COMMUNITARIZATION
OF INTERNATIONAL FAMILY LAW AS SEEN
FROM A DUTCH PERSPECTIVE: WHAT IS NEW?
- A PROSPECTIVE ANALYSIS -

BY

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I. - THE NEED FOR A PROSPECTIVE
AND RETROSPECTIVE ANALYSIS

It has become clear in the past couple of years that the EU sees itself as having a large role to play in the field of unification of rules of Private International Law (PIL), included the sub discipline International Family Law (IFL). The first Regulation in the field of PIL that came into force was a regulation on IFL, namely the Brussels II Regulation. (1) And though Brussels II still remains the only regulation in the field of IFL that has taken effect, it must certainly not be seen as a one-off: if it is up to the EU, there will be more of such legislation concerning the discipline of IFL in the future.

What is less clear is what form this legislation shall have. The Brussels II Regulation is apparently a device for stimulating intra-communitarian mobility. A closer look reveals that Brussels II partly already concerns

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family relationships with “external” aspects (2). Debates about the regulation of IFL aspects concerning family relationships on an “extra-communitarian” level are, however, still dealt with at national level.

Thus, the debate about the regulation by the EU of IFL issues of family relationships with external aspects has not been very relevant until now. One must however re-focus in this field as it cannot be ruled out that the EU will deal in the future with the regulation of legal family relationships with external aspects on a more fundamental basis than in Brussels II.

Anyone that must re-focus with regards to ED interference in IFL in 2004 will necessarily be pushed to work in a prospective manner. Even so, a retrospective manner together with an evaluation of the status quo should not be left out: anyone that looks into the “how” and “why” of EU interference in family relationships with external aspects, will inevitably be confronted with the “how” and “why” of the EU’s PIL and IFL policy as such. At the same time a question arises about the EU’s interference compared to the way EU-Member States currently deal with IFL in relation to external aspects. As far as it concerns tendencies in the national context, in this paper especially Dutch situation shall be examined further. (3)

Finally one should realise that in analysing IFL, in relationship to the EU, one should regularly ask in what way one can learn from past experiences and current affairs in the field of PIL in general: (4) IFL is, of course, a

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(2) In the preamble of the Brussels II regulation, it is stated in a rather laconic way: “The measures laid down in this Regulation should be consistent and uniform, to enable people to move as widely as possible. Accordingly, it should also apply to nationals of non-member States whose links with the territory of an Member State are sufficiently close, in keeping with the grounds of jurisdiction laid down in the Regulation”.

(3) Due to the necessary prospective character of this theme, this paper shall pay a fair amount of attention, possibly more than in other papers, to the way in which national authorities currently develop and use IFL.

(4) Important insights into the relationship between EU law and PIL were developed mainly in French and German doctrine even before the Treaty of Amsterdam. See e.g. M. WILDERSPIN and X. Lawis, “Les relations entre le droit communautaire et les règles de conflits de lois des Etats membres”, R.C.D.I.P. 2002, pp. 1-37. These insights primarily concerned to what extent EC Law can have an impact on PIL via the four freedoms and the principle of non-discrimination. New insights developed after the Treaty of Amsterdam, this time from the perspective of the accordance of own regulatory powers of the EU institutions themselves. A question is: what can be learned from those analyses, the current developments, and the questions that arise from the field of PIL in general. For example, what can be learned from German discussions about the principle of non-discrimination as put forward in the EC Treaty if nationality is used as a connecting factor. What can also be learned from discussions in international contracts law and international tort law on the granting of a universal or limited geographical scope on PIL regulations with regards to the applicable law? The same goes for discussions about the need for unification of International or substantive private law, the problems about the relationship between EU-Regulations and other international PIL sources (and, in interaction with this, the interpretation of ERTA case law). The latter shall not be dealt with in this piece except for what is mentioned infra, under 4.1., especially footnote 111, but more information can be found in G. JOUSTRA, “Naar een communautair internationaal privaatrecht”, in Preadviesen. Internationaal, communautair en nationaal IPR, Mededelingen van de Nederlandse Vereniging voor internationaal recht, Den Haag Asser Press 2002 and M. TRAESE, “De verhouding van de Europese Gemeenschap tot de confe-
sub discipline of the wider field of PIL. Not only is EU interference in IFL currently an issue but in general in the entire field of PIL.

II. - INTERNATIONAL FAMILY LAW

II.1. - The esoteric and stubborn character of IFL

The field of PIL is traditionally seen as having a large ivory tower content. This is possibly due to the fact that PIL can be characterised as a "second rate law" as PIL, as a discipline, is occupied with the private legal relationships in an international context and therefore includes provisions on jurisdiction, applicable law, recognition and enforcement without getting embroiled with the substantive legal aspects of the case at hand. The sub discipline IFL probably deserves the label of being an esoteric science even more so than PIL as a whole. IFL is said to be strongly ideologically defined which leads to people not treading lightly into the field without prior knowledge. PIL jurists seem to have the tendency to make the sub discipline IFL into a separate entity and are reserved, therefore, in applying general developments in PIL to it. PIL jurists often concentrate on either IFL or PIL outside of IFL whereby the influencing of one sub discipline by another usually proves to be the exception that proves the rule. PIL outside IFL and IFL are therefore able to develop separately. This separate development together with the "second rate" character of IFL means that IFL is isolated and therefore has a couple of inaccessible and unique traits. (5)

II.2. - Cultural and economic aspects of International Family Law

IFL deals with relationships in Family Law that take place in an international context and is partly therefore already embedded in the debate on the "collision of cultures". IFL has, consequently, the reputation of being rather a "soft" field of law, where emotions can run up very high. That tradition of examining IFL as a manner of handling a collision of cultures, results in the placing of IFL into the debate about integration, specifically in the cultural aspects of this debate. By 2004 developments of IFL have


(5) This sometimes leads to IFL withstanding developments for a very long time, for example concerning equal treatment of men and women.
been placed almost completely in the debate on respect for cultural diversity and it is usual in this to pay attention to the (legal) cultural differences of certain migrant groups. This is how the discussion on IFL is placed within the debate on "integration", where a lot of focus is placed on the alleged differences of certain migrant groups too.

The result of all this is that whereas those that practice other fields of the law as for example Immigration Law, Social Security Law, Nationality Law, Tax Law, etc. are faced with legal questions of IFL, the PIL questions that arise are largely left unanswered or only marginally answered. When a deeper analysis is required, questions are transferred to PIL specialists. PIL specialists for their part mostly study IFL as an isolated science, set apart from other fields and their developments.

What is in danger of being left out here is what I call the "socio-economic component" of IFL. (6) That IFL has such a component becomes clear if one recognises that IFL can be examined from two different perspectives.

On the one hand IFL as a discipline is concerned with regulating particular aspects of relationships in Family Law that have international aspects, in particular the aspects of jurisdiction, applicable law, recognition and enforcement. Examined from this point of view, IFL aims only to regulate family life, or at least certain aspects of family life that take place in an international context. On the other hand the outcome of an IFL dispute also functions as a link in a chain of legal questions. In other words, the outcome of a dispute of IFL often forms the link between on the one hand rules concerning Family Law, and on the other rules of "Migration Law". (7) Rules of IFL do not stipulate whether or not married partners or also unmarried partners qualify for family reunification – these rules are by their nature to be classified as rules of migration law. Nevertheless, rules of IFL are very important when defining the notion of "married partner" or "unmarried partner" and therefore determining a person's public legal claims. In other words, it is not the field of IFL that determines whether one can ascribe public legal claims based on certain family relationships or not. Rather when a decision in an area of public law has been taken, IFL rules are crucial in the evaluation of public legal claims based on family relationships with an international dimension. An example of the above would be the acceptance or not of a foreign marriage or a foreign judicial decision entailing the changing of a foreigners age – these are typical IFL

(6) What is interesting is that even where IFL is analysed in relation to the debate on integration, it is only analysed in its "cultural" aspects. Almost no attention is paid to the socio-economic aspects of IFL.

(7) Whereby Migration Law in this context means all public legal claims within the law governing residence, nationality and social security based on family relations.
cases. These can be important in cases of claiming residence or claims to pension rights and child benefit. In such cases IFL must be seen as more than just a couple of rules governing family relationships with an international context: IFL has socio-economic consequences where it serves as a link between the rules governing Family Law on the one hand and rules of Public Law on the other.

If one examines IFL from this angle, then it appears IFL has recently sailed into turbulent waters and has arrived at a stage of intensive interaction with other legal disciplines. The cause lies in factors of a socio-economic nature. Particularly important are the developments which are going on in the field of the regulation of mobility of people and in the developments in the law on residence, Nationality Law and Social security law regarding claims made by foreigners based on their family relationships.

The meaning of the above for jurists is on the one hand that PIL jurists are being tempted more than ever before to come out of their ivory tower, and that jurists from other fields are being tempted to delve deeper into problems of PIL nature. Moreover, the recognition of this hinge position and the economic impact of IFL makes it conceivable that many policy makers become attracted to applying IFL rules in such a manner that the economic interests that they strive to achieve are best served. I shall go into these socio-economic components of IFL in this paper; specifically in the light of current developments to Europeanise it.

III. THE EFFECT OF RECOGNITION ON THE SOCIO-ECONOMIC COMPONENT OF INTERNATIONAL FAMILY LAW: DEVELOPMENT OF A TWO PRONGED POLICY

Earlier on, I indicated the possible impact of economic policy decisions on the way IFL is treated in present Dutch national policy. (8) In particular I indicated developments in the Netherlands which tend to have a restrictive way of treating IFL, through restrictive migration policy. In

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(8) See the references made infra, footnote 10. I also indicated already earlier (V. Van Den Eeckhout, "Gelijkheid in het internationaal privaatrecht. Een kritiek op gangbare structurering van het debat", Nemesis 2003, p. 177-189) on the "ideological defilement" of IFL: ideologies that are connected with a restrictive integration and immigration policy let their effects be felt on developments within IFL, as I argued there. I assumed that current developments in IFL are to a large extent parallel with general social-legal developments, and I illustrated this with the manner in which in PIL the goal of equal treatment of men and women is being achieved. Indeed, the fact that policy makers and practitioners of IFL live in that same society will undoubtedly contribute to "socialised" IFL. What is dangerous, I argued, is when "cultural" and "gender equality" arguments are used in a veiling way. This happens, in particular, where claims are evaluated by authorities as being purely situated in a context of clashing of cultures, but where in actual fact government priorities for migration are being aided.
those publications I also pointed out that in a European context the tendency is to move in an opposite direction with regards to IFL, through opposite economical practises. Recognition of the social-economic impact of IFL leads, apparently in this sense, to the current development of a “two track policy.” Due to the fact that policy is made on two levels, namely on European level and on a national (Dutch) level, the two track policy is one that compares developments on a national (Dutch) level and on a supranational European one. But because their work is limited to their own particular areas, one would be better off speaking of a situation of “bi-polarity.” As I will point out later, the future may well point to a true two track policy system within only one level, if the EU will deal with “extraomunitarian” cases and, in this context, takes over the tendencies prevalent in the national context.

Hereafter, I shall firstly briefly remind and describe some of the developments on the national level. The problems and questions that arise from this are primarily meant to be used as reference points in the later discussion on what kind developments are occurring on European level. So I shall start with the Dutch experiences and then move on to the European context where I will firstly look at the intra-communitarian context and then the legal relationships that include an external aspect.

III.1. – *Current developments on a Dutch national level*

### III.1.1. Ways to cope with International Family Law in a restrictive sense

One should not overestimate the phenomenon of the impact of economic concerns on the way IFL is looked at in the Netherlands, but, however, the general tendency seems clear to me: in a Dutch context where questions arise about claims with regards to the laws on residence and nationality as well as Social Law for non-EU foreigners, the Dutch authorities look at IFL very restrictively. (9) Sometimes these authorities even almost completely ignore IFL in order to stop a foreigners claims coming to fruition in the above fields. (10) Thus, a manipulation takes place of IFL; a manip-

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(9) By restrictively I mean that IFL is used to stop claims rather than aid them.

ulation in the sense of development of rules of IFL and use of margins within IFL in a "negative" manner (11), included manipulation in the sense of ignoring of IFL rules. (12)

It is true that Dutch IFL as such – certainly in the areas of marriage and divorce – is traditionally fairly "liberal" in the sense that it is strongly "favor matrimonii" and "favor divortii" based. But this obvious "favor-inclination" must be strongly re-examined: Firstly, IFL itself sometimes already infringes on the so-called "liberalism", because of the pressure of restrictive migration policies – see for instance the changes made to article 4 Act “Wet Conflictenrecht Huwelijk”; here the legality of consular marriages has been limited so as to prevent false marriages. (13) Recent legislation in the area of the International Lineage Law and International Adoption Law has the spirit of liberalism, but has felt the same pressures from migration policies. (14)

makes a critical and detailed analysis of the most important legal aspects with relation to legislation and verification of documents. The author comes to the conclusion that the Dutch "legalisation" policy contradicts international obligations and Dutch laws on PIL. In policies regarding "problem countries" the use of PIL is virtually non-existent.


(12) See what is mentioned in footnote 10. As BOELES indicates briefly, certain practices of manipulation of IFL are also visible in Social Security Law, in particular with the former practice in Social Security Law in relation to the value that is given to foreign judicial decisions by which a date of birth is changed. See also – and this is more recent in Social Security Law – the practice concerning the definition of the notion "own child" in article 7 Act on Child benefit ("AKW"); here too one can see the ignoring of PIL rules. Instead of using PIL one sees the material legal judgment of the situation created abroad. Further information about this can be found in V. VAN DEN EECKHOUT, “Uw kinderen zijn uw kinderen niet ... in de zin van artikel 7 AKW", Tijdschrift voor Familie- en Jeugdrecht 2001, pp. 171-176 and G. VONK en Y. YDEMA-GUTJAHR, "Over de invloed van buitenlandse culturele waarden op de juridische normering in de sociale zekerheid", in N. VAN MANEN (red.), De multiculturele samenleving en het recht, Nijmegen: Ars Aequi Libri 2002, pp. 357-368. The judicial decision with which these practices came into being, according to Vonk and Gutjahr, was in the judgement of the Centrale Raad van Beroep of 23 December 1987 (RSB 1988/168). But in fact, in this judgement the CRvB in a way accorded a second chance by looking at the substantive law.

(13) See VAN DEN EECKHOUT, "Internationaal privaatrecht en migratierect. De evolutie van een tweespoorverbond", l.c.

(14) See for the inclusion of this in PIL rules: article 9 paragraph 1 under b of the New Act containing rules of law with regard to lineage and the recognition thereof ("Wet Conflictenrecht Afstamming") (law of 14 March 2002 that took effect on 1 May 2003). This WCA is at a first glance fairly liberal concerning the recognition of judicial decisions, legal facts and legal transactions. But what is interesting is that next to the general demand that the foreign judicial decisions having respected principles of due process, article 9 paragraph 1 under b states that a decision must be made "after a proper investigation has taken place". See about this L. JORDENS-COTRAN, "De wet conflictenrecht afstamming", Burgerzaken en recht 2002, pp. 261-
A less “liberal” image also appears if one looks at how IFL works in connection with other legal domains: occasionally IFL, and the honoured favor-principle, is left alone, but the IFL honoured liberalism gets degenerated afterwards: a liberal IFL regulation can, after all, remain useless when no attention is paid to the outcome of IFL disputes in other legal areas. (15) Also it happens that liberalising tendencies in IFL are edged on even stronger when a liberal IFL regulation in its effect on another area of the law is negative for those concerned. (16)

In such situations it often seems as though IFL rules are simply left aside and that margins are used just to ensure a negative result for those who claim rights. Apparently negative consequences for foreigners in migration law can be reached by using IFL in a certain way. All this certainly raises a number of fundamental questions that I shall briefly go into below.

III.1.2. A search for consistency, legitimacy and, in general, questions on the positioning of PIL

The instrumental use of PIL and the treatment within PIL of certain PIL principles threatens consistency in the field: if one keeps playing with the rules in order to reach a satisfactory outcome for government authorities, then this will inevitably result in an arbitrary and inconsistent use of PIL rules. (17)

267 en 296-303, specifically p. 302, note 117, where she states that this goes much further than is common use in IFL, given the fact that apparently recognition can only take place if the judicial decision is based on trustworthy facts. PIL thus seems to be affected with having to go too far in examining documents. For the latter in a different context see P.B. Boeles, o.c. Also article 10, paragraph 2, under c Wet Conflictenrecht Afstamming concerning the “sham recognitions” and similarly article 6 paragraph 3 of the recent Wet Conflictenrecht Adoptie (in which it is stated that acknowledgment of an adoption can be withheld in the interest of public order, when it is an adoption that has taken place for appearances to trick the system). Incidentally, this goes against the advice of a government Commision on PIL (advice 16 October 2000) that warned against using PIL for the law on foreigners and nationality issues; cfr. also, mutatis mutandis, with relation to stopping sham marriages, (the advice of 1 May 1977 about the Ontwerp Rijkswet Nederlandsch). The legislator held that a ground for refusal could be upheld if it was based on sham adoption or sham marriage. For further reading: V. Van Den Eckhout, “De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw”, cfr. also, mutatis mutandis, that fundamental Human Rights - e.g. the right to have family life respected and the non-discrimination principle - could be violated here along a specific usage of PIL rules. (17)
Questions that arise are how far the rules of PIL may be bent, in which manner and with which arguments they can be filled in, and whether there are certain reasons and situations when the entire field of PIL should be used or not. (18) The answer to these questions needs a certain amount of contemplation about IPL techniques, about consistency within PIL and between the field of PIL and fields such as Social Security Law, Nationality Law and laws on residence. More fundamentally though is the question whether PIL should be allowed to be influenced by political policy aims that are prevalent in other fields. Can it be justified to use PIL for migration purposes or to use certain aspects of migration as arguments within PIL? In actual fact, the question that remains is whether PIL should link up with developments in the field of migration (19) or whether it should try to stand ground and even put up a fight. (20) A third option, PIL could be that PIL would develop completely independently. (21)

Whoever asks questions about the positioning of PIL, about (in)consistencies in the way governmental authorities use IFL and the legitimacy of methods being used, must answer questions on a variety of levels. For example, a comparison can be made between the use of IFL within Nationality Law, Social Security Law and the laws on residence (22): are IFL

(18) The issues brought up here are also applicable in the defining of margins in (Dutch) material Family Law, as substantive Dutch Family Law includes margins that can be filled in differently in different cases under influence of considerations of migration law. These margins include, for example, concepts as the interest of the child, the interdiction of marriage on the basis of "lineage", the "permanent breakdown" of the marriage, the possibility to allow minors to marry if "serious reasons" are present ...

(19) See for example supra, footnote 13.

(20) For example when PIL is interpreted as being an instrument that aims to simplify international legal traffic. In my contribution in Nemesis I looked at the compatibility of PIL with aims in Migration Law: I stated that the spirit of PIL goes against its usage to work against rights to residence but the spirit is certainly compatible with PIL usage to increase mobility of people - as is happening recently in an EU context. Even though it is true that sometimes reservations are made to the goal of simplifying legal traffic, I believe the goal of hampering claims of residence as such cannot be a goal that should be taken into account in PIL. See V. VAN DEN EECKHOOUT, "Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid", I.c. Also infra.

(21) If so, there is however a risk to be mentioned here (see also footnote 15) that PIL judicial decisions will not take effect in other areas of the law. An intervention of less consequence (than denying in an absolute way public claims based on family relations) in other areas of the law is possibly the inclusion of rules concerning nationality and residence that at a later date has been proven to be fraudulent, nationality and/or residence can be revoked (in other words, an intervention in other areas of the law takes place in order to lessen the pressure in a particular area of PIL, but at the same time international legal relationships do have effect in the public legal sphere. See in this context for developments in Dutch Nationality legislation, critically from the perspective of the consequences for children [not dealing with issues of PIL], S. SARI, "Herroeping van het Nederlanderschap wegens bedrog en gevolgen voor de kinderen", Migratierecht 2003, pp. 325-331.

(22) With where at all possible comparative research, for example into German practice concerning international family legal relationships within Social Security Law (this German practice is also mentioned by Vonk and Ydema-Gutjahr I.c.) in their discussions about the way in which the Dutch Centrale Raad voor Beroep currently judges.
questions answered differently if they arise within laws on residence, Social Security Law or Nationality Law? Will PIL be used within a field and not in others? (23) Are there even examples of a difference in usage within one field and in a confrontation with the same family relationship when the answer to the questions posed in one case is advantageous for a government authority and in the other circumstance is not? (24)

Such an exhaustive analysis of Dutch PIL has not yet been done, although in earlier papers I did a small amount of research into this area. After these first steps in research into the current methods, I believe that I can conclude that in practise Dutch PIL is currently developing in all directions, though in general it is clear – to my regret – that it is evolving in a restrictive sense.

I do not want to say here that there are no circumstances in which justification of different usage of PIL rules exists. (25) Only, currently, no convincing justifications are given for the different usage, but if a different usage occurs then it should be justified, visible inconsistencies should be underpinned with clear argumentation and the practice should be seen in the light of human rights that are either being respected or are being infringed upon throughout. (26)

At this moment in time there has not been such a systematic and clear analysis. The only consistency that I have found until now is the manner in which PIL is used – even if there may well be exceptions –is almost always bad for the people involved.

(23) See also the points made by Vonk and Ydema-Gutjahr (l.c.) about the different usage of PIL rules in Social Security Law.

(24) For this see for example the opinion of L. Jordens-Cotrnan at the conference “Informele buitenlandse huwelijken en het Nederlandse recht” on 13 March 2003 organised by Register Amsterdam about the practise of recognising informal marriages in cases of child benefit on the one hand and pension payments on the other hand. Informal marriages seem to be recognised by luck of the draw, albeit that almost always the possibilities to claim social rights are negatively influenced by the proceedings. The registering in the Basic Local Administrative Registry (GBA) and legalisation are done on a arbitrary basis (more about the role of registration of marriages in the GBA, E. Gubbels, “Inschrijving huwelijk in het buitenland met een minderjarige?”, Burgerzaken en recht 2002, pp. 147-160). In earlier jurisprudence it looked as though the (non-) recognition of informal marriages would get a positive surge for those involved in the proceedings (see for this the judicial decisions noted by L. Jordens-Cotrnan, “Huwelijksbevestiging in het Marokkaanse en Nederlandse recht”, Recht van de islam 1999, pp. 83-131, particularly p. 121). In this case a U-turn seems to have been made in the last couple of years.

(25) In the sense that recognition of a family legal relationship within PIL could still result in non-recognition of a family relationship in other areas of the law, but also that non-recognition of a family legal relationship within PIL does not have to stand in the way of recognition of family relationships in other areas of law. See also V. Van Den Eckhout, “De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw”, i.e., footnote 23: it could be possible that a family situation is not recognised as such, but does result in the granting of certain legal rights.

(26) Is the right to experience a proper family life being hampered by the way in which different areas of the law react to one another?
I believe it would be wrong to label the above usages and practices as being part of the struggle to combat fraud and justify them in that way. Or is it perhaps logical that other conditions apply, now and again, depending on what a certain foreigner is asking for? Is it logical that stricter conditions are applied when a foreigner wishes to apply for certain advantageous benefits? Should we be more lenient in allowing certain documents to be used as evidence if the foreigner is at a disadvantage? (27) Could the will to combat fraud be a justification so that in certain situations, ultimately, the entire field of PIL is made applicable or not? In my point of view, such kinds of justification are not acceptable. (28)

Naturally, it is possible to discuss on the way in which importance should be attached to the interests of persons on the one hand and the interests of authorities on the other. (29) However, it cannot be the case that the interest of government authorities is being helped by the systematic refusal of applications – in an inconsistent way. I shall leave this area of aiding governmental interest and combating fraud aside. I do, however, wish to point out here briefly that the area of fraud raises a number of serious questions about the positioning of PIL. The issue at hand is the overwhelming fear of and perception of fraud: the perception that has become very popular is that when claims of residence, on social security or nationality are made by foreigners, one should be very vigilant against abuses. It is said that mechanisms of control must be increased. It appears that, in the discipline of IFL, too, the idea is spreading that IFL is being put under pressure by attempts to abuse it, not solely to obtain advantages in Family Law, (30) but also to obtain advantages in residence, on social security and nationality. (31) Thus, a central question for research is how IFL deals with – and should deal with – “fraud”. Analysis of this requires a fundamental study of what is understood in IFL by “fraud” – what is, for example, the difference between “shopping” and “fraud”. (32) It also

(27) It seems e.g. as though there is a difference in the manner in which the requirement of legalisation for a certificate of marriage for recognition is handled, or in the manner in which the legalisation of a certificate of birth is used as a requirement for child benefit.

(28) See for a fundamental criticism in the context of “legalisation”, P.B. Boles, o.c.

(29) If one wanted to shape the result of government interest in the public legal domain, then wouldn’t there have to be consistency in the manner in which PIL is used in, for example relation to nationality laws on the one hand, in relation to social security laws on the other hand? Or within on area of the law – for example, if one has an own family legal definition within social security laws, then one would want it to be the same for marriages as well as succession matters, or not?

(30) For example, attempts to facilitate a divorce through manipulation of IFL.

(31) For example, through sham marriages, sham adoptions, ... See, e.g., J. Erauw, “De codefication van het Belgisch internationaal privaatrerecht met het ontwerp van wetboek I.P.R.”, Rechtskundig Weekblad 2002, p. 1557.

requires determination of the extent to which IFL is concerned with the fact that people sometimes try to influence claims in areas outside Family Law through management of IFL techniques. This part of the analysis should focus on how the policy of combating fraud affects the way IFL rules are promulgated and applied. Here, the following issues would be tackled: should more techniques be developed in IFL itself – e.g. through elaboration of the “exception of international public order” (33)? Or should the discipline of IFL be left undisturbed? (34) Can alternative ways of combating fraud be found, through intervention at a preliminary stage or post-IFL? (35) What are the advantages and disadvantages of each of these options, as viewed from the perspective of IFL? (36) In such an analysis, special attention should be paid to the theme of family formation and family reunification: these are issues which were at first presented as needing attention only as a way of combating “fraud”, and then over time made the focus of an open policy of discouragement, regardless of whether fraud had been perpetrated or not.

III.1.3. Implicit economic distress

As mentioned earlier, everything still seems in an embryonic stage and one can therefore only speak of incidental usage of IFL in a restrictive

(33) See also about the possibility of forming the “reality test” in such a manner as to ensure that a person can only gain access to a family legal institute if certain conditions are met regarding issues of residence, V. VAN DEN EECKHOUT, “Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid”, i.e. See also supra about sham marriages, sham adoptions and sham recognition’s.

(34) Perhaps because the discipline of IFL has to be considered too “soft” to combat fraud? If so, can this supposed inadequacy to combat fraud be used to justify the whole discipline of IFL being by-passed in certain areas? For a critical analysis in this context, see P.B. BORLES, o.c., who refers to several practices in which IFL rules are not respected, even outside the area of legalisation. Historically see H.U. Jessurun D’OLIVEIRA, “Kromme rectificaties”, Ars Aequi 1983, pp. 663-673 concerning recognition of foreign judicial decisions where a date of birth is changed. In the judgment of the tribunal of Amsterdam, 4 October 1996 (in the procedure preliminary to the judgement of the CRvB, 7 April 1999), the tribunal explicitly referred to the factor of “fraud” to put aside rules of PIL, arguing also that in doing this way, a “fair” way of handling could be reached. See however, for a critical analysis of the unfair result of handling this way, V. VAN DEN EECKHOUT, “Uw kinderen zijn uw kinderen niet… in de zin van artikel 7 AKW”, i.e. It is worth mentioning that in CRvB Utrecht, 14 January 1998, confronted with a “Spanish adoption”, one party tried – in vain – to argue on the basis of article 3, first paragraph of Regulation 1408/71, containing an interdiction on discrimination on the basis of nationality.

(35) Regarding an attempt to intervene in the phase before PIL, see historically, the original Dutch legislative suggestion about registered partnerships, with criticism from H.U. Jessurun D’OLIVEIRA, “Geregistreerde partnerschappen en de Europese Unie. Kanttekeningen over de internationale reikwijdte van het wetsvoorstel”, N.J.B. 1995, 1566-1570.

(36) It is conceivable that a comparison of the pros and cons will ultimately result in criticism of the intensity of the battle against fraud as such, and thus will not be limited to the pure expression of a preference between different ways of combating fraud. For a critical view of the tendency to increase control mechanisms, see also K. GROENENDIJK and R. BARZILAY, Verzwakking van de rechtspositie van toegelaten vreemdelingen, Utrecht: Forum 2001.
sense. Moreover, much seems to happen in a "veiled" manner; as far as I can see IFL has never been earmarked in a general way as a method for aiding a restrictive migration policy. Due partly to the fact that the economic arguments remain disguised, certain practices and phenomena have not yet been discussed; but discussed they must be. Discussions must be done with a field of research where the margins are sufficiently wide-placed. (37)

Discussion is certainly also necessary in anticipation of European intervention in areas that are momentarily non-European. Especially as, and I shall go into this further on, in a European context PIL is explicitly used as a key to economic considerations. (38)

Seen from this perspective, the central question to answer will be to what extent the EU will try in future to interfere in PIL aspects of international legal relationships that have "external" aspects. And a follow-up question is how the socio-economic aims in that context shall be balanced. Put this way, it is particularly interesting to monitor the current and future developments in a European context.

III.2. – A new actor: the EU

III.2.1. New interferences from an unexpected angle

Fairly unexpectedly a new actor has entered the domain of IFL regulation; an actor on a supranational level that traditionally has acted...
almost entirely for economic reasons and with economic motives. (39) Indeed, it is known that the 1997 Treaty of Amsterdam substantially and controversially changed the EC Treaty, and the changes that affected the field of PIL are known as “the Europeanisation of PIL.” This phenomenon of Europeanisation of PIL can be seen as a process whereby the EU has given itself powers to create PIL rules, through the new article 65 in the EC Treaty. This concerns procedural law (jurisdiction on the one hand and recognition and enforcement on the other) as well as rules of applicable law—in short all PIL traits.

In the last couple of years, it was not expected that this would happen, certainly not concerning the sub-discipline of IFL. A confrontation with the difficulties of (International) Family Law did naturally exist, but the European authorities always took a restrictive stance. (40) Of course there are family legal terminologies in EC Law, but in the past, family legal matters in the jurisprudence of the European Court of Justice were very incidental and of a subsidiary nature. The ECJ did, for example, come with a verdict on the legitimacy of foreign judicial decisions whereby a date of birth was rectified, in matters of rules on name, or in matters of alimentation. But in the case of family legal terminologies that are central to EC Regulations and Directives, Co-operation Treaties, etc the ECJ has traditionally been rather reserved in any interference in (International) Family Law of member states. The European Court of Justice has thus acted subdued with regards to IFL of member states, also in cases such as European legislation whereby family members of EU employees made use of the right of residence, or in similar cases where legislation was applicable through co-operation or association treaties that gave social and economic advantages to those involved. (41) What was particularly distressing, was the promulgation of legislation in this area by European institutions themselves.

(39) Everything though the EU is losing its purely economic character and goals, and is now also working in areas such as Human Rights, it is still a fact that the EU is primarily inspired by economic motives. See on this the Draft Council Report 13017/01 on the need to approximate Member States’ legislation in civil matters of October 29th, 2001, adopted at November 16th 2001.


The Treaty of Amsterdam changed all this. European institutions want to interfere substantially in the field of IFL. It is clear that, in previous years, European institutions have been creating ambitious plans for a unification of IFL, or, even better, the EU has been focusing on unification of IFL – see the Action Plan (42) and the Draft Programme. (43) Obviously the EU sees itself as being largely responsible for unification of IFL rules.

The justification for this is less clear and needs clarification (44): it is unclear whether policy makers at the creation of the Treaty of Amsterdam intended to intervene from the beginning in IFL as sub-discipline of PIL and from which perspective and angle one actually wanted to intervene from. For example, is the real goal, the completion of freedom of movement of persons or the freedom of movement of judicial decisions – and what is the relation between both?

III.2.2. Why is there EU interference in International Family Law: two visions?

In my point of view there are two possible visions on the Europeanisation of IFL. Even if the policy makers did not have one of those visions as possible explanations for EU interventions from the beginning, the presentation of the visions could of course still give us justification afterwards as well as a further insight into the development of the process of Europeanisation of IFL. In other words, the matter of explaining the justification of EU interference may seem academic but could also give us clarification about the manner in which unification could be best developed, and answer the question whether a unification of rules of PIL is enough or whether there should also be unification regarding the rules of substantive Family Law and/or a unification of the rules in the field of Public Law. Thus, a clear vision of the why about the process of Europeanisation, regarding possible justification of which matters that fall within EU responsibility, is important. (45) In short

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(43) Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, O.J., C012, 15.01.2001, pp. 0001-0009. In Tampere the European Council asked for the implementation of a programme for mutual recognition. Concerning IFL especially – and in particular on alimentation and authority – the draft text wishes to see a greater advance.

(44) See also for a discussion about this with more references O. REMJEN, "European Private International Law, the European community and its emerging area of freedom, security and justice", CMLR 2001, pp. 53-80, particularly p. 74 where he states "Family Law has ever been named as "le vecteur essentiel" for the European judicial area". See also on this point M. ThAKST, o.c.

(45) On the one hand it is about which areas of Family Law can be regulated (specifically: can it be just "matters of status" or also wider family legal matters) and on the other hand the question about which PIL domains can be regulated (all the PIL questions or not).
any clarification of the above can give us a valuable insight into the development of the unification process and give us the direction in which the EU will move.

III.2.2.a. “Free movement of persons and an area of freedom, security and justice” (46)

The key question is how exactly IFL is related to the EU. (47) If one attempts to answer this question then one will inevitably see that the authority to interfere with PIL is regulated in the new Title IV of the EC Treaty with the title: “Visas, asylum, immigration and other policies related to free movement of persons”. Even though it may not have been the direct intention of having PIL placed in the EC Treaty in this way, the place in which these powers are summed up in the Treaty could be relevant for further augmentation of EU interference in IFL. (48)

It is interesting to notice that up till now only one of the list of aspects of “Migration Law” in Title IV has been given serious attention, namely that of “free movement” – as one of the fundamental freedoms of the EC Treaty. Quite often it is stated that the aim is to get rid of differences in legislation that hamper mobility of people, but it boils down to vague pointers as to how exactly IFL is related to this fundamental freedom of movement of persons.

III.2.2.b. The uniform definition of family legal terminology as a “preliminary question” and/or the furtherance of legal security

In my point of view, if one really would like to point out the importance of the freedom of movement of persons, there are two categories in which arguments could fall – whereby, possibly, one could also think of a combination of the two. The first category emphasises the stimulation of mobility within the EU through the uniform filling-in of terms of family law where they are relevant in EU law. The second category emphasises the stimulation of the freedom of movement within Europe through an increase in general legal security.

(46) See the terminology used in article 2 of the Treaty on the European Union and article 61 of the EC Treaty.

(47) Concerning questions about how the criterion of “necessity” is to be interpreted and applied in the context of article 65, see, briefly, M. Tenreiro and M. Ekstrom, loc. cit. p. 185.

(48) Further on this (also sceptical), Struycken (Interview with MR. A.V.M. Struycken and Mr. J.G.A. Struycken, Acta Acqui 2001, p. 747) and C. Joustra, Mededelingen van de Nederlandse Vereniging voor Internationaal recht, Verlag van de Algemene Vergadering 2003, p. 36. It is interesting to note that authors such as Joustra argue for a disconnection of PIL on the one hand and migration law on foreigners on the other in the EC Treaty, specifically through the accommodation of the respective areas in different titles in the EC Treaty.
Perhaps in drafting the Treaty of Amsterdam the primary idea was defining “family member” in a uniform manner where this term is used in European legislation. Thus, it becomes possible to argue that the EU in Europeanising PIL primarily sought to Europeanise international *family* law. But perhaps the aim was to give the citizens a greater feeling of legal security through legislating PIL rules in the field of PIL outside IFL as well as IFL. Both categories have aspects of legal security, but in the first category the importance of IFL as a cornerstone (IFL as a link between the rules of Family Law and public legal claims) is evidently visible, whereas this is not the case in the second category. I shall explain below.

In the first category one can assume that the creators of Title IV were trying to come to a uniform definition of family legal terminology in EU-regulations regarding the freedom of movement of employees. The first issue would then be the interpretation of the term “family members” in Regulation 1612/68 – the Regulation on freedom of movement for workers within the Community. (49) The hypothesis in this category would be the following : a uniform and liberal interpretation of IFL terminology would stimulate greater usage of claims in the field of freedom of movement. So a person married in accordance to the laws of one member state, moving to another and falling under the provisions of the Regulation 1612/68 would not have to worry about the other states authorities not recognising a partner as his husband or wife. In other words it is important to ensure clarity concerning who, from an IFL angle, falls under the provisions, as they are now formulated, where family members are granted a derived right of residence. The first thing that should then be done is work on unification of rules of recognition. In this specific field more legal security could certainly be achieved. It is also possible to go a step further in this category by including family legal terms in legislation where the issues are not about the freedom of movement of persons, but about social advantages. (50) claims granted via association trea-
ties, (51) and so forth – perhaps even legislation coming from the Council Directive of 22 September 2003 on the right of family reunification where family legal terminology also exists. (52)

In the second category, however, the essence is about stimulating legal security for those that have already been allowed to be mobile within Europe. (53) The assumption here is that a unification of regulations of IFL on a liberal basis will stimulate claims regarding free movement within Europe, or at least shall remove any obstacles to that effect: if this is realised, people will be more able to know what they can expect in circumstances of internationalisation of their legal relationship by exerting their right to freedom of movement; at any rate they can rely upon the fact that they shall not lose any family legal claims by moving freely within Europe. In this category it is easier for one to distance oneself from the limitations to unify regulations regarding family legal terminology that appear within EC Law and of limitations in regulating problems concerning recognition. Rather than focussing on problems regarding a derived right of residence...

ket freedoms provided that such definition cannot be regarded as an obstacle to said freedom. Although the meaning of family members has been specified in secondary Community legislation, such as Article 10 of Directive 1612/68, it, however, refers to the circle of family members entitled to family reunification but not to entitlement of family members to social protection benefits".

(51) See in this context Groenendijk, note in the Baumbast Case (Baumbast and R. 2002-09-17 C-413/99, JV 2002(466), where Groenendijk argues that regarding a decision by the Court of Justice on family reunion, article 10 of 1612/68 does not limit itself to the mutual children, but also children of one of the parents – such as the daughter of Baumbast. Groenendijk bases his arguments on the fact that the ECJ bases its decision on the aim of the regulation – the wife would be hindered in joining a future husband if she would have to leave a daughter behind to do so. Then he points out that this will also have consequences for those that fall under the provisions of association treaties. Such a question is already centre of proceedings regarding article 7 Decision 1/180 of the Association Council EEC-Turkey (case C-17/02, AYAZ, PhEG 2002, C281/22). Can then be argued that mutatis mutandis PIL rules must also fall in line and be treated in a consistent way?


(53) About the differences and interactions between being allowed to be mobile or to be resident (in an EU member state where one would like to migrate to, another EU-member state that one has migrated to in the first instance, or the home country of one's partner); see ECJ Singh (C-370/90 (1992) ECR I-4295), and see also the recent judicial decision in Hacene Akrich (C-109/01 2003-09-23) and the conclusion of the advocate-general in this case, particularly no. 123. See, critically, on Hacene Akrich, comments of CAG, JV 2004/1, also referring to the "Chen-case" (C-204/02, O.J., 2002 C189, p. 12, to be expected) and recent developments in legislation concerning right of freedom of mobility and residence of citizens of Union and their family members. See also the Council Common Position of 5 December 2003 on the proposed Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (see http://www.europa.eu.int/comm/justice_home/doc_centre/citizenship/movement/doc_citizenship_movement_en.htm; in March 2004, this Directive on the right of citizens of the EU and their families to freely move and reside within the territory of the Union has been adopted by the European Parliament), not introducing a preliminary condition of residence.
for family members of a EU employee, the second category is far wider and
aims to stimulate mobility through the creation of a climate of legal secur­
ity in the area of family law. The idea is that people will be more reserved
in moving from one member state to another, if they are afraid of losing
claims by immigrating, or if simply they do not know what changes in their
legal position they can expect on a family legal basis. Included in the latter
is the matter of what Law is applicable regarding their family relationship
and which authorities can be addressed, and finally what value a judicial
decision has in another country. (54) As far as this category is more direct
than the first regarding the three PIL questions, (55) one can say that this
category can justify in a greater manner the unification of rules of IFL,
though in this category, more than in the first, the goal of reaching a uni­
fication of rules of IFL in an intra-communitarian context becomes
clear. (56) However, additionally, one can surely say that it is a possibility
that work will be made of legal security also regarding the applicability of
association treaties, the Directive on the right of family reunification etc.

III.2.2.c. Possible conclusions from the Brussels II Regulation?
The first piece of EU unification in the field of IFL – the Brussels II
Regulation – can still be explained in two ways and can support the two
categories mentioned above. This is because Brussels II fits in with the
second category in the sense that it is favourable to the encouragement of
mutual recognition, within the EU, of judicial decisions on divorce and

(54) In this sense one is creating, for example, liberal rules, being a guarantee for “liberal
access to justice.” Regarding the question on whether one could limit oneself to unifying PIL
rules see for example K. BOELE-WOELKI, “Divorce in Europe: unification of private interna­
tional law and harmonisation of substantive law”, in H.F.G. LEMANDER en P. VLAS (red.), Met
recht verkregen : Bundel opstellen aangeboden aan mr. Ingrid S. JOPPE, Deventer: Kluwer 2002,
pp. 17-28. It is possible that from this perspective a push could even be made for unifying claims
on a public legal basis (here it could be stated immediately that “unification” in the area of
claims of public law based on family relations, could be elaborated in a double way: on the one
hand, one could think of unification in the sense of unification of the family-law-concepts used
in public law, on the other hand, one could think of unification in the sense of unification of
claims of public law themselves).
(55) I should point out however immediately that although in the first category it is all about
the defining of family legal terminology, and from that possibly the aim of free movement of judi­
cicial decisions – in other words, the focus is put on the unification of rules of recognition and
enforcement – also within the first category it could still be argued that to achieve the aim of free­
dom of movement of judicial decisions, an unification of the rules of jurisdiction and applicable law
(the latter to stop “shopping”) is necessary. Further information about the possibility and reality
of the unification of rules of applicable law in divorce, a study by the Asser-institute in 2002 (http://
europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm).
(56) See further about the question what matters should be unified, seen from the perspective
of increasing legal security and not losing rights if one moves from one country to another,
N. DETHLOFF, i.e. specifically on whether just IFL or also substantive Family Law should be uni­
fied. In this context, Dethloff makes a distinction between a loss of status or of family-law rela­
tionships on the one hand, a loss of the legal effects of a status or legal relationship on the other
hand.
thus stimulates legal security. At the same time it fits in with the first category: although the Brussels II Regulation explicitly enters into termination of marriage, this naturally influences the status of family members with regards to laws on residence, albeit in a negative manner. (57) It also paves the way for entering into a new marriage where a new partner appears that must also be granted certain privileges through a derived right of residence. (58) 

If one looks at the way in which Brussels II came into existence, then it seems to be pure luck that article 65 was used as the basis for the Regulation. (59) Following on from this, it is my opinion that Brussels II does not contain anything conclusive.

A greater amount of evidence is the fact that the EU has let it be known that PIL rules should be unified in the areas of Marital Property Law and Law of Succession (60). These rules do not directly influence the status of a family member based on a derived right of residence and are completely separated from matters of residence. Therefore a link with the first category is far fetched. But interference in these areas could lead to a greater legal security for those that already have claims regarding the freedom of movement. Therefore, it is my opinion that, the second category offers more support to the way in which the EU wishes to interfere in IFL. The Draft Council Rapport of 29 October 2001 also seems to support this theory. (61)

(57) It is interesting to note that the EU is busy shoring-up the legal position of divorced partners and widows/widowers of persons that used their right of freedom of movement. See Proposal Com (2001) 257 O.J., C270È, 25.09.2001 on the right of Union Citizens and their family members to move and reside freely within the territory of the Member States, and the Council Common Position of 5 December 2003 (see supra, footnote 53). For ECJ cases that already moved in this direction: see DIATTA (267/83 (1985) EOR 567) and BAUMBAST (2002-09-170-413/99).

(58) See also, mutatis mutandis, in a non-European context, for a recognition of the same link my comments on the judicial decision by the Dutch Hoge Raad, HR 9 November 2001, V. VAN DEN EECKHOUT, "Gelijkheid in het internationaal privaatrecht. Een kritiek op de gangbare structurering van het debat", i.e.: whether the gentleman could let his "second" wife come over or not depended on whether a divorce would be recognised or not.


(60) It is, for example, foreseen in the Draft programme that future legal instruments will be drawn up on jurisdiction, recognition and enforcement of judgments relating to property rights arising out separation between married and unmarried couples and to wills and successions. Moreover, Brussels II itself also contains rules on parental responsibility – even in an extended way in the new Brussels II Regulation. Here, it could be noticed however that residence claims could be influenced by decisions on parental responsibility ...

(61) Specifically, no. 6 and no. 14. See supra, footnote 39. See also in general the reasons that are presented to interfere with PIL, including issues of applicable law: see recently the Explanatory Memorandum with the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”), Com (2003) 427(01), focusing on legal security.
III.2.3. The tendency of liberalisation in an intra-communitarian context — how far and in what sense?

III.2.3.a. Liberalisation of (International) Family Law

A situation of legal security can be achieved that guarantees a minimum or maximum of claims and can therefore to a greater or lesser extent show favour-tendencies. (62) It is interesting to see how things have been worked out in Brussels II.

Looking at the manner in which the Brussels II Regulation has been formulated, one can distil the following concerns: the promotion of the goal of mobility through the increase in legal security, a legal security to be realised by achieving a situation of international harmony. Once one has been granted a divorce it will no longer be questioned, which ensures that any achievements made will not be lost by migrating within the EU; the opposite case would hamper movement.

Through an examination of the Brussels II Regulation it is clear that the creators of that Regulation were led by the principle of "favor divortii." (63) This favor-tendency is, for example, realised through a com-

(62) Indeed, a difference has to be made between the goal of legal security on the one hand (improving the foreseeability of solutions), and goals such as preventing a loss of rights on the other hand. Not only in the second category but also in the first can the EU take on a more or less liberal stance in the execution of powers in the field of unification of IFL: it is possible for the EU, in the search for IFL uniformity in the area of solutions for IFL problems of family legal terminology, to achieve a liberal or less liberal regulation whereby the IFL rules are measure according to either the "softest" or "strictest" EU member state.

(63) For more about the favor divortii principle in the Brussels II Regulation, see V. VAN DEN EECKHOUT, "Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid", i.e. and V. VAN DEN EECKHOUT, "Nieuw internationaal echtscheidingsprocesrecht: Brussels II", Tijdschrift voor Civiele Rechtspleging 2001, pp. 69-102. The new Brussels II Regulation does not introduce any changes concerning matrimonial matters. As regards rules on parental responsibility, the new Brussels II Regulation pretends to have taken into account the principle of the interest of the child (see for example consideration 12 of the Regulation, "The ground of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity (...)", resulting inter alia in the principle that jurisdiction should lie in the first place with the Member State of the child’s habitual residence. One could argue that thus, the elaboration of the principle of the liberal access to justice has been reduced. But whatever what may be said about the elaboration of the principle of the interest of the child in the Regulation, the general idea of the EU is apparently that children in general benefit from being subjected to a European regulation, particularly from the benefit of the system of mutual recognition: in consideration 5 of the new Brussels II Regulation, it is said "In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.") The grounds for non-recognition are kept to the minimum required, as well in Brussels II as in the new Brussels II Regulation. Moreover, in the new Brussels II regulation, judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of the Regulation should be recognised and enforceable in all other Member States without any further procedure being required. See in this context, on the Brussels Regulation, H.U. Jessurun D'OLIVEIRA, "The EU and a metamorphosis of private international law", in J. PFAFFETT,
position of rules of jurisdiction that express the principle of liberal access to justice. Moreover, no hierarchy is made between the different grounds on which competence could be based. If one had chosen a stricter way of creating rules of competence then this would certainly not have been favourable for the influence of the favor divortii in the Regulation. The draft of the Brussels II Regulation explicitly chooses not to reduce the amount competent fora – and in line with that, not to reduce access to the courts – even though forum shopping could be avoided. This is even more remarkable as one has not yet reached the stage where conflict law between member states is unified and so forum shopping becomes all the more plausible. The principle of favor divortii is not only elaborated in rules of jurisdiction: the principle remerges in the way in which the Regulation views recognition and enforcement, amongst other things through the flexibility and the provision of extra chances to achieve a divorce when one has not been granted it in the first place. This is because judicial decisions where the granting of divorce has been refused do not fall under the provisions of Brussels II. At the same time it is plausible that authorities in several Member States are competent, which could result in people being able to re-try a divorce somewhere else. All in all one can say, then, that Brussels II certainly has a liberal spirit.

Brussels II limits itself in the unification of PIL rules to those of procedure. The question then is in how far the same goals apply regarding the rules of applicable law; particularly goals concerning the abolition of hurdles to mobility, international harmony, legal security, no loss of achieved rights, and the creation of rules that stimulate access to the family legal

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Reform and development of private international law: essays in honour of Sir Peter North, Oxford: Oxford University Press 2002, pp. 111-136, especially pp. 131-132, arguing that too much precedence is given to the free circulation of decisions, thus neglecting the interest of the child, in Brussels II. See also on the issue of “interest of the child” in the new Brussels II regulation D. VAN ITERSON and M. Sumampouw, I.e.

(64) Due to the fact that the rules of applicable law and substantive law differ with regards to divorce in the different member states, a stronger canalisation would coincide with more hurdles in the possibility of getting a divorce. There are historical examples of how a particular order is prescribed concerning the relevant authorities in order to make one’s own authorities exclusively competent, which then results in the hampering of the possibilities of achieving a divorce. See for example, V. VAN DEN EECKHOUT, “De wisselwerking tussen materieel recht en internationaal privaatrecht: eenrichtings- of tweerichtingsverkeer?”, Rechtskundig Weekblad 1999-2000, pp. 1258-1259, and also V. VAN DEN EECKHOUT, Huwelijk en echtscheiding in het Belgische conflictenrecht: Een analyse vanuit de invalshoek van nationaliteitsgemengde partnerrelaties, Antwerpen: Intersentia 1998, p. 210 etc. For an example where people are forced to address their own national authorities and face negative consequences by then not being able to address another judicial institute, see the Treaty of Istanbul (CIEC-agreement on the changing names and surnames of Istanbul of 4 September 1965). The treaty provides the national authorities with the exclusive jurisdiction on liberalising tendencies such as trans-sexuality. H.U. Jessurun D’OLIVEIRA (“Weg met exclusieve jurisdictie in het namenrecht”, N.J.B. 1985, p. 1305) calls this treaty a “hurdle” to new developments in trans-sexuality. See for recent developments, R. LAWSON, “In de schaduw van Goodwin”, note under Rb. ’s Gravenhage 14 October 2002, N.J., CM-Bulletin 2003, p. 313.
institute. In the manner in which Brussels II was created the goal of
achieving international harmony has lost its importance regarding the
drafting of rules on applicable law: in the regime of recognition in Brussels
II there is no control through conflict laws. In other words, in areas where
the regime on recognition is applicable in the sense of the Brussels II Reg-
ulation, enough freedom is left to draft rules on applicable law without
having to worry about the problems and goals regarding international har-
mony.

In areas where there is no such regime on recognition, one should
logically still look at the goals of international harmony in the phase
of drafting rules of applicable law. One would, in other words, have to
look at how international recognition can be helped by the rules of
applicable law. On this point, a question arises after reading the ECJ
Gilly case (65), namely, that the jurisprudence of the ECJ could lead
to a connection with nationality or domicile as being the most impor-
tant in such cases, if the principle of connection through nationality or
domicile proves to be the most promoted. Seen from the perspective of
the goal of international harmony, the connection through nationality
seems to me at first glance the best option as authorities are more
likely to recognise foreign judicial decisions when the national laws
have been applied to those involved, particularly concerning foreign
judicial decisions on own citizens.

Or is the goal of international harmony not the only issue — or per-
haps not of primary interest — and therefore do other issues (such as
the importance of “integration”) need researching, issues that the EU
perhaps also sees as being important? (66) And do these point in the
same or another direction if it comes to create rules of applicable

(65) Gilly Case (ECJ 12 May 1998, C-336/96). The case revolved around a double tax
payment regarding the use of the principle of nationality. For a short analysis of the Gilly
case, see A.H. Van Hoek, Internationale mobiliteit van werknemers: een onderzoek naar de
internationale arbeidsswaring, EG-reeht en IPR aan de hand van de wetenschappelijk, Den
Haag: Sdu Uitgevers 2000, p. 290 etc. also concerning Conflicts Law. Van Hoek introduces
the requirements “reasonable and customary.” Whether this can be used in PIL in terms
of a “suitable and reasonable criterion” has to be seen through the ultimate goal accorded
to PIL. The question is then for which goal the criterion is useful and reasonable. In the
past (V. Van Den EECKHOUT, “De wisselwerking tussen materieel recht en internationaal
privatrecht: eenrichtings- of tweerichtingsverkeer?”, i.e.) I have differentiated two possi-
ble “ultimate legitimisations” in PIL, namely showing respect to peoples culture on the one
hand, the stimulating of situations of international harmony on the other hand (whereas
the goal of international harmony via the drafting of rules on applicable law must probably
be seen in the light of rules on applicable law combined with rules on jurisdiction and
recognition).

(66) And that in light of the Gilly case, could also be used as a legitimisation in the interest
of these issues and could link in with the “reasonable and suitable” criterion. Considerations
that could also fit in with the jurisprudence of the ECHR — (see particularly ECHR Gaygusuz v.
Austria, 16 September 1996) regarding the question when a difference in treatment can be justified—
in the search for “objective and reasonable justification.”
An interesting remark in this context can be formulated from the Garcia Avello case, namely that from this case it seems that the EU is less inclined, or so it seems — albeit perhaps only in the treatment of people with multiple nationalities in (international) law on names — to reason in terms of considerations in the sense of “respect for culture” or “integration”. At any rate these issues do not seem to have first priority when compared to goals such as legal security and international harmony for the increase of mobility.

It can be expected that if the EU decides to regulate IFL aspects of certain family legal issues through Regulations, then the EU will unify rules of recognition before unifying rules of applicable law. If there are already European rules on recognition, the argument of drafting PIL rules for the goal of harmony in international decision-making becomes irrelevant, then the question arises on the basis of which arguments a useful agreement on applicable law can be drafted — or on what basis the ECJ could judge a national regulation on applicable law on its merits. If, hypothetically, there were no European rules on recognition at all, it would still not seem unreasonable to suggest that the ECJ would be asked for a ruling at some stage on (national) rules of applicable law.

(67) See also the reaction of the advocate-general and the ECJ in the Garcia Avello case regarding the Danish argument that no difference in treatment may be made between those with multiple nationalities and national citizens because the same treatment meant an increase in better integration. The case revolved around the question of whether the Belgian authorities were forced to deviate from the Belgian rule that gives right of way to the Belgian laws on names if the person in question had more than one nationality of an EU member state (including the Belgian nationality) and whether the Belgian approach was contrary to the ban on discrimination as stated in articles 12 and 17 of the EC Treaty. The ECJ answered positively: the Belgian practice to forbid any exception to the application of Belgian rules was not allowed. Interesting are the remarks made by the advocate-general in the conclusion of the Racene case (no. 79) about how integration should be viewed in this context. See also the conclusion of the advocate-general in the Garcia Avello case (2003-10-02 C-148/02, no. 72) where he states that, “I would moreover take issue with the argument that the principle of non-discrimination seeks essentially to ensure the integration of migrant citizens into their host Member State. The concept of “moving and residing freely in the territory of the Member States” is not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly repeated or even, continuous movement within a single area of freedom, security and justice”, in which both cultural diversity and freedom from discrimination are ensured”. In the Garcia Avello case, article 12 is used to justify a difference in treatment between “Belgian” citizens and “Belgian-Spanish” citizens (see especially Garcia Avello, consideration nn. 34, 36 and 37). On the issue of considerations about “integration”, “respect for culture” and “mobility” in PIL, see also V. VAN DEN EECKHOUT, De wet toepasselijk op het huwelijk en de huwelijksontbinding van nationaleitsgemengde paren. De impulsen van de confrontatie van het I.P.R. met “gemengde-partnerrelaties voor de ontwikkeling van het conflictrecht, PhD KULeuven 1997 (corresponding mainly with the vision of the ECJ) and V. VAN DEN EECKHOUT, “De wisselwerking tussen internationaal priveatrecht en materieel recht”, where I distinguish between respect for the “State legal culture” (on the issue of respecting the prohibitions of foreign law, see infra, footnote 78 and following and footnote 91) and respect for “the culture of an individual”. See also infra footnote 70.
(68) In such a situation the argument of attaining international harmony through rules on applicable law would still be valid. Then, the issue of how this interest should be seen in the light of other interests would need looking at as far as it concerns rules of applicable law.

So, in short, mainly in areas where the goal of international harmony has been reached via the creation of a recognition regime, the question emerges about what issues need to be consulted when drafting rules on applicable law. (69) If the goal of international harmony has been achieved via rules of recognition, is it then possible to build any imaginable system of applicable law and reason purely in terms such as “integration” and “respect for culture,” (70) or are there other “European legal” issues that need to be looked at that can affect the eventual outcome?

Above I already mentioned the consideration that people should not be able to lose their granted rights when migrating. (71) Perhaps it could be argued that much importance should be attached to this concern, especially in the context of the EU, as peoples' reasoning will be that if rights could be lost by...
migrating, they won’t be stimulated to use their right of mobility. Concerning this last point I think it is possible to see an analogy with considerations of ECJ in other matters. So, for example, mutatis mutandis, regarding the issue that one should not be allowed to lose attained rights, the recent Hacene Case (72) may be relevant. Hacene revolved around residence, but the reasoning, in both the judicial decision and the conclusion of the advocate-general, is about how one can avoid discouraging the movement of people if they perceive the risk of losing certain rights they would otherwise have.

Concerning the drafting of rules of applicable law with regards to the issue of avoiding that people may lose rights, I can make the following remarks. Firstly, the interest in this issue may be seen as one of the greatest reasons (73) to unify rules of applicable law. (74) The next question is

(72) Hacene Akrich C-109/01 2003-09-23. On Hacene Akrich, see already above, footnote 53.

(73) Unless one would understand “obtained rights” and/or the concern to prevent a loss of rights in a very strict sense, namely that the rights that ought to be protected only deal with judgments (claims that already have been put before authorities) and don’t include “law” or “rules” as such (claims that someone could rely on, but actually did not). For discussions on “obtained rights”, see for example I. Joppe, Overgangsrecht in het internationaal privatrecht en het fait accompli, Arnhem: Gouda Quint 1987, 360 p. and A.V.M. Struyvenken, “s lands wijs ’s lands eer” (afschiedscollege K.U.Nijmegen, 31 August 2001, KU Nijmegen 2001, 41 p. In this hypothesis, it seems as if there would also be more room to plead for unification of rules of applicable law with a preference for the law of the domicile, or with a preference for the systematic application of the lex fori. It could already be stated here that reference to the domicile criterion would be able to encounter forum shopping, preference for the lex fori would not. Moreover, reference to the domicile criterion would lead to the following situation: only if one would move to a Member state with a more liberal substantive family law, unification of IFL in this sense would have a “liberalising” effect (in this opposite situation, the person who claims rights in court before moving, would be better off than the one who does not); on the issue of whether the “State of origin” would, subsequently, be forced to recognise what is obtained in the “State of residence”, the problematic is very similar to what will be discussed below.

(74) See for an analysis of the necessity of unifying rules of applicable law from an idea that a lack of uniformity would mean that people lose rights when migrating, Dethloff, (N. Dethloff, “Arguments for the unification and harmonisation of family law in Europe”, in K. Boele-Woelki (red.), Perspectives for the unification and harmonisation of family law in Europe, Antwerpen : Intersentia 2003, pp. 37-64, specifically p. 52 where she states that: “Only unified rules on conflict of laws can ensure internationally uniform decision-making so that a status existing in one state, whether created by operation of law or based on a court decision, remains in effect in another”. According to the Action Plan work needs to be done on the unification of rules concerning Conflicts Law in order to avoid forum shopping. Dethloff also focuses on the need to avoid “a race to the court” – a situation which would hamper the equality between the parties – in her argumentation to unify rules of applicable law. See also, on the concern of avoiding forum shopping, as well as on the concern of avoiding a “race to the court”, Jantara-Jarborg, “Marriage dissolution in an integrated Europe”, Yearbook of private international law, 1999; especially concerning the need to unify at the same time ancillary claims if one reasons from this perspective. See in this context also infra, footnote 81. See also, on PIL besides IFL, recently the argumentation in the Explanatory memorandum with the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”), Com (2003) 457(01), e.g. p. 7: “(...) the harmonisation of the conflict rules also facilitates the implementation of the principle of the mutual recognition of judgments in civil and commercial matters. The mutual recognition programme calls for the reduction and ultimately the abolition of intermediate measures for recognition of a judgment given in another Member State. But the removal of all intermediate measures calls for a degree of mutual trust between Member States which is not conceivable if their courts do not all apply the same conflict rule in the same situation.”
then of course how exactly, from this angle, rules of applicable law can best be unified. It must indeed be noted though that not all forms of unification can guarantee that people would not lose any rights when migrating: a complete following of the domicile principle would, for example, incur a loss of rights, because after migration the concept "domicile" will have a different filling-in than before which results in other rules being applicable, which in turn can imply a loss of rights. (75) A similar remark can be made concerning application of the lex fori. (76) All in all the above seems to suggest a preference for nationality as a connecting factor, particularly if national citizens of one Member State move from this "home" country to another Member State (77). Thus, in a rather paradoxical way, it could be argued that difference in treatment of EU-citizens on the ground of nationality would be the best way to remove obstacles to free movement and thus to ensure the principle of freedom of movement and to.

Assuming now that the analysis based on the angle of "avoiding the loss of rights" points, in general, to a link with nationality, another question arises: does one want to go as far as saying that all prohibitions that exist in the national law of a Member State be respected? (78) If so, would this not be a break on the process of liberalisation of IFL as wanted by the EU, through ensuring that one does not get less, but also no more, rights than one had in ones home country? Such a strict application of the principle of nationality would lead to people being condemned to having their...

(75) This is recognised by Dethloff, i.e., p. 52: "(...) even if the rules on conflict of laws are unified, a loss of legal positions can arise with a change in residence. Such a loss of legal position will always occur where the connecting factor is not immutable, but where the applicable law is based on the habitual residence in question". Dethloff does not go into the hypothetical that such a new situation would create a "gain": the primary concern here is to ensure that those involved are guaranteed of keeping their old rights; something they could not have if the criterion of domicile were used. On the attaining of new claims in the case of migration and the question of whether those new rights could be used when returning to one's home country, infra.

(76) One could of course suggest that as long as authorities from the sending state (the home country) as well as the receiving state (the residence state) are competent, no loss of rights would exist in the case of application of the lex fori: one would then be able to start proceedings in one's "own" authorities in order to enforce the law of the home country, and the country of residence would in turn have to recognise the result. One argument against this is that this practice could only be executed by those able to return to their home country to start proceedings. This situation thus also seriously hampers the access to justice and could even be seen as a form of class justice. Should one not be able to get the same "service" in the new country of residence to exact one's rights?

(77) It could be argued that in drafting IFL-rules this way, one would respect the "principle of mutual recognition" — often understood as a preference for the legislation of the Member State of origin. See, for a recent discussion of the principle of mutual recognition — especially dealing with the question whether the principle of mutual recognition could function as a hidden choice-of-law-rule, M. Fallon and J. Meeuse, "Private international law in the European Union and the exception of Mutual recognition", Yearbook of private international law 2002, pp. 37-66. See also M. Traet, o.c.

(78) In the case of missing rules of recognition, one could argue that only in acting this way a situation of international harmony can be attained.
national law applied with all its advantages and disadvantages, and could be contrary to the favor and liberalising tendencies as laid out in the Brussels II Regulation. Should we then not have to work towards a system that is more favor-centred? Or at least a system that has the advantages of using nationality as a connecting factor — no loss of rights when migrating — and includes favor-tendencies?

The above can be illustrated by the problems surfacing with registered partnerships and same-sex marriages. These are areas where there are still no European rules of recognition. In the Belgian PIL on same-sex marriages the principle of nationality is primarily used — at least in the legislation itself. (79) The consequence of this is that the entry to the institute of a same-sex marriage is very limited. The question arises if the Belgian regulation can be seen as one that is in line with EU concerns: can the difference in treatment on the basis of nationality be justified (80) on the basis of considerations in the drafting of international harmony and no-loss-of-rights? (81) Or can one speak of discrimination on the grounds of nation-

(79) See M. Pertegás Sender, “Huwelijk tussen personen van hetzelfde geslacht in Belgie: interrechtelijke en internationale implicaties”, in P. Senaeve en F. Swennen (red.), De her­vormingen in het personen- en familierecht 2002-2003, Antwerpen: Intersentia 2003 and P. Wautelet, "Note sur l’ouverture du mariage aux ressortissants étrangers de même sexe", to be consulted on the electronic journal tijdchrft@ipr.be 2004 (1), pp. 97-105 (www.ipr.be). It has to be noted immediately that the Belgian practice has been changed in January 2004, with the publication of a new circular letter. See the circular of 23 January 2004, Belgisch Staatsblad 2004, 27 January 2004 (also to be consulted on tijdchrft@ipr.be 2004 (1), containing rules of how should act in the field of applicable law and recognition. Concerning the issue of applicable law, through the use of the principle of the “exception of public order”, a system is established which is similar to the Dutch legislative system! Thus, the Belgian system has been transformed in a much more “liberal” system. Nevertheless, the Belgian legislative system is still interesting to study, both seen from the perspective of studying a “European typical case-study” (the Belgian legislative system doesn’t seem to be “unique” in its way of dealing with PIL-issues of new forms of family life, see the comparative report K. Waaledijk, “Major legal consequences and procedures of civil marriage, registered partnership and informal cohabitation for different-sex and same-sex partners in nine European countries, to be published. This report also gives information about the Belgian way of dealing with PIL-issues of registered partnerships and informal cohabition in Belgium) and from the perspective of future developments in Belgian legislative PIL (with the introduction of the circular, an administrative change has been realized, but the question rises how the Belgian legislator will handle in the future). In this context, it is worth mentioning the remarks of P. Wautelet: Wautelet appears to be, in principle, in favor of a system such as the Dutch system, but argues that if one is looking for a convenient connecting factor, one should one should take into account the fact that marriage legislation is connected with migration: (“(...) il ne faut pas oublier que le mariage a des conséquences dans bien des domaines du droit, notamment sur les droits des époux en matière de sécurité sociale et de titre de séjour. Ces conséquences doivent être prises en compte pour déterminer quelles attaches sont nécessaires pour permettre l’application du droit belge.”

(80) Difference in treatment on the basis of nationality seems to be consistent with jurisprudence from the Garcia Avello case (see footnote 67). Concerning reservations that can be made in this area see infra.

(81) Citizens of countries that recognise same-sex marriage can still make claims to this institute in Belgium. However, citizens of countries that do not recognise same-sex marriage cannot. Analogous to the Hacene case, one could argue that people that hail from countries where same-sex marriages are prohibited would not be discouraged from migrating to a country that would
ality, (82) seen from the point of view that it is unfair to use the nationality criterion so that one person would achieve entry into a family legal institute and another would not. Should one not be thinking more along the favor-lines? (83) It is possible that the principle of non-discrimination on the grounds of nationality could be interpreted in such a manner that a pure link with nationality would no longer be allowed. It is even possible that access to the institute of same-sex marriage would be seen as a human right (84); this would mean that the preference for nationality should be not give them the possibility of a same-sex marriage as they were never able to have one in the first place. On a strict basis only regarding the "no-loss-of-attained rights" can one expect a more pro-active stance from the EU whereby the EU would itself create such rights? See for example mutatis mutandis (revolving around the field of residence) the strict form of reasoning in Hazene Akrich in the case of article 10 of the Regulation 1612/68, in stark contrast to the dynamism in the Carpenter Case (C-60/00 2002-07-11, where article 40 EC is interpreted in the light of the ECtHR). On experiences in PIL in a negative sense, see V. VAN DEN EECKHOUT, "De wet toepasselijk op het huwelijk en de huwelijksontbinding van nationaliteits-gemengde partners", o.c. concerning the situation where parties are married under a system of law where a divorce is not possible and after a change in nationality one of the parties claims that on the basis of the "old" applicable laws divorce is not possible and whereby the other party claims that divorce should now be possible. (82) The Johannes case is interesting in this context (see supra, footnote 41). The ECJ decided that article 6 EC (after revision, article 12 EC) does not stand in the way of the law of a member state that uses the nationality of the persons in question as reference, should lead to a European Civil Servant having a larger burden in one case than another who is in effect in the same situation. Trast (M. TRAST, ib.) argues in his commentary on this case that after the coming into effect of the Treaty of Amsterdam with the basis for rules for competence in the field of PIL the ECJ would – at any rate now – be competent and therefore the ECJ may now judge differently. See also M. FALLON, comments with Johannes, Revue trimestrielle de droit familial 2000, pp. 247-249. (83) Regarding the hypothesis that no rules of recognition are available and the nationality link can be pleaded from a angle of "respect for international harmony" I personally stated that only using nationality as a reference would be discriminatory. I also stated that the principle of international harmony is not the only one and that holding on to the principle of nationality could also be seen as disproportionate in order to achieve the goal of combating fraud. See, mutatis mutandis, concerning registered partnerships, V. VAN DEN EECKHOUT, "Huwelijk en echtscheiding in het Belgische conflictenrecht", o.c. At that time, I was mainly orientated on the "non-european context", but the issue now prominently also rises in a "european context". (84) See, recently, ECHR Karner 24 July 2003, 40016/98, ECHR 2003/83, with comments of J. GERARDIN. See also the contribution of O. Lasse, reasoning from the perspective of article 12 ECtR and pleading from this perspective for liberal rules of applicable law, to be published in Revue du Droit des Etrangers. See also, mutatis mutandis, the judicial decision by the German Constitutional Court of 4 May 1971 (see V. VAN DEN EECKHOUT, "Huwelijk en echtscheiding in het Belgische conflictenrecht", o.c., pp. 300-301) where the argument of freedom of marriage, a constitutional right, was used in order to set aside international harmony. See in this context D. VAN GRUNDERBEECK, Regulieren von personen- en familierecht. Een mensenaardelige beamer- ding, Antwerpen : Intersentia 2003, p. 201, where she states that the entering into of a marriage that has references in more than one legal system, it is possible under article 12 ECtR that IPL rules are used as an integral part of national law and foreign laws are made applicable. (Van Grunderbeeck is referring to ECHR, nr. 9027/80 X t. Zwitserland, 5 October 1981), "as far as these substantive rules don't violate such a convention". Van Grunderbeeck illustrates this last sentence with the example of the violation of a convention by the national judge himself in the application of foreign law, for example if this judge refuses to allow a marriage on the basis of a foreign interdiction on marriage which is contrary to the ECHR" (See also, ECRM
corrected in some cases—as is recently realized through the introduction of a new circular, using the concept of “exception of public order” to mitigate the nationality preference. The Netherlands paid more attention to arguments of this last type. At any rate the Dutch government can be labelled as being much more liberal; people that had a claim to enter into marriage in their country of origin keep this claim when they migrate to the Netherlands, but the category of people that have access to this institute is interpreted even wider. The fact that a person hails from a country where same-sex marriages are illegal is not of consequence in Dutch PIL and therefore does not hamper the possibility of entering into a same-sex marriage in the Netherlands. (85) Access is given to liberal substantive law (86) through the liberal construction of PIL. (87) The Netherlands does not limit itself so that people, when they migrate, don’t lose claims, but when they migrate “new” claims are allowed.

Perhaps it is not necessary from an EU perspective to issue such favor-type PIL rules, they don’t seem prohibited anyway. From the perspective of improving mobility, one can say that if one has a favor-type system people would possibly be stimulated to move abroad because when they migrate they could possibly gain more rights than they had before migrating. Viewed from this perspective, intra-communitarian mobility can only be improved. But put in this way, a following question arises. Is it possible that migration would still be hampered if, hypothetically, the attained rights in the new country of residence in a migration at a later date to the

11 April 1996, appl. No. 24001/94, Gill en Malone tegen VK, by T. Loenen, ("Onderscheid naar sekse de rechtsorde uit of er juist weer in", FJR 2002, pp. 228-234). The former clearly shows us that in view of human rights, the principle of nationality should not be taken too far. In my point of view, even when no human rights are affected, the principle of nationality should not be used absolutely. See V. Van Den EECKHOUT, “Huwelijk en echtscheiding in het Belgische conflictenrecht”, o.c.

(85) A same-sex marriage that comes into existence in the Netherlands would not have to rely upon recognition abroad.

(86) Especially along the lines of article 2 Wet Conflictenrecht Huwelijk; requiring for marriage that one partner has residence in the Netherlands or has Dutch citizenship (since April 2001, the same applies to partnership registration (art. 80 a(4) Book 1 CC, as amended by the law of 13 December 2000, Staatsblad 2001, nr. 11). Whether or nog the law of the Country of origin of a foreigner permits or recognises registered partnership or same-sex marriage is not relevant in the Netherlands (see K. Boele-Woelki, “Registered Partnerships and Same-Sex marriage in the Netherlands”, in K. Boele-Woelki and A. Fuchs (eds.), Legal Recognition of Same-Sex Couples in Europe, Antwerpen: Intersentia 2003, p. 43).

(87) In doctrine (Dethloff, l.c., p.51, see already supra, footnote 74) it has already been said that a too liberal rule of jurisdiction would contravene the protection accorded to the weakest party in a family legal case. But one could also imagine the case where both parties would like to proceed in the same way in a situation where one country is far more liberal than another. On the issue of creating European liberal rules of applicable law and favor-tendencies, also in the sense of creating party-autonomy, see for discussions on PIL outside of IFL, J. Israel, “Europees internationaal privaatrecht. De EG, een comitas Europaea en “vrijheid, veiligheid en rechtvaardigheid”, NIPR 2001, pp. 135-149, especially pp. 140-141, with further references (e.g. to Base-dow and others).
country of origin cannot be taken back? Here again, it is possible that certain analogies can be made with the ECJ and the advocate-general in the Singh and Hacene Akrich cases. (88)

If we assume a flexible regime of recognition as being the one proposed then a PIL regulation as the Dutch one in the case of same-sex marriages would not pose any problems in the area of international harmony and the favor-principle would also be accomplished. If no regime of recognition is anticipated, then a PIL rule as the Dutch one for same-sex marriages could be problematic for the goal of international harmony regarding decisions. The EU could thus end up becoming a patchwork. (89) But at the same time one can remark that in the long term, one could possibly achieve an even more general favor-movement with international harmony as the result: if a same-sex marriage is enacted in the Netherlands then it is possible that the authorities abroad could reason that as the marriage has already come into existence it might as well be recognised, especially seen from the issues about harmony in decision making and the no-loss-of-rights due to migration. In a situation where other EU countries and even the country of origin (if a remigration takes place) would reason as above then one could speak of a combined tendency in the direction of liberalisation and an achievement of the goal of international harmony created by the fact that a country has a soft recognition system. It is then imaginable that the country of origin would eventually not only adapt the rules on recognition but also the rules on applicable law. (90) It would then perhaps also become possible that people whose legal relationship exists in a purely internal context could be given a family legal institute, especially if it would be seen as unfair not to give them access — for example because otherwise it would be felt as being a kind of reverse discrimination, in other

(88) The difference is that within this matter it is questionable whether this kind of claims could be categorized as "intracommunatarian" cases that fall under the EU competence, see infra. But see in this context also the Carpenter case in which article 8 ECHR was central, particularly in the light of the goal of freedom of movement of services.

(89) Analogous from Jessurun D’OLIVEIRA ("Vrijheid van verkeer voor geregistreerde partners in de Europese Unie. Hoog tijd!", N.J.B. 2001, aD. 5 – see also H.U. Jessurun D’OLIVEIRA, "Freedom of movement of spouses and registered partners in the European Union", in J. Base- dow e.a. (ed.), Private law in the international arena – iiber amicorum Kurt Siehl, The Hague: T.M.C. Asser Press 2000, pp. 61-77), who in light of the freedom of movement of persons talks about “a Europe with different speeds, and, seen from a territorial point of view, a checkered freedom of movement which has to jump over countries not allowing registered partners in”. For more about this see II.2.3.b.

(90) In which case one could talk of backward progression. On the phenomena of the taking in of techniques in rules of applicable law through introducing them first in rules of recognition, see V. Van Den Eckhout, De wet toepasselijk op het huwelijk en de huwelijksontbinding van nationaliteitsgemengde partnerrelatie, o.c.; also in this context V. Van Den Eckhout, "Book review of G. Steenhoff (red.) Een zoektocht naar Europees familierecht", Rechtsbundig Weekblad 2001, p. 855-899.
words, people that never migrated could otherwise be held back. In this sense the final result could be a liberalisation of substantive Family Law.

Of course it could seriously be doubted whether the EU itself would try to exert such dynamisms – see, again, mutatis mutandis, discussions in migration law, particularly on the competence to regulate issues of family reunion, with the phenomenon of “reverse discrimination”, and dealt by in the ECJ in cases like Singh and Hacene Akrich. But even so, it may be possible for the Member States themselves to reason that, once PIL-rules as the Dutch ones are in force, taking into account “European internal market concerns”, this could force same-sex marriages to be recognised elsewhere in Europe, because it would otherwise mean a hurdle to the freedom of movement. In such a case, one would be able to notice an “indirect effect” of european rules and logic on national rules.

From the previous analysis one could deduct that European concerns combined with respect for human rights point in the direction of liberalisation of (International) Family Law. Of course, it has to be noticed immediately that there is naturally a large discussion about the right of respect of cultural identity of the member states. This is a discussion that could inject subtle distinctions in the tendency of liberalisation of IFL that has been started by the EU. (91) Here, possibly, the specific character of IFL – compared to PIL outside of IFL – will be able to have an impact.

III.2.3.b. The liberalisation of (International) Family Law and/or public legal claims. Case study: Working with new forms of family life of European creation

The issues of liberalising (International) Family Law as such need to be differentiated from issues of public legal claims based on family legal relationships and the meaning of IFL in this context – issues that have a number of areas that do fall within the competence of the EU.

It is interesting in this context to note a judicial decision from the Belgian labour Court of Liège of 12 June 1990, where nationality was denied importance in deciding whether an Italian was underage or not – in order to evaluate social security rights of this person: reference to the nationality criterion was in this context seen as being contrary to the EC

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(91) See also infra, under IV.2.4, and supra, footnote 38 as well as supra, footnote 70, the argumentation of Struycken. See also no. Dethloff, i.e., p. 56 regarding the consideration that restrictions on free movement arising from substantial legal differences are only permissible if they are justified by public interest, are not disproportionate, and are furthermore in agreement with the fundamental rights (with reference to the Bosman Case of the Court of Justice). See also, mutatis mutandis (Bell adresses the issue of the variety of national laws on partnerships) and as well with reference to the Bosman case, M. Bell, i.e., for a discussion of “combat of fraud” and “protection of the national cultural or moral values” as justifications for keeping up obstacles to free movement.
treaty. (92) Could it thus be that IFL rules need balancing and possibly need including in a more liberalising trend because of the realisation that their application hampers public legal claims? Could it also be that IFL rules that are an answer to preliminary questions (93) may, sometimes, have to be left aside? With an eye on the case of Liège, we now reach the issues of public legal claims.

Once again, several can be made clearer if from a PIL perspective the question is asked as to the manner in which the EU will react to new “forms of life,” such as non marital partnerships, registered partnerships and same-sex marriages. In my point of view, this analysis should take account of two different developments: on the one hand the manner in which international aspects of new “forms of living together” are organised through PIL rules and, on the other, the manner in which these new forms of living together, that appear in an international context, have public legal consequences attributed to them, combined with the role that PIL plays in this. It is indeed conceivable (94) that the field of PIL becomes more liberalised in a sense that international legal relationships can subtly create such new forms of living together and dissolve them: this can also have an effect on the manner in which the rules of jurisdiction, applicable law and recognition are drafted. But a liberal IFL does not necessarily mean a liberalisation of public legal claims on the basis of these forms of living together.

In my contribution “De vermaatschappelijking van het internationaal privaatrecht” (95) I came to the conclusion that a differentiation must be made, and developed an analysis of developments in a non-European con-


(93) For the treatment of preliminary questions in the law regulating the rights and duties of Community civil servants, see Kohler, "Zum Konfliktrecht internationales Organisationen: Familienrechtliche Vorfragen im europäischen Beamtenrecht", Jura 1994, 416. See in this context also ECJ, 5 February 1981, NJ 1981/654, with conclusion of Warner and comments of Schults (Schults refers in this context to the Gunella and the Devred cases).

(94) On the expectations on whether the EU shall be busy in this field, see V. Van Den Eeckhout, "Internationaal privaatrecht en migratieroek. De evolutie van een tweesporenbeleid," I.e. p. 78 as well as L. Th. L. Pessis, "Internationaal privaatrecht. Echtscheiding, kinderbescherming en gezagsvoorziening en gezagsvoorziening, kinderbescherming, alimentatie, adoptie (1998-2002), WPNR 2001, pp. 1065-1063, where he states that the EU should look at PIL rules on non-marital partnerships, registered partnerships and homosexual marriages from a human rights perspective. Pellis refers in this context especially to the Action Plan, whereas it was stated that the principle of freedom of movement should be completed with the principle of respect for fundamental freedoms, including the principle of protection against discrimination. There is much discussion about whether or not the Brussels II Regulation is applicable regarding the dissolving of homosexual marriages. See, P.M.M. Mottemans, "De welzijds erkenning van echtscheidingen binnen de Europese Unie", NIPR 2002, pp. 263-273, with references.

(95) See V. Van Den Eeckhout, “De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw”, I.e. see supra under III.1
text" from this point of view. I pointed out that it is possible that IFL is being liberalised, but that at the same time in other areas of the law a more restrictive system is being created, as for example in Nationality Law. I therefore made a distinction between on the one hand tendencies to liberalise Dutch International Lineage Law and, on the other hand, tendencies to hamper public legal claims based on lineage relationships in a non-European context. The previous means that an evolution of IFL in liberalising sense is completely useless for several people if there are no public legal consequences attached to family legal relationships, especially if through denying public legal consequences the family legal relationships are hampered. (96)

Altogether, the same sort of warning fits within a European context. Also in the European context when one talks about liberalising tendencies one should clarify in which area liberalisation is taking place. On the one hand one has the question to what extent the EU will interfere in PIL regulation of new forms of living together and, on the other hand, one has the question if these new legal practises can be linked to the principle of freedom of movement of EU employees and their families. In a wider sense, which legal consequences could be attributed to these family relationships? Imagine an employee in a EU context wishes to use his right to freedom of movement as a EU citizen and wishes to take his family members with him. The field of PIL grants him the possibility of a registered partnership that could also be recognised in another country as a registered partnership. This rule of PIL, however, can remain completely meaningless if the employee cannot take the person in question with him as a family member. This situation is still particularly prevalent if the term "spouse" as defined in the Regulation 1612/68 is strictly applied as being a married partner of another sex. This is particularly the case if the ED keeps holding on to a traditional and fairly conservative definition of family members. (97) In other words, even if the EU would interfere with IFL concerning these new

(96) See V. VAN DEN EECKHOUT, "De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw", i.e., pp. 155-156.

(97) In the Reed case a softening happened in the jurisprudence of the ECJ: if a member state grants non-married partners "social advantages" – and thus the issue was qualified – then the member state must also grant these advantages to those that migrate (on the patchwork and a situation of "two speeds" that could come to pass within the EU because of this see, H.U. Jessurun D’OLIVEIRA (supra footnote 89) and M. BELL, i.e. For a critique on the restrictive definition of developments see K. WAALDIJK, “Towards equality in the freedom of movement of persons”, in K. KRUCKLER (red.), After Amsterdam : sexual orientation and the European Union. A guide, Brussels, ILGA Europe 1999, pp. 40-49. See in this context also M. BELL, i.e. In the Council Common Position of 5 December 2003 (see supra, footnote 53), it is stated that “family member” also includes the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage. And see in this context also ECJ, 7 January 2004, C-117/01.
forms of living together, it does not automatically mean that the term family member would be widened. (98)

It can be said, however, that the PIL interference could at any rate be an important impulse in the widening of the definition of family member. (99) The question is also whether the EU can be more progressive than the European Court of Human Rights, (100) concerning forcing member states to recognise new "forms of life," particularly when the analysis is from a perspective of free movement of persons, (101) or other claims that are granted in EC Law. If so, then the process of Europeanisation of PIL could mean a wider process of liberalisation, and it would also mean that a larger group of people would attain derived rights of residence in EC Law than before. If not, then the liberalisation via unifying PIL rules will be limited. All in all, the foregoing leads to the conclusion that one should be not too quick to speak of a process of liberalisation within Europe.

III.2.3.c. Looking further a field

Exactly how far Europe will systematically liberalise on a pure PIL field will become clear when Europe takes the reigns of matters that, seen from this perspective, really matter — namely, PIL regulations on marriage and

(98) In this context see, H.U. Jessurun D’OLIVEIRA, "Geregistreerde partnerschappen en de Europese Unie. Kanttekeningen over de internationale reikwijdte van het wetsvoorstel", i.e., regarding the differences that must be made between the regulation of access to certain institutes on the one hand, and the consequences of the granting of those types of living together in European legal sense on the other.

(99) A comment that is perhaps useful here is that if in future, EC regulations on the terminology of "family members" are widened, then this could also be an important impulse in unifying PIL rules in this field: the necessity to have European PIL rules in this field would then also become more acute. Thus, the interference of the EU with PIL would not only have consequences for public legal claims, but also vice-versa the regulation of public legal claims could provide an impulse for EU interference in IPL. If one looks at it this way, the freedom of movement of persons (or in a wider sense the fundamental freedoms) and the regulation of IPL become linked and a reciprocal way of influencing each other emerges.

(100) On the jurisprudence of the ECJ see D. Van Grunhoven, o.c.

(101) On this see V. VAN DEN EECKHOUT, "Internationaal privaatrecht en migratierect. De evolutie van een tweesporenbeleid", i.e. For a short allusion on this see M. FALON, "Droit familial et droit des communautés européennes", Revue trimestrielle de droit familial 1995, pp. 381-400, especially pp. 383-384. It may be important to point out that in this context the ECJ has already been more lenient in interpreting article 8 ECHR than the ECHR itself. See especially the Carpenter case (11 July 2002, C-60/00) and the note by FordeI' (EHRC 2002/76), specifically on the area of the importance of "illegal residence" and the possibility to have a family life elsewhere. This could be clarified by the fact that the EU wishes to protect family life in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty. See also H. TONER, "Comments on Mary Carpenter v. Secretary of State", 11 July 2002 (Case C-60/00). European Journal of Migration and Law 2003, pp. 163-172 and H. TONER, "Community law, immigration rights, unmarried partnerships and the relationship between European Court of Human rights jurisprudence and Community law in the Court of Justice", Web Journal of Current Legal Issues 2001, 5, on the fundamental question of whether the Community Institutions, Member States or Court of Justice can develop a distinctive understanding of what respect for family and private life means in the context of Community migration law.
lineage. The sensitive areas of marriage and lineage that, more so than for example divorce and Marital Property Law or Law of Succession can have a direct impact on the question to what extent someone has the right of residence (102), have not yet been brought up by the EU. The fact that Europe has not yet touched upon a PIL ruling of creation of family relations – particularly in legal relationships concerning external aspects – is probably also the reason why the theme has not yet been discovered by those that wish to aid foreigners. For jurists oriented on legal aspects concerning foreigners, EU interference will probably only become a sensitive issue if PIL regulations of family forming and family reunion of third countries come to pass.

It has to be noted that EU interference is currently in full swing in the area of consequences concerning residence of family relationships between and with persons from third countries. (103) But a regulation of IFL aspects of these issues has not yet been put to table. Thus, one can only speculate on the manner in which the EU wishes to regulate IFL issues: there are no clear signals on how one wishes to regulate marriage and succession.

In the following though I wish to make a couple of comments on EU interference in PIL issues with legal relationships that have an external aspect. As far as the EU wishes to interfere with IFL issues that have a purely communitarian relationship in a liberal manner, a question rises on whether the same will happen in PIL situations that have external aspects.

IV. – EU INTERFERENCE IN LEGAL RELATIONSHIPS WITH EXTERNAL ASPECTS

IV.1. – Is the EU competent?

The primary question is whether the EU has the competence to regulate PIL relationships with external aspects. In answering this question one has to differentiate between regulating external aspects in Regulations and the issue of the (exclusive or not) competence of the EU to make and enter into agreements with third countries – the so-called “treaty-making power” of the EU. (104) Hague Conventions become all the more superfluous if the

(102) It may seem paradoxical that especially those areas where EU interference could be seen as most expected are the ones that are not (yet) being dealt with. International Marital Law and International Lineage Law are crucial matters in terms of filling in family legal terminology in EC Law as well as in general the improvement of legal security.

(103) See the Directive on the right of family reunification, O.J., 3 October 2003.

(104) If one assumes that there is no competence, then one could ask the question whether national PIL can still be influenced by what is regulated on a European level. Regarding the impact in Dutch Community PIL of EU activities, see the recent revision of international juris-
EU exercises "external" competences; then, the focus of the discussion shifts from the issue if European IFL should have priority on Hague Conventions in intracommunautarian cases, into the debate if European IFL should deal itself with external aspects - and should also have priority on Hague Conventions in such cases. In the Brussels II Regulation, one pretends to ensure that the 1980 Hague Convention on child abduction will continue to apply within the European Community, but that the Regulation adds a number of rules intendend to complement and reinforce the application of the Convention within the Community.

External aspects can appear in PIL Regulations when the scope of the Regulation has been widened so far as to include citizens of third countries residing in the EU or EU citizens residing in a third country; external aspects also appear when the Regulation regulates an aspect of applicable law resulting in the application of the law of a third country. In the Brussels II Regulation the rules on jurisdiction are drafted in such a manner that it is certainly plausible they may also be applicable in a case concerning non-EU citizens or EU citizens that are not residing in the EU. (105) The same conclusions can be made about recognition and execution in Brussels II.

Probably, if one aims to unify PIL in issues that are linked to the principle of freedom of movement of EU-citizens - or to other freedoms, such as the freedom of services - this already necessarily entails the regulation of some situations that have "external" aspects. So, for example, through the foregoing one could already come into contact with situations involving third-country nationals: imagine the issue of recognition in a Member State of a divorce judgement, rendered by the authorities of another EU-Member State, between a German employee and his Nigerian woman, living in the Netherlands - a situation that is indeed falling within the scope of the Brussels II Regulation.

The question is whether EU interference could go a lot further. I refer, once again, to the fact that EU competencies in this area are regulated in Title IV of the EC Treaty with the heading "Visas, asylum, immigration...
and other policies related to free movement of persons." This time I want to emphasise "visa, asylum and immigration." It is abundantly clear that the EU is becoming more active in this area. In this context we can see the EU regulating at least the residential status of citizens from third countries and their family members – possibly even going that far as granting a right of freedom to long-established citizens from third countries, similar to the right of freedom of EU-citizens, and thus also resulting in a derived right of residence of family members of non-european citizens. At the same time we can see the EU being confronted with problems and issues of IFL, even if it is only because family legal terminology is used in these regulations – see the Directive on the right of family reunification.

It may be useful to remember in this context that the Europeanisation of PIL happened at the same time as the Europeanisation of Migration Law. Even though the link between aspects of Migration Law and aspects of PIL was perhaps more of a coincidence then not, the fact that both fields are shored under one title could be important when searching for justification of EU interference in IFL issues that are not purely intra-communitarian. A number of questions then arise, which I shall illustrate using matters of marriage and divorce. In order for marriages and divorces to freely circulate within the EU, is it necessary that member states not only recognise one another's judicial decisions on them, but also take on a common position on the recognition of marriages and divorces that originate in third countries? (106) Is this more or less analogous to EU regulation on the freedom of movement of goods that also has internal and external aspects, (107) and also more or less analogous regarding the external component of regulation on the freedom of movement of persons, namely the creation of a common migration policy? (108)

If so, are we only talking about marriages and divorces between EU citizens (or between an EU-citizen and a third country national), where a

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(106) I touched on this at an earlier stage in V. VAN DEN EECKHOUT, "Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid", i.e. I stated that it may be useful and relevant in this context to look for a common ground for European principles of Family law. See, however, rather sceptical on the possibility to come into existence of a comprehensive system of European principles of family law, D. VAN GRUNDERBEECK, o.c. See on this work also M. ANTOKOLSKAI, "Book review of D. Van Grunderbeeck", FJR 2003, pp. 251-254.

(107) In other words, to what extent can the two pronged character (on the one hand the regulation of intra-communitarian movement, and on the other the drafting of common rules on "import" regarding all that comes from abroad) of the EU concerning Migration Law and the freedom of movement of goods be extrapolated to the regulation of IFL matters by the EU?

(108) To the extent that the regulation of migration from outside the EU is seen as being derived from the freedom of movement (see article 61 EC and the considerations in the Hacene case), but where one goes much further than one would think in first instance. Mutatis mutandis, for a critique on the regulation by the EU on purely residential aspects of citizens of third countries see, H.U. Jessurun D'OLIVEIRA, "Familiehereniging in Europa. Werk in de Raad van Europa en de EU", in M.-Cl. FORLETS, B. HUREAU en D. VANHEULE (red.), Migratie- en migrantenrecht : recente ontwikkelingen, deel 7, Brugge 2002.
decision can have an impact on the freedom of movement of persons? (109) Or do we also need a common stance on the marriage of two citizens of third countries? Is it possible that a regulation could come into being that regulates legal relationships where there is no actual mobility, but only a hypothetical possibility of mobility of those involved within the EU, or a future mobility? (110) Or, to what extent can the two-pronged character (on the one hand the regulation of intra-communitarian movement, and on the other the drafting of common rules on “import” concerning all that comes from abroad) of EU regulation of Migration Law and the freedom of movement of goods be extrapolated to the regulation of issues of IFL by the EU? Should, for example, IFL aspects, as family reunion of non-European citizens that do not move between EU member states, regulated? Can this fall under the scope of article 65 EC-Treaty, namely “measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with article 67 and insofar as necessary for the proper functioning of the internal market”? The central question is therefore, to what extent EU interference should be limited to the regulation of IFL aspects that relate to the freedom of movement of EU citizens, or to what extent this boundary and perspective can be crossed? Does one need to leave behind the idea of regulating PIL aspects that have a direct connection with migrating EU citizens?

Probably, the answer to several specific questions on the external competence of the EU can be found in the ERTA-doctrine of the ECJ. (111) And perhaps the review of this doctrine, and in general the answering of several questions about the competency on external aspects, is in turn dependent on the basic view one has on why the EU should interfere with

(109) One could think of a marriage that was enacted in a third country between an EU citizen and someone from a third country. The derived right of residence of the citizen of a third country and the using of the right to freedom of movement will probably depend on the answer to the question on whether or not the marriage will be recognised by other EU member states.

(110) See, infra, footnote 112.

(111) This case was important in developing the theory of implicit external EU competencies. On ERTA (Erta Case 22/70 Commission v. Council (1971) ECR 263) in PIL outside of IFL see, C. Joustra, I.c. and, also dealing with PIL, M. TRAEST, O.C. See also, recently, on the treaty-making competence of the EU in the field of PIL, K. BOELE-WOELKI and R.H. VAN OOM, “The communitarization of private international law”, Yearbook of private international law 2002, pp. 1-36. For the meaning of ERTA-doctrine in Family Law, see also the Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, O.J., L048 21.02.2003, p. 1 and the Proposal for a Council decision authorising the Member States to ratify, or accede to, the 1996 Hague Convention (Com (2003) 0348 def). See also the Commission white paper of 27 March 2001 concerning mutual recognition of decisions concerning parental responsibility; it was decided that in accordance with ECJ jurisprudence on external competences to prevent member states from individually acceding to the 1996 Hague agreement to the extent that rules on international jurisdiction, recognition and enforcement could frustrate community rules, particularly Brussels II.
aspects of IFL. Thus, the answer to the question to what extent the regulation of non-communitarian issues is necessary in order to regulate intra-communitarian issues, could be dependent on ones’ vision of why the EU should interfere in IFL: it is possible that differing answers will arise depending on ones view of the Europeanisation of PIL – as explained above, the definition of family legal terminology where it is necessary and/or the creation of a system of legal security. (112) It is also possible that in this case – as in an intra-communitarian context – the view on the justification of EU interference shall be of critical importance. Perhaps that will also be important when answering the question of which sub-disciplines (pure status questions or other family legal issues) and which PIL questions (jurisdiction, applicable law, recognition and enforcement) need to be formulated. (113)

If the EU sees itself as being largely competent and also manages to justify this, then the next question is how the EU wants to achieve all this.

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(112) In my interpretation, Basedow (J. BASEDOW, “The communitarisation of the conflict of laws under the Treaty of Amsterdam”, CMLR 2000, pp. 687-708, specifically p. 701) looked at the issue of “cross-border implication and the relations with third states” from the problem of legal security. He looked at the situation of a German couple that had a divorce that was recognised in England (Britain), but not in Germany. In the light of this he asked whether or not the EU should interfere with the recognition of judicial decisions of third countries. Basedow uses, in first place, the situation where two EU members and a third country are involved, but also extends the case to one EU member and a third country; “For the involvement of a second member state may result from events which come about after the relevant occurrences, e.g. from a subsequent change of residence of one of the parties which gives rise to an additional forum within the community”. (It is interesting to note in this context that Niamh Nie SHUIBHNÉ, “Free movement of persons and the wholly internal rule: time to move on?”, CMLR 2002, pp. 731-771 : p. 736, stated that: “Another aspect of the wholly internal rule classified subsequently is the condition that the cross-border element in any given case must be real, not just potential or hypothetical”. Is it possible that there is a difference to be noticed here between what is traditionally stated by the ECJ in terms of criteria of reviewing a case where the freedom of movement of persons is violated on the one hand, and on the other the justification of EU interference with Migration Law and IFL?) Here Basedow still speaks of EU citizens. But what if no EU citizens are party to the case? Elsewhere Basedow states that under certain circumstances legal relationships where a third country reaches a decision on the legal relationship between a citizen of a third country, should be taken into account. An oral contribution made by Basedow is reproduced by B. ANCEL et MUIR-WATT, “La desunion europeenne. Le Reglement dit “Bruxelles II”, R.C.D.I.P. 2001, pp. 408-409, note 19: “(...) selon J. BASEDOW, la liberté de circulation pourrait imposer aux autres Etats membres de reconnaître le divorce d’un citoyen d’un Etat tiers prononcé dans son Etat d’origine alors qu’il y résidait encore, dès lors que, son divorce a été reconnu selon le droit international privé commun de l’Etat membre où il est venu s’installer ultérieurement.”

(113) Cf. see the issues discussed above in III.2.2. Here too the question arises as to whether the EU should limit itself to matters of recognition of status issues or should move to regulate matters of jurisdiction, applicable law, recognition and enforcement in most areas of Family Law. As I said, in his analysis, Basedow seems to embark from the principle of legal security and international harmony: in his view, anything that enters the EU and/or circulates within the EU must, in order to preserve legal security and international harmony, be treated the same in every member state.
IV.2. – Which approach?

IV.2.1. An approach in line with the intra-communitarian context?

From a migrant's point of view it is perhaps not important who regulates, but what the regulation ultimately entails. Seen from the migrants' economic perspective the central question of unification of IFL can then be the following: to what extent will the EU in its regulation be liberal or restrictive? By that I mean will the regulation of IFL support people in their claims to rules of public legal issues or will they render them ultimately weaker? Seen from an economic perspective, the most important question regarding Europeanisation of PIL for non-European migrants is precisely how IFL will be regulated and applied in situations where IFL is determining in claims concerning the law on residence, Nationality Law and in Social Security Law – in other words, in those areas where IFL functions as a cornerstone. To the extent that the EU wishes to interfere in a liberal sense with IFL issues that have a pure inter-communitarian context, the question arises to what extent IFL will be used similarly in situations that have external aspects. From the point of view of IFL as such, as from an angle of IFL interfering with public legal claims, it will be interesting to see how liberal the EU will be. Concerning unification, will the EU unify according to the softest or the strictest national example?

Will the EU take a differentiated stance in relation to IFL rules concerning intra-communitarian or extra-communitarian issues, in the context of its liberalising tendency? A possible difference in approach could take place in a direct or indirect way. An indirect difference could be made, for example, by legislation, where rules of applicable law are summed up in order to create a universal geographical scope, but through the differentiating of a specific interpretation of the “exception of international public order”. (114) For example, in the drafting of legislation (115) regarding rules of applicable law, a direct difference can be made by holding on to the principle of application of laws on nationality on the one hand and one the

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(114) As put forward in the context of communitarisation of “Rome I” and “Rome II”. On the possibility of coming to a “europeese exceptie van internationale openbare orde”, see supra, footnote 106, on research by D. VAN GRONDMERIJK.

(115) Or in the review of national IFL by the EGI. According to Fallon and MEEUSEN, the application of the principle of mutual recognition could lead to the application of the law of a third-country. On the issue of reviewing the law of a third-country, especially from the perspective of the principle of mutual recognition, see M. FALLON and J. MEEUSEN, i.e., pp. 64-65 whereas they state “Whereas it is unacceptable to say that the law of a third State violates the EC treaty, it should be perfectly acceptable to conclude that the application of such law designated by the choice-of-law rules of a Member State obstructs intra-community trade and must therefore be rejected ‘and’ Although the law of third States is not subject to the supremacy of Community law and its content does not violate the latter, Member States are prohibited from applying such law when its application would burden cross-border activities”.

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other the principle of application of laws on domicile. Is it thus possible that differences could be made between rules of applicable law applicable to EU-citizens on the one hand, third-country nationals on the other hand, or – within the category of third-country nationals –, applicable to third-country nationals that are already allowed to reside (116) in the EU on the one hand, and third-country nationals that still need permission to enter into the EU on the other? In these different contexts, should one review using a different assessment as the one formulated in the Gilly case (117) that in using a connecting factor, this factor should entail a “suitable and reasonable criterion”, should the assessment of being a suitable and reasonable criterion be executed in the light of another goal, or should one fill in the assessments that are formulated in an intracommunatorian context in another way when external aspects appear – for example, what could be the importance of a “lack of reciprocity” in the relation with third countries? Is there also more room here for reasoning in terms of “culture” and “integration” or should the primary reasoning be one of “the reaching of a situation of international harmony in decision making” and “no-loss of attained-rights”? It is true that so-called “European internal market arguments”, based on freedom of movement, can not be relevant as such in certain “external” situations (118). But nevertheless, the same concerns could still come into play through, for example, principles of human rights (119) or principles of PIL themselves (120).

(116) And – if activities of the EU lead to the creation of a right to move freely within the EU for third-country nationals – that may also be allowed under EC law to move within the EU.

(117) Supra, footnote 65.

(118) See also, mutatis mutandis, M. Bell, I.e., regarding migration claims of same-sex partners, whereas he states “obstacles to free movement cannot be easily transposed to the situation of third country national couples, either immigrants or asylum applicants, because such persons do not enjoy autonomous free movements rights within the EU at present.

(119) Notable in this context are Ancel and Muir-Watt (B. Ancel et H. Muir-Watt, "La dévolution européenne. Le Règlement dit "Bruxelles II", I.e.), about the influence of European Law and human rights on PIL: “Même si la portée des unes et des autres est encore très incertaine dans leur interaction avec le droit international privé, on ne peut que lever leur ambition commune d'imposer la continuité d'une relation familiale telle que consacrée dans l'Etat d'origine, fût-ce au prix de la neutralisation de l'exception de fraude et, plus généralement, au mépris des conditions auxquelles l'Etat requis en subordonne la reconnaissançe. Ainsi, chassée du domaine du règlement, la reconnaissance des décisions de dissolution des union para- ou pseudo-conjugales a pourtant vocation à jouir au même titre d'un régime aussi favorable, tandis que le refus d'accès à la libre circulation européenne n'empêchera pas les décisions familiales des États tiers d'y entrer sur la vague des droits de l'homme.” See also, mutatis mutandis, M. Bell, I.e., whereas he tries to obtain the same results for people who are not able to refer to the freedom of movement, arguing on principles of human rights.

(120) It is remarkable that N. Dethloff (I.e.) presents the issue of how to prevent a loss of legal positions or change in rights or obligations before treating issues in a specific European context. See also on the possibility of an issue of international harmony of decision making becoming a justification for the respect for the application of gender-discrimination law, V. Van Den EEOKHOUT, “Gelijkheid in het internationaal privaatrecht. Een kritiek op de gangbare structurering van het debat”, I.e., p. 187 footnote 54.
As I mentioned before, PIL usually leaves a fair amount of room for manoeuvre. By this I mean that a couple of PIL dogma's, such as the exception of international public order, fraud, (121) the treatment of those with multiple nationalities, normally leave room for manoeuvre within PIL rules. The question is then, to what extent the EU will allow member states' variation on this point, and/or allow itself to vary in an intra-communitarian or an extra-communitarian context. Next to this, it would be interesting to see the manner in which one could try to hamper, through IPL, public legal claims by EU citizens and citizens from third countries that are accorded the same rights and, finally, citizens from third countries. 

Seen from this angle, it is my view that a number of ECJ cases could be analysed from an angle of their importance to IFL, even though these cases were rarely about an issue of IFL. In this context an example would be the Zentros-, Uberseering and Inspire cases. (122) These cases concerned the right to establishment of legal persons, but interesting deductions can be made regarding IFL, specifically in the field of possibilities that are open to member states in the area of combating sham marriages, sham recognitions, sham adoptions, and so forth. The interesting question then arises about what impact the freedom of movement of persons can have on national legislation, that pretends to attempt to combat fraud, but in actual fact only tries to issue extra requirements. (123) Also, to what extent the combating of fraud will lead to a difference in approach to claims based on

(121) As in a national perspective, the European perspective must deal with issues of fraud, in particular sham marriages, and with the question what impact the freedom of movement of persons can have on national legislation that pretends to combat fraud but in actual fact creates extra conditions (for an analysis of the impact of EC Law of the Dutch legalisation policy, see P.B. Boeles, a.c.). A closer look shows that one is not always neutral in IFL when dealing with international legal relationships. The former, in a sense that when one is confronted with citizens in this legal order, imputations of fraud are formulated, whereas those imputations are not made when one is confronted with citizens of a different legal order. See V. Van Den Eekhout, "Internationaal privaatrecht en migratierelat. De evolutie van een tweeopentsheide", i.e., on imputations of fraud when people proceed before national authorities in order to dissolve their marriage, or H.U. Jeannin D'Olivetra, "Kromme rectificaties", i.e., on the willingness to recognise foreign judicial decisions when a date of birth has been changed. See supra, footnote 83, on the combating of sham relationships via the strict use of the principle of nationality.

(122) Cases Zentros (C-212/97 (1999) EOR 1-1459), Uberseering (C-205/90 2002-11-05) and Inspire Art (C-167/01, 2003-09-30). See on these judgements recently J. Meeussen, "Het arrest Inspire Art: Het Hof van Justitie bevestigt zijn liberale benadering van de communautaire vestigingsvrijheid van vennootschappen", to be consulted on the electornical journal tijdschrift@ipr.be 2004 (1), pp. 122-126.

(123) See the Zentros, Uberseering and Inspire cases in the context of the law on legal persons, but more importantly is the analysis of these cases regarding harm to economic freedoms by so called combating fraud, for example, by the issuing of rules to combat sham marriages. On the issue of sham marriages see Resolution 4 December 1997, O.J., C16 December 1997 and, in European jurisprudence, the Singh (C-370/90 (1992) ECR I-4265), and Kadiman cases (17 April 1997, C-561/95 ECR I-2133), Kol (5 June 1997, C-285/96 ECR I-3009), European Commission versus Germany (18 May 1989 249/B6) and recently, Hacene Akrich (C-109/01 2003-09-23), JV 2004/1, Comments CAG and ECHR 2003/85, comments A. Wolter.
family relationships or concerning intra-communitarian or extra-communitarian disputes — for example because in the phase of reviewing legal relationships created outside the EU — thus not yet included in the freedom of movement — they should perhaps not yet be reviewed in the light of respect for fundamental EC freedoms. It is important to note here that some in the Netherlands believe that the Wet op Formele Buitenlandse Vennootschappen can — and should — still be used in extra-communitarian situations even though it got a negative review by the ECJ in the Inspire case.

IV.2.2. Interaction with new forms of living together of non-European origin

I am also interested to know in what manner the EU will interact with (IFL-aspects of) non-European forms of family life. (124) How will non-western concepts be built in and in a following phase how will they evolve in terms of claims of a public legal nature? Will the EU also be liberal in this context or will it be restrictive? (125) Will there be a greater form of openness regarding foreign laws that dissolve a family tie or fail to recognise it, than for foreign law concerning "unknown" forms of family ties; this, for purposes of migration policy.

It is important to mention the ECJ's Mesbah case in which the Court seemed to be fairly liberal, (126) in the sense that the Court worked with a wide definition of the concept of family and showed itself to be flexible regarding forms of living together of non-European origin.

IV.2.3. Those with multiple nationalities and Nationality in general

In the Mesbah case there was, however, a problem of positive nationality conflict. The solution to that problem turned out to be negative for the

(124) Previously the EU treatment of "new forms of living together" was discussed (III.2.3). Here one can see that the EU is not only confronted with (new) family forms of European origin, but also with family forms of non-European origin such as polygamy, forms of custody, and more. The question is how these non-European forms of living together will be treated and what IFL interference there will be.

(125) On the way in which the EU treats non-European family concepts, see M. Nys, L'immigration familiale à l'épreuve du droit: le droit de l'étranger à mener une vie familiale normale: de l'existence d'un principe général de droit à sa reconnaissance, Bruxelles: Bruylant 2002, 665 p. In defining "family" in the Directive on the right of family reunification, one limited oneself to the "nuclear family," through a restrictive migration policy regarding citizens from third countries. It is stated however that this is a minimum, and that member states are free to diverge in creating a "softer" regime. On polygamy in the Directive on the right of family reunification, see consideration 10 on 11 and art. 4, 4° of this Directive. On unmarried or registered partners in this Directive, see also consideration 10 and art. 4, 3°. On actual developments concerning polygamy in English law, including the impact of developments in migration law, see also P. SHAH, "Attitudes to polygamy in English law", ICLQ 2003, p. 369-400.

(126) Mesbah 11 november 1999, nr. C-179/98, (RStV 2000/57). Regarding the co-operation agreement EEC-Morocco, article 41 paragraph, the ECJ stated that the term "family members" also meant those relations ascended from the employee and his wife that live in the member state of residence.
person involved: acting this way, it became possible to refuse giving the person handicap benefits, based on an association agreement with Morocco.

This is an important point. The classic European stance has been that competence on nationality legislation should be left to member states. (127) But judicial decisions by the ECJ point to the fact that member states are not completely free in the way they treat people with multiple nationalities. Some scholars go as far as saying that the Micheletti case ensures that the member states nationality laws should be in congruence with Community Law as they are not allowed to frustrate the freedom of movement of persons. From that Nationality Law can be discussed. (128)

In ECJ jurisprudence, it is clear that the principle of freedom of movement of persons has implications for the way in which member states

(127) Similarities can be made between the way in which EC Law and the laws on nationality on the one hand and EC Law and IFL on the other are linked together. For laws on nationality as well as IFL it is crucial to know how legislation is drafted in order to know who can make a claim to EU Law and co-operation agreements between the EU and third countries. The group of people that can claim the right of freedom of movement of persons can be increased or decreased depending on how the rules on nationality or IFL are used. Just as it is important for the definition of the term "family member", the definition of the term "nationality" is of crucial importance in seeing whether people can lay claims on Community Law. The classic stance of European institutions is that competence in terms of legislation on nationality falls to the member states. In other words, member states are sovereign in this area. This means that they can increase or decrease the size of the group that can lay claims as EU citizens on the freedom of movement of persons through soft or strict laws on nationality. Until recently this has also been the case for marriage and lineage that are also important concerning the term "family member." After the Treaty of Amsterdam there seems to be a difference in the way in which laws on nationality and IFL develop: where the EU has created its own competence in the field of IFL it has not (yet) done so regarding laws on nationality. Though with ECJ jurisprudence in mind, one can say that member states are not completely free in the way they treat those with multiple nationalities. But, thus, in short, IFL is confronted with the same questions, concerning the freedom of movement of persons and non-discrimination of EU citizens as issues of nationality are. In nationality issues a problem frequently arose concerning whether or not the situation was one of intra-communitarian or extra-communitarian nature (see for example the Manjit-Kaur case (C-192/99, 30 February 2001, CMLR 2002, pp. 881-895, note H. TONER; H.U. Jessurun D'OLIVEIRA, comments with Manjit KAUR, JV 2001/124 and P. SHAR, "British Nationals under Community law: the Kaur Case", European Journal of Migration and Law 2001, 3, pp. 271-278). The same could happen in IFL. Incidentally, also problems of a PIL nature are frequently discussed in preliminary nature when discussing issues of nationality, for example when deciding whether someone is a "spouse" in order to grant them then nationality of a member state. Thus, there is a lot of interaction between the fields of IFL, nationality and EU Law. (128) Regarding the question to what extent a member state is fully sovereign in determining the granting of and taking away of its own nationality. From a clause in the Micheletti case stating that laws on nationality of member states must be in congruence with Community Law. In certain doctrine (G.R. de GROOT, "Comments with Micheletti", Migrantenrecht 1992, pp. 108-110), it has been deduced that the laws of member states may not frustrate freedom of movement of persons, which can have serious consequences for the nationality laws of some member states for example regarding the loss of nationality by permanent residence abroad. See, G. R. de GROOT, "Editorial. Latin-American European citizens. Some consequences of the autonomy of the Member States of the European Union in nationality matters", Maastricht Journal of European and comparative law, 2002, p. 115-120). H.U. Jessurun D'OLIVEIRA, "Comment with Micheletti", CMLR, 1993, pp. 623-637. See also V. VAN DEN EECKHOUT, "Review of M. Vande Putte en J. Clement, Nationaliteit", Rechtskundig Weekblad 2002, p. 594.
should address situations of multiple nationality. However, the ECJ does seem to differentiate depending on whether it is a situation of freedom of movement of persons or not, and whether it concerns a citizen of and EU member state or of a third country. (129) Occasionally, member states do seem to have the freedom to regulate situations of multiple nationality, and to use, or not, PIL techniques as a reference to solve a positive nationality conflict or to insert extra conditions for those of a certain nationality. It seems as though member states have a lot of freedom if one does not fall within the standard model of being an EU citizen in a situation of freedom of movement of persons.

Put generally, what needs to be done is to assess when member states have the competence to regulate in situations of multiple nationality and to use, or not, PIL techniques as a reference to solve a positive nationality conflict or to insert extra conditions for those of a certain nationality. One should include that if a situation of singular nationality arises, whether PIL techniques could be used as a “reality check”.

From a pure PIL perspective, the question arises as to the meaning of this jurisprudence and to line of thought in relation to reality checks in pure IFL situations. Can it be said that when one has a situation that has to do with PIL legislation, (130) EU citizens, (131) and a confrontation with positive nationality conflicts, that almost automatically it can be stated that freedom of movement of persons is made part of proceedings – or that it concerns an issue of Community Law – and there is no freedom to resolve the positive nationality conflict. (132) If so, what is the meaning

(129) See the cases, Devred (Case Kenny-Levick, echtg. Devred t. Commission, Case 257/78 14 December 1979), Scholz (C-419/92 (1994) ECR 1-505), Micheletti (C-369/90 (1992) ECR 1-4239), Memre (11 November 1999, nr C-179/98) Also, Saldanha (C-122/96 1997-10-02, Manjit Kaur (C-192/99, 2001-02-20) and others. Also the publications by J. Meusen (J. Meusen, “Bipatridie in international en Europees verband”, in W. Drukker (red.), Oostlanden aangeboden aan Fons Heynen ter gelegenheid van zijn vijfentwintigste verjaardag, Gent: Mys & Breech 2002, pp. 219-233), specifically the comparing of Memre en Micheletti in this context. See also the recent case Garcia Avello (2003-10-02 C-148/02).

(130) Of European origin or not.

(131) For an interpretation of the Garcia Avello case in the sense that the same approach be taken when a child takes on the nationality of a non-EU citizens with the same rights as an EU citizen (e.g. because his Dutch mother lives in another EU member state and is married to a Russian man, see E Gubbels, “Recente ontwikkelingen in het Europees recht”, Burgerzaken en Recht, October 2003, p. 373. See also A.P. Van der Mei, “De juridische meerwaarde van het Burgerschap van de Europese Unie (2)”, Migrantenrecht 2003, nr. 9-10, pp. 325-326 and H.U. Jessurun D’Oliveira, “Het Europese Hof activeert het Europese burgerschap”, N.J.B. 2003/2238.

(132) In the Garcia Avello case one assumed that the case was about an issue of Community Law. In the conclusion the ECJ pointed out that even if it was true that the children had not migrated, their father at least had made use of his right to move within the EU. In the judgement (no. 27-28), the Court states that “(…) a link with Community law does (…) exist in regard to persons in a situation such as that of the children of Mr. Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State. That conclusion cannot be invalidated by the fact that the children involved in the main proceedings also have
of this jurisprudence for the Brussels II Regulation? Thus, from a PIL point of view an analysis of the above-mentioned ECJ jurisprudence could be extremely useful.

IV.2.4. Room for manoeuvre for the EU and/or member states?

In effect the foregoing refers once again to the question of when a member state can fall back on own IFL rules and whether member states have own room for manoeuvre; possibly differentiated depending on whether it concerns a matter of freedom of movement of EU citizens or something else. (133) From the same perspective another question arises, namely as to the value accorded to foreign judicial decisions that are made through family legal proceedings that have impact on child benefit or pension payments and so forth. (134) In general this is the field of the value of foreign judicial decisions and the legalisation of foreign acts. (135)

The previous raises another question though. On the one hand I discussed the way the EU approaches PIL rules, on the other hand one also needs to point out a completely different issue, namely to what extent member states have room for manoeuvre in the regulation of issues that do not fall under the field of IFL but that can reduce IFL disputes to an "empty cartridge". One could think of legislation on a specific minimum age before a permanent permit of residence can be given or even claimed, or also, additional conditions on a persons income. (136)

the nationality of the Member State in which they have been resident since their birth and which, according to the authorities of that State, is by virtue of that fact the only nationality recognised by the latter." The conclusion by the advocate-general is interesting (nr. 41): "In the present case, the commission submits that the introduction of citizenship of the union, with its attendant enjoyment of all the rights conferred by the Treaty – including, thus, the right to be free from any discrimination on grounds of nationality – is a new factor enabling the court to reach a decision in this case on a rather broader basis than it did in Konstantinidis. I agree that article 17 makes clearer the applicability of the principle of non-discrimination to all situations falling within the sphere of community law, without there being any need to establish a specific interference with a specific economic freedom."

(133) See also IV.2.2.
(134) See regarding the use of foreign judicial decisions where a date of birth has been changed the jurisprudence of the ECJ [Dafeki (C-336/94 (1997) ECR I-6761), as well as Ors en Kocak (C-102/98 and C-211/98 2000-03-14)] in relation to CJvE 14 January 1998 (concerning the rectification of a date of birth by a Moroccan judicial decision and child benefit), USZ 1998/75, with a note by A.P. van der Mei. See also BR 13 July 2001, NIPR 2002 afl. 3, no. 166, p. 303. For a critical look at earlier practices see Jessurun D'Oliveira, "Kronomme rectificaties", i.e. On the meaning of the Dafeki case and other judicial decisions by the ECJ on "non-European contexts", see P.B. Boelles, o.c.
(135) In the above mentioned document of October 2001 (supra footnote 39) the Daerki (C-336/94 (1997) ECR I-6761) and Konstantinidis (C-168/91 (1995) ECR I-1191) cases are mentioned as examples of matters where the EECJ came into contact with issues concerning civil acts.
(136) See also article 7, 3 of the Council Directive of 22 September 2003 on the right of family reunification, O.J., L251, 3 October 2003: "Member States may require third country nationals to comply with integration measures, in accordance with national law. With regard to refugees and/or family members of refugees referred to in article 12 the integration measures referred to
I shall once again refer to what I stated above, namely that one can liberalise the rules of IFL without actually liberalising claims in the areas of laws on foreigners, Nationality Law and Social Security Law. I fear that, following the example of several Member States, also the EU may – be it occasionally – do this, especially concerning claims from non-European citizens. (137)

In short it is always necessary to make a distinction between IFL rules on the one hand and public legal claims on the other, but nevertheless to look at what will happen, together. For example, does it happen that rules of European IFL are not used to regulate family legal preliminary questions that occur in the evaluation of a public legal claim? And if this happens, what is the consequence for the evaluation of said public legal claim? (138) In a more general sense, are rules of IFL in either a liberal or restrictive sense being linked together? (139) Is it, altogether, plausible that things evolve in the sense that in an intra-communitarian context IFL keeps on liberalising and helps to widen public legal claims, whilst at the same time in legal relationships with external aspects the combination of IFL and public legal claims results in a negative outcome?

in the first subparagraph may only be applied once the persons concerned have been granted family reunification." On the "integration" condition, see recently in the Netherlands Adviescommissie voor Vreemdelingenzaken, "Voorbij de horizon van 'Amsterdam'”. Een advies over het Europese beleid inzake asiel, arbeids- en gezinsmigratie na 1 mei 2004, ten behoeve van het Nederlandse voorzitterschap, fifth chapter, e.g. p. 34. (to be consulted on www.acvz.com). Earlier H.U. Jessurun D'Oliveira (“Haagse huwelijksverdrag 1902. Een terugblik en een aanmaning”, N.J.B. 2002, 1597) mentioned that in the eventual European regulation of PIL matters concerning applicable law on marriages, that a mechanism be created where national hurdles to marriages with citizens from third countries could be set aside. On the possibility of having such an exception even if a Treaty says nothing about it, see V. VAN DEN EEOKHOUt, "De wisselwerking tussen materieel recht en internationaal privaatrecht: eenrichtings- of tweerichtingsverkeer?", l.c. In my point of view, such a view should be heard, but it only concerns one part of the problem. Just as important is the problem of member states adding conditions to PIL rules to hamper family "creation" and family reunion of non-ED citizens. This has become clear by, for example, the Dutch situation, as I have explained in V. VAN DEN EEOKHOUt, "De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw”, l.c. In this context see also the Maxx case (C-459/99 2002-07-20), on the requirement of visa’s for third country family members for migrating EU citizens.

(137) See also supra, e.g. footnote 37.
(138) As is currently the case in certain cases of Dutch Social Security Law, now that Community IFL has been put to one side. Cfr. supra III.1.2.
(139) See for example the problems that exist when a "future spouse" does not fall under the personal sphere of the Directive on the right of family reunification: see P. BOELE, "Nederland en toekomstig Europees gezinsherenigingsrecht", Migrantenrecht 2000, pp. 179-187, note 12 and H. STAPLES, "Gezinshereniging naar komend Unierecht”, NTER 2000, pp. 77-83: this omission could imply that future spousal would have a particular difficult time in forming their relationship if they are not allowed to a short stay with the goal of getting married, and if at the same time in the country of marriage a marriage cannot be had because of, for example, religious prohibitions concerning marriage.
IV.2.5. Human Rights

Interwoven in all this and independent of whether or not one differentiates between the intra-communitarian and extra-communitarian context are the principles of human rights, that certainly need respecting. In the above the importance of human rights has already been mentioned now and again. (140) The issues are the following: respect for family life, respect for cultural diversity, the ban on discrimination on the grounds of nationality, (141) race, gender, and sexual orientation and so forth. It is interesting to note that in the last few years doctrine has become more and more interested in the relationship of European Law on the one hand, and Migration law, Family Law and Human Rights on the other (142). It is my opinion that also IFL issues should be considered more and more often in those cases.

In discussions about EU interference in IFL, interests shall have to be weighed; interests of the EU, of member states, of individuals. Particularly, cases where interests clash will be interesting. When one talks of a weighing of interests then it is interesting that in an intra-communitarian context, debates in doctrine are momentarily on the possible difference between EU member states, EU interference and the interests of the EU. In essence it is all about differences in interest on a governmental level; particularly in debates on sovereignty – and the right of cultural autonomy – of member states versus the (economic) interests of the EU in unification. (143) I wonder if in the extra-communitarian context the difference will be between the interests of the individual on the one hand and that of the EU and member states on the other. Indeed, economic interests of states and those of individuals seem to clash in debates on Migration Law, in particular, and as I mentioned above, the regulation of IFL in the evaluation of public legal claims can make a difference. (144)

(140) See supra, footnotes 64, 65, 80, 81, 100, 101 and 119.
(141) Regarding the discussion to what extent the in article 12 included principle of non-discrimination on the grounds of nationality is applicable between EU citizens or also in relationship with citizens of third countries, see G. BRINKMANN, i.e., p. 303 as well as the conclusion in the Mrax-case of the ECJ (C-459/99). See also, recently, P.B. BOELES, "Burgerrechten van Europese burgers en derdelanders (toespraak Asser-Conferentie 2003)"; in Europese burgerschap en de rechtsgevolgen voor de burgers in de EU, Asser Instituut Colloquium Europese rechts, 2003, to be published.
(142) See for example the work of researchers such as Helen Toner and Helen Stalford.
(143) On this subject see ETHLOFF, i.e. p. 59 and also, M. JANSTRA-JAKUBOVA, i.e. Also M. ANTOKOLSKAIA, i.e. See also the issues in an intra-communitarian context, namely the interests of individuals to have access to certain family legal institutes and to be able to use certain family legal claims (and subsequently to have public legal claims), the interest of the EU to reach a liberal IFL and the interest of (some) EU member states to slow the tendencies towards liberalisation, supra III.2.3.
(144) See on this in short, supra, footnote 29.
V. - Conclusion: 
One needs to tread carefully 
V.1. - EU prospects
seen from current Dutch developments

The EU has already made the field of IFL into a method for the stimulation of the freedom of movement of EU employees. The realisation that decisions made regarding mobility are also determined by evaluations made by people on the consequences of mobility on their personal family life is an impulse for the drafting of a liberal European IFL. The fact is that thus the sub discipline of IFL has entered the arena of economic considerations; and subsequently, IFL developments will be reviewed in light of economic considerations in the future. It is therefore important to look at lessons that can be learned from developments and experiences in the area of EU interaction with PIL outside IFL.

The current problems surrounding justification of the Europeanisation of IFL, make it difficult to assess to what extent EU interference will be liberalising in, for example, the field of granting residential claims or the granting of socio-economic advantages. A first glance uncovers a start to a process of "liberalisation". Concerning the link between PIL and migration, the EU is certainly operating in a liberalising sense: concerning family reunion of family members of EU employees, the idea is that the integration of the EU employee in another EU member state only has advantages if certain family members are allowed to join him; and it seems to be a task for PIL in stimulating this right. The question is though to what extent PIL interference will also lead to a widening of acceptance of claims in a public legal sense. For example, will EU interference lead to more people making claims to derived rights of residence than before as family members of a EU employee? In legal relationships with external aspects it is completely unclear to what extent Europeanisation will be liberalising.

The questions asked regarding consistency, justification and positioning of PIL in a national context are important for a national level as in a European context. In time, questions will be asked about consistency in European regulation as questions now are asked on a national level about consistency in the use of PIL in a national context and PIL on a European level. In a European context, comparisons can be made between proceedings that do or do not concern the Statute on Civil Servants, the freedom of movement of EU employees or not, citizens of associated countries or not – all this coming from European legislation and jurisprudence, as well as national jurisprudence dealing with European law. The questions are important because current developments are afoot where policies of liberalising mobility (concerning the freedom of movement of EU employees
and their families) as policies concerning the selective limiting of mobility and residential legal claims (concerning migration of non-western peoples to European countries) are pressing ahead, while policy makers at the same time seem starting to realise that PIL may be a useful policy instrument.

Viewing everything from this angle, the central issue is the difference in treatment in the regulation of aspects of IFL within the regulation of freedom of movement of EU citizens on the one hand, and outside the regulation of the latter on the other. Will the EU go for a fundamentally different approach – creating either liberal either restrictive rules of IFL depending on the merits of the case; or creating liberal IFL-rules in both cases, but attaching a different importance to them if they are related to migration claims – whether or not it concerns solely the freedom of movement of EU citizens? If so, a two-track policy of IFL could come into existence in EU legislation and jurisprudence. IFL could then function as the echo or as an amplifier of migration policy, sharpening differences between the stimulating of mobility of EU citizens within the EU on the one hand, and on the other, the discouraging of migration from outside the EU to its member states.

At this moment, an analysis of EU interference with IFL in relation to the legal position of citizens of third countries is necessarily of a prospective nature. One can only wait and see how the EU will react. But at least, I hope to have made it clear that if the EU is active in interfering in IFL, from “a Dutch perspective” – i.e. the perspective of migrants confronted with the Dutch actual system – there are elements of hope, but also fears. Hope that the EU will crucially differ from the Dutch stance, as for example on legalisation of documents, but fears that the EU may eventually do the same, resulting in double practises regarding PIL. By that I mean liberalising when stimulating freedom of movement of EU citizens, but restrictive when confronted with other situations.

In the drafting of a liberal European IFL, will it be possible that a throwback will take place resulting from the taking into account of considerations that are currently present in a Dutch national context? Important will be to what extent European institutions will pay attention to issues that are seen as important today in national contexts; will they copy the national developments or will they resist them. From a Dutch point of view one of the main questions is to what extent the Dutch situation and Dutch issues will be extrapolated or pushed back by the Europeanisation of PIL. Will the Europeanisation have an impact on the current affairs in a national context by reviewing or stopping restrictive tendencies? Or will tendencies that now exist in a national context get a wider “audience” via Europeanisation? In the worst situation, Dutch practices could become the model for European public legal claims linked to IFL.
It does need to be said, though, that Dutch IFL rules as such can sometimes be inspiring, (145) especially if one would want to back out of a strict use of the principle of nationality and would want to build in favour-tendencies in IFL itself (146).

V.2. - Waking up sleeping dogs?

Whereas I used to be afraid of waking sleeping dogs by mentioning in public the use of using IFL for restrictive migration purposes in a Dutch and Belgian context, (147) I now feel the time has come to openly address this problem. There is a risk that structural developments will take place through Europeanisation of PIL that extrapolate national tendencies. A prospective analysis is welcome in my point of view.

Currently, there are a couple of Dutch jurists and legal academics that are able to slow or stop certain Dutch developments by combining EU law with arguments from fundamental human rights and basic principles of PIL. (148) This type of analysis needs more attention.

Personally, I agree with many of the developments in the EU concerning the Europeanisation of PIL, especially as the EU has the goal of attaining international harmony together with favor-tendencies. (149) At the same time I am weary that actual developments could drastically change if the situation of non-EU citizens is concerned. Caution from this point of view in this area is perhaps wise. Still keeping a watchful eye on EU interference...
in PIL from the perspective of non-EU migrants can certainly do no harm. Whether or not the drafters of the treaty of Amsterdam had the intention to relate IFL-issues in a direct way to Migration issues, there is a link between IFL-issues and migration issues, and it is worth to be examined how things work out now that the EU is unifying (aspects of) IFL as well as (aspects of) migration law.

V.3. — The hope for a positive EU contribution

For those that wish to see a positive EU contribution for non-EU citizens, caution is required. In order to attain a positive contribution, it seems crucial to me that the EU keeps going along the positive lines already started upon also concerning legal relationships with external aspects. Although concerns about international harmony, no-loss-of rights, legal security, non-discrimination and so forth may seem crucial if one wants to interfere in IFL in order to integrate Europe, these concerns can't be seen as if they are reserved for, or limited to the intracommunitarian context. In my opinion, these concerns that could at first glance be labelled as “European internal market arguments” finally just enlighten even more principles that should be respected if one wants to draft or apply rules of IFL. In other words, one always needs to search for a balancing of IFL rules that take into account issues such as international harmony, no-loss-of rights, legal security, favor-tendencies whereas these are convenient, respect for human rights, combined with a search for a link between IFL and rules of a public legal nature in a non-frustrating way.

If the EU truly recognises the cultural, ideological and economic components of IFL, (150) and these components are all treated in a honourable, consistent, convincing and reasonable manner that respect fundamental rights, basic principles of IFL and principles of European law itself, only then will Europeanisation breathe a wind of fresh air through Dutch IFL.

(150) And if the EU is aware of the risk of contaminating the debate, and the ideological and economic arguments used in the debate (see supra, footnote 8); one has to realise that also in a European context one could want to hide behind, for example, principles of non-discrimination on the grounds of gender, only to block the recognition of family legal relationships where the people involved wish to make a claim on a residential legal, social legal, or nationality legal basis. See supra footnote 106.