

# Adoption: Cross-border Legal Issues and Gaps in the European Union

At present, there is no EU legislation with respect to adoptions. Under the Treaties, substantive family law falls within the sphere of competence of the Member States. However, the EU may adopt measures concerning family law with cross-border implications (Article 81(3) of the [Treaty on the Functioning of the European Union](#) (TFEU)), including in the field of adoption.

This note is intended to summarise issues relating to the current legal framework – legal gaps and consequent obstacles to free movement of citizens – and avenues for solutions. It is drawn up on the basis of the background briefings<sup>1</sup> prepared by independent experts and presented at the JURI-PETI workshop on '[Adoption: Cross-border legal issues](#)' held at the European Parliament (EP) on 1 December 2015. The workshop had two main objectives: on the one hand, to respond to a number of petitions submitted to the EP on issues relating to adoptions without parental consent involving non-national children and, on the other hand, to provide some background reflections for the legislative own-initiative opinion which the Legal Affairs Committee has decided to prepare.

## 1. ADOPTIONS WITHOUT PARENTAL CONSENT OF NON-NATIONALS IN EU MEMBER STATES

In the last years, a number of petitions have been brought before the relevant EP committee raising situations of adoptions without parental consent, ordered with a view to protecting the best interests of the child and involving non-national children. In some of these cases, relatives in the country of nationality were prevented from being granted custody. At present, all EU Member States' legislations provide for procedures enabling public authorities to dispense with the parents' consent for adoption in cases of abandonment, lack of contact with the child, deprivation of parental rights or unjustified or unreasonable refusal of consent by the parents where it is clearly in the children's best interests to be removed from their families<sup>2</sup>. In most Member States, however, this mechanism is rarely activated and, where it is, only as a last resort. In England and Wales, on the other hand, the frequency and speed of the process, as well as the clear government policy in favour of adoptions and the difficulty in having adoption decisions reviewed, is rather unique and has given rise to a number of disputes involving non-UK parents and relatives.

Although the matter falls mainly within the competence of national law, the cross-border aspect is a matter for EU and international law. In most cases, UK authorities which have failed to inform consular authorities of the country of origin of the child have not complied with their obligations under the [1963 Vienna Convention on Consular Relations](#) (Article 37).

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<sup>1</sup> Collected in a compendium entitled [Adoption: Cross-border legal issues](#), hereafter 'the compendium', European Parliament, Policy Department C, PE 536.477

<sup>2</sup> See C. Fenton-Glynn, [Adoption without consent](#), European Parliament, Policy Department C, PE 519.236

In addition, the [Brussels IIa Regulation](#)<sup>3</sup> and the [Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children](#) (to which all EU Member States are parties) lay down obligations as regards communication between the central authorities of the Member States involved and provide for a mechanism of transfer of jurisdiction. Recent judicial decisions tend to show that a better balance is being sought between national approaches focused on the protection and best interests of the child and a concern for cultural dimensions when non-national children are involved.

## 2. RECOGNITION OF INTERCOUNTRY ADOPTIONS IN THE EU

Intercountry adoptions<sup>4</sup> in the European Union (EU) are governed by the [Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption](#) (hereafter 'the 1993 Hague Convention'), to which all EU Member States are parties. All 95 contracting states around the world benefit from the automatic recognition of intercountry adoptions carried out between them, provided that the guarantees and safeguards established in the Convention are complied with. Thus, recognition 'by operation of law' (as stated in Article 23) means that no procedure is needed in the receiving State for recognition, enforcement or registration of the adoption order established in the State of origin. In the same way, adoptive parents do not need to 're-adopt' their children in the receiving State.

It is only possible to refuse to recognise a conventional intercountry adoption if it is manifestly contrary to the public policy of the recognising State, taking into account the best interests of the child (Article 24).

### 2.1. Challenges to the recognition of intercountry adoptions

However, in practice, additional procedures are required for recognition in some States, including EU Member States<sup>5</sup>. This is clearly in contradiction with the 1993 Hague Convention and can be very problematic, especially if the transcription process takes a long time.

Apart from these challenges relating to proper implementation of the 1993 Hague Convention, it should be recalled that about half of the world's countries are not parties to the Convention. Adoptions of children from these non-contracting States are not automatically recognised. In such cases, recognition is subject to domestic law and to possible bilateral agreements, which can lead to long, cumbersome and sometimes painful procedures for adoptive parents and the child.

### 2.2. Possible solutions

The [Special Commission](#) (i.e. the organ in charge of monitoring the practical operation of the Convention within the Hague Conference system) made some recommendations to overcome non-compliance with Convention provisions regarding automatic recognition.

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<sup>3</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>4</sup> 'Intercountry adoptions' should be distinguished from 'international adoptions'. The former refers to the adoption of a child who is habitually resident in a state other than that of the adoptive parents, regardless of nationality. The latter covers the adoption of children of a given nationality by parents of another nationality, whether or not they reside in the same state.

<sup>5</sup> See note 162 in particular in '[20 years of the 1993 Hague Convention – Assessing the impact of the convention on laws and practices relating to intercountry adoption and the protection of children](#)', Preliminary document No 3 of May 2015 drawn up by the Permanent Bureau of the Hague Conference for the attention of Special Commission of June 2015 on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption.

However, these recommendations are not binding. Contracting States, including EU Member States, are encouraged to review their own practices to ensure actual 'automatic recognition' of intercountry adoptions.

EU Member States could also be more active in encouraging third countries to join the 1993 Hague Convention. This would not only be beneficial for EU citizens in terms of administrative procedures, but would also allow these third countries to benefit from the minimum standards of protection which the Convention establishes for children and their families – both adoptive and of origin –, preventing the abduction, sale and trafficking of children and making the lives of abusive intermediaries more difficult.

### 3. RECOGNITION OF DOMESTIC ADOPTIONS IN THE EU

At present, there is no mechanism under EU law for the recognition and enforcement of domestic adoptions<sup>6</sup>. Neither is there any mechanism at global level. Cross-border recognition of domestic adoptions in the EU is ruled by the domestic law of the Member States or by bilateral agreements.

Concretely, the absence of a unified and harmonised system creates legal uncertainty for adoptive parents who move from one country to another, and subjects them to differences of treatment depending on the country they move to. Moreover, it gives rise to possible conflicts of family statuses<sup>7</sup> that may result in conflicts of substantive rights and obligations for the individuals concerned.

This problem is not specific to the EU since the cross-border recognition of domestic adoptions is not more regulated at global than at EU level. However, in the case of the EU, this situation creates a clear obstacle to the exercise of the right to free movement within the territory of the Member States, as recognised in the Treaties (Article 22(2)a and 21(1) TFEU).

#### 3.1. Problematic situations that may arise as a result of the absence of a harmonised EU system of recognition of domestic adoptions

The following is a non-exhaustive list of possible legal issues (lengthy and cumbersome administrative procedures will not be explored here), some of which have given rise to judicial decisions:

**3.1.1.** The non-recognition of an adoption can create disputes in relation to inheritance rights. In the *Negropontis* case<sup>8</sup>, the European Court of Human Rights (ECtHR) had to decide on such a situation, in which the adoption had been ordered in one of the USA states, the adoptive parent had property in Greece and no steps had been taken to have the adoption recognised in Greece. Although the case involved a third country, the situation would have been similar with two EU Member States. After the death of the adoptive father,

<sup>6</sup> R. Cabeza, in her briefing on pp. 55-64 of the compendium, further explains that 'domestic adoptions', which she defines as an adoption 'made pursuant to the law of the country that makes it in circumstances where the 1993 Hague Convention does not apply', can actually include an international element and may thus be labelled as 'international adoptions' while being governed by national law. Examples may include the adoption of children who are non-nationals of their EU country of residence by adopters who are residents of the same EU Member State, or even the adoption of children who are non-nationals of their EU country of residence by adopters of the same nationality habitually residing in the same country, which could be conducted under the domestic law of the EU country of nationality.

<sup>7</sup> Defined by G.P. Romano as: 'the situation where two individuals have, in the eyes of one country with which they have a strong connection, a particular family status but, in the eyes of another country with which they also have a strong connection, another status which is regarded by the substantive legislations of both countries as incompatible with the first', see pp. 17-44 of the compendium.

<sup>8</sup> ECtHR, 2 May 2011, reported by G.P. Romano in pp. 34-35 of the compendium.

a dispute arose between his brothers and sisters and the adoptee about the succession. The ECtHR found in the adoptee's favour, concluding that the failure by Greece to recognise the status of adopted child amounted to a violation of the European Convention on Human Rights.

**3.1.2.** The non-recognition of an adoption can create uncertainty in relation to the citizenship of the child. In the case of an adoption made in a first State, where the adoption order indicated that the child bears the nationality of that State, issues may arise in the future if the family relocates to a second State which does not automatically confer its citizenship on the adopted child.

**3.1.3.** Same-sex couples are allowed to adopt in some EU Member States. However, the filiation link thus created may not be recognised by other EU Member States to which they may move. This creates problems in terms of parental responsibility and very practical issues in terms of school registration, medical care, etc.

**3.1.4.** More generally, the non-recognition of an adoption could hinder the recognition of decisions on parental responsibility, which is automatic under the Brussels IIa Regulation, even though the regulation does not cover adoption orders or the establishment of the parent-child relationship.

**3.1.5.** A specific type of issue can be identified in relation to the non-recognition of child protection measures equivalent to adoption, but not labelled as such, established in Muslim jurisdictions<sup>9</sup>. As adoption per se is prohibited under traditional Islamic law, most countries whose domestic law is inspired by Muslim law have not included an institution called 'adoption' in their legislation (Tunisia is an exception in this respect, as are India and Sri Lanka, where Muslims may adopt children). However, a closer look at the legal mechanisms established to protect children, particularly orphans, in some of these countries shows that these mechanisms may be functionally equivalent to adoption. Despite this functional equivalence, such legal links may currently be disregarded by EU Member States as far as adoption is concerned.

In this connection, the ECtHR<sup>10</sup> had to give a ruling in 2012 on France's non-recognition as adoption of the link between a French woman and an Algerian baby girl she was caring for under Algerian 'kafala' procedures. Even though this Algerian legal mechanism created a permanent bond with full parental care between the woman and the girl, and allowed the transfer of the name and the establishment of testamentary dispositions, and the cancellation of the kafala could only occur if in the best interests of the child, the ECtHR dismissed the action and found in favour of France, whose law does not allow the adoption of a foreign minor where the child's state of nationality prohibits adoption.

## 3.2. Some avenues for solving issues, as raised at the 1 December 2015 workshop<sup>11</sup>

### 3.2.1. Allowing conflict of family statuses but coordinating their effects

Under this approach, a Member State would have the possibility not to recognise an adoption conducted in another Member State under conditions that were not legal under its own domestic law (e.g. situation of adoptions by same-sex couples). However, it would be obliged to give effect to the status created in the first State (e.g. in the case of succession, parental responsibility, family name, etc.).

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<sup>9</sup> See N. Yassari's briefing note in the compendium, pp. 65-78.

<sup>10</sup> ECtHR, 4 October 2012, *Harroudj v. France*, reported by N. Yassari, op. cit. pp. 70-71.

<sup>11</sup> Solutions 3.2.1 to 4 are based on G.P. romano's briefing, 3.2.5. on Nadjma Yassari's a,d 3.2.6 on L. Martinez Mora's, op. cit.

### 3.2.2. Making mutual recognition of family statuses compulsory

This solution would be simpler to implement but perhaps seen as more of an intrusion on the sovereignty of Member States. Also, in order to avoid 'legal tourism', the Member State creating the status would need to ensure that the individuals concerned had a sufficient geographical connection with it (e.g. same-sex adopting parents residing in Member State A should be prevented from going to Member State B to benefit from a more liberal legal system and having the adoption further recognised in their less liberal State of residence A).

### 3.2.3. Having two (or more) Member States participate in the creation or termination of status through co-decision mechanisms

Such a co-decision model can be found in the basic scheme of the 1993 Hague Convention, as it aims to bring together the authorities of two States – that of residence of the child and that of residence of the adoptive parents – in order to agree on the adoption process.

### 3.2.4. Enacting EU laws on creation and termination of family statuses and setting up EU authorities to administer them

This solution is based on the idea of enacting EU optional legislation (without replacing the substantive legislation of the Member States), relying on EU administrative authorities such as EU civil registrars and EU judicial authorities, following the model of the Unified Patent Court. The EU legislation would provide an option typically for mobile EU citizens, having contact with more than one EU Member State. While this is obviously a more forward-looking solution, adoption could be an area in which to start.

### 3.2.5. Take a functional approach to assess the adoptive link

This solution was raised in relation to the recognition of child protection measures ordered in Middle Eastern legal systems as equivalent to adoption<sup>12</sup>. Instead of merely focusing on the actual use of 'adoption' as a label in the law of the country of origin of the child where the legal protection arrangement was established, judges could take a closer look at the actual function of this protection mechanism. Criteria for recognising a functional equivalence could be whether the legal protection link created a permanent legal relationship between the parents and the child, provided the parents with full parental authority and took place with the best interests of the child as the overarching principle.

Such an approach could become of even more relevance in a context of increased migratory movements to the EU from these jurisdictions.

### 3.2.6. Engage in the development of an international instrument for the cross-border recognition of domestic adoptions

Since issues relating to the non-recognition of domestic adoptions are not limited to relations among EU Member States and there is no global regulation of cross-border recognition of domestic adoptions, EU Member States may also choose to engage in the development of a global instrument to solve the issue on a wider scale, since globalisation entails movements of individuals that go beyond intra-EU mobility. This would make it possible to benefit from the experience acquired in the development and operation of the 1993 Hague Convention, and to find global solutions to issues which are not strictly European.

<sup>12</sup> See N. Yassari's briefing note in the compendium, pp. 65-78.,

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