensure recognition of the effects of a civil status record or legal situation connected with civil status created in a Member State other than the one in which it is invoked."[41]

In conclusion, Member States need to make a detailed investigation into the effects of the instruments drafted by EU institutions. This is especially the case with proposals and legislative activities that are conducted other than through

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[41] Inaccurate expressions were also presented by the EU Commission as regards the notion of marriage during another legislative procedure, i.e., in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Bringing Legal Clarity to Property Rights for International Couples*, COM (2011) 125 final. Some fragments of this document are internally contradictory, e.g., "marriage is a long-established institution that exists in all 27 Member States" is contradicted in the next sentence: "[M]arriage may be open to opposite-sex couples or to same-sex couples" (p. 6). Precisely and honestly speaking, the "long-established institution of marriage in all Member States" may not be characterized as "open to same-sex couples." *See* Piotr Mostowik, *The Questionable Impact of EU Regulations No 2016/1103 and 2016/1104 on the Identity of Marriage in a Member State*, PROBLEMY PRAWA PRYWATNEGO MIĘDZYNARODOWEGO [PROBLEMS OF PRIVATE INTERNATIONAL LAW] (forthcoming, 2018), a paper presented at the conference on "Marriage—Its Identity and Legal Recognition," September 29–30, 2016, Warsaw University, organized by the Ordo Iuris Institute (www.ordoiuris.pl/en). *See also* Piotr Fiedorczyk, *Attempts at Redefining the Family in Contemporary Polish Law*, 3 INT'L J. JURIS. FAM. 357 (2012).

procedures requiring unanimity in the Council, as well as with matters that cannot be considered EU judicial cooperation in family matters. A precise examination of drafts, in particular, is justified by the need to protect constitutional juridical expression of parentage in a Member State. Reviewing EU legislative measures, having in mind the difference between official explanations concerning family matters and practical potential effects, leads to the conclusion that Member States should trust in general but examine the details as a reasonable approach.

Such an approach is justified also by the fact that at the beginning of the twenty-first century, family law, including maternity and paternity, varies in the world, and not only in the ordinary way that differences between domestic laws have always occurred. Current differences between legal systems relate to the foundations of family law and to the initial general assumptions of this branch of law, that is, that it imitates nature (the principle of *naturam imitatur*) rather than imposing solutions that contradict biology. This principle has always been a pattern for family law. Differences of the magnitude seen in current changes to family law are not comparable with those we have known in the past. Some legal systems differ in their legal concepts of marriage and the origin of the child on an unprecedented scale, unknown in the entire previous development of the law, to judge from sources dating from the last seven or eight thousand years.[42] European Dignity Watch accurately observed:

> The situation is significantly different for documents relating to marriage, civil partnership, adoption and (due to major discrepancies in material law regarding artificial procreation) birth certificates. These documents refer to matters in which considerable differences exist between the legal systems of different Member States. This means that considerable differences of legal effect also exist between the documents concerned, some of which may produce effects under the law of one Member State that are considered undesirable—or even illegal or adverse to the public order—in another Member State. …
>
> In the same vein, there are considerable differences in Member States' legislation on adoption, with some Member States allowing (and others prohibiting) the adoption of children by unmarried persons or same-sex couples. In these areas, therefore, the mutual recognition of civil status documents cannot be automatic but must be subject to the receiving Member State's own policy approach.
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> In this context, it should also be observed that less than one hundred years ago, the convergence of the legislative situation regarding marriage, divorce, and adoption was much greater than it is today.[43]

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[42] *See* Francis Rue Steele, *The Code of Lipit-Ishtar*, 52 AM. J. ARCHEOLOGY 425 (1948).
[43] European Dignity Watch, *supra* note 22, at 2–3.

Finally, the motto of the European Union of Member States, announced at the session of the European Parliament in 2000, is once again worth recalling: United in diversity (*In varietate concordia*). In essence, this calls for a more cautious approach by EU institutions to drafting provisions that might constitute unwelcome interference in the family law principles of the Member States that retain legislative competence in this area. Family law is firmly rooted in local societies, as well as domestic fundamental constitutional and moral systems. Legal systems differ widely. For example, in some states family law still reflects nature and biology, while others have changed that approach and created—from biological point of view—the artificial legal concept of same-sex parents. This final conclusion is reflected also in the preamble to the Charter of Fundamental Rights of European Union: "The Union contributes to the preservation and to the development of [its] common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States." [44]

[44] 2012 J.O. (C 326) 1.