ANNEX

The perspective of having a European Code on Private International Law

Research paper
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Contents

List of abbreviations

CoNE	Cost of Non-Europe
CJEU	Court of Justice of the European Union
EU	European Union
PIL	Private International Law
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
OJ	Official Journal

List of tables

List of boxes

Executive summary

Policy context

Private International Law ("PIL") aims to deal with the cross-border aspects of all questions related to private relationships between individuals such as family law, property law and the law of contract. It has traditionally been a matter of national competence. However, the integration process of the European Union has naturally meant that a European approach to certain PIL issues had to be introduced. Hence, a number of instruments have been adopted at EU level in order to deal with some of the most crucial matters related to PIL (namely the Brussels and Rome Regulations). The Treaty on the Functioning of the European Union ("TFEU") also entrusts the European Parliament and the Council with the task of adopting measures addressed at ensuring mutual recognition and enforcement of judgments and the compatibility of national rules with regards to conflicts of laws and jurisdiction (Article 81(2)(a) and (c)). Measures related to family law with cross-border implications have to be adopted by the Council unanimously (Article 81(3)).

In spite of these efforts, several areas of PIL directly related to the citizens' day-to-day lives are still unregulated at European level. The lack of legislation dealing with certain matters of private law with cross-border implications has severe consequences and significant costs for both administrations and EU citizens.

Objectives of the report and methodology

This report aims to estimate the Cost of Non-Europe ("CoNE") in EU PIL. CoNE refers to the costs (economic costs, social costs, costs related to incomplete protection of citizen's rights) presently borne by EU citizens and economic operators due to the absence of harmonised provisions of EU PIL. The report also examines the wider economic effects of the gaps on the functioning of the internal market and the costs related to the complexity of the current framework for PIL, including the costs and benefits related to adopting one single instrument on PIL in the form of a European code.

In order to achieve these objectives, the first task has been to identify the gaps in EU PIL that should be investigated due to the problems they pose on the day to day life of citizens. Secondly, the broad scope of CoNE in the areas of gaps and deficiencies/ weaknesses of existing PIL have been dimensioned. The final task has been to dimension the scale of CoNE that could be "saved" through a Code addressing the gaps have been dimensioned.

The existing gaps have been identified on the basis of the lack of EU regulation covering one or more of the elements of PIL (i.e. applicable law, jurisdiction and recognition of judgments). In some cases, an area is considered as a 'gap' since there is no EU PIL

legislation on the matter, whereas in other instances, a gap has been observed due to the absence of coverage of the applicable law, jurisdiction or the recognition of judgments. Gaps currently existing can be classified into six main headings covering the main areas of law falling under PIL: (i) Law protecting individual rights; (ii) Family Law; (iii) Law of Succession; (iv) Property Law; (v) Law relating to obligations; (vi) Law relating to incorporated and unincorporated bodies.

The table below provides an overview of the main gaps identified for this report.

Subject Area	**Main gaps identified**
Law protecting individual rights	• Status and (passive and active) legal capacity of *natural persons* • Representation issues - Incapacity; and - Powers of Attorney • Names - Names of Adults; - Names and forenames of children
Family Law	• Marriage/partnership related matters - "De facto" unions - Existence, validity and recognition of same-sex marriage - Existence, validity and recognition of registered partnerships; • Parent-child relationships - Establishment or contesting of a parent child relationship; • Adoption - Recognition of adoption decisions • Maintenance - Maintenance obligations arising out of "de facto" unions
Property Law	• Declarations such as gifts and trusts • Property rights over movables/immovables (including recording of rights); • Security rights; • Nature of rights in rem
Law relating to Obligations	***Contractual*** • Agency; ***Non-contractual*** • Violation of privacy and rights relating to personality including defamation
Law relating to incorporated and unincorporated bodies	***Incorporated bodies*** • Foundation of commercial companies and organisations including implied companies; • Transfer of company seat; • Personal liability of company officers; • Internal organisation; ***Unincorporated bodies*** • Foundation of non-commercial organisations and not for profit organisations.

Key problems existing

Due to the gaps currently existing, problems are faced by citizens in their day to day lives. Citizens are deterred from exercising their right of free movement, as provided in Article 20 and 21 TFEU due to the variations in law existing in the Member States. The obstacles faced by citizens can be expressed in terms of costs, with these costs relating to legal uncertainty, legal costs (e.g. cost of litigation), costs of non-recognition and cost of delays. In addition, emotional costs are incurred by the citizens due to the emotional effect the gaps in PIL have on their private and family lives.

An example of a significant CoNE occurs due to the variation in Member State legal regimes relating to representation issues (incapacity and powers of attorney). Such differences create major problems for citizens when moving cross-border. For instance, Greg, a Welshman, has been living in Lithuania following his retirement 15 years ago. He has assets, including property, in both Member States. Greg suffers from dementia and is therefore not able to manage his affairs. In order to raise funds to financially support Greg's living costs, his house in Vilnius needs to be sold. His son, Jasper, lives in Cardiff. Jasper has been granted power of attorney for Greg. Since no common legislation is in force between these countries, the powers of attorney are not recognised in Lithuania, with Jasper not being able to act on Greg's behalf in selling his house in Vilnius. This gap currently existing in PIL leads to legal costs and emotional costs for EU citizens. It has been estimated that these costs amount to €16.8 million per annum, with emotional costs estimated at € 3,000 per case for an adult.

The total CoNE estimated in relation to the current gaps in EU level PIL amounts to approximately €138 million per annum. The approach taken to estimate the CoNE of gaps in EU level PIL has been to isolate specific costs directly associated with particular gaps.

Gap	**CoNE (€)**
Legal Capacity	7.5
Incapacity	16.8
Names and forenames	2
Recognition of de facto unions	8.7
Recognition of same-sex marriages	4.2
Parent-child relationships	19.3
Adoption decisions	1.65
Maintenance of de facto unions	13.1
Gifts and trusts	5.6
Movable and Immovable property	5.56
Agency	14
Privacy	1
Corporations	38.3
Total	**137.71**

The existence of such costs are likely to have wider impacts on individuals, families and companies, particularly small companies, considering decisions to move between Member States or to invest 'cross border'. There are of course many factors that affect such decisions, including: language; cultural differences; prices; and, access to services. However, the uncertainty resulting from the absence EU level PIL in these areas coupled with the 'difficult to understand' differences between the laws in different Member States may combine to stop families taking choices they would otherwise prefer. The uncertainties about whether what would seem to be straightforward family matters could be resolved may act as a 'tipping point' that undermines free movement. For a small company, trading in products or services geared towards young people, concerns about differences in legal capacity and uncertainties about whether, if difficulties arose, they could be resolved easily, may well have the effect of the company deciding that cross border trading is 'not worth the potential hassle'.

In order to reduce the CoNE of lack of PIL, the gaps in EU PIL could be filled through a sectoral approach or through codification. There are a number of advantages and disadvantages associated with codification. While codification would guarantee the transparency of PIL, simplify its process and save costs due to legal clarity, it could also create difficulties due to the legislative effort associated with creating a Code and the difficulties of reforming the Code on a regular basis. If either sectoral or codification legislative solutions were applied to reduce or eliminate the current gaps, the costs would be expected, on a gap by gap basis, to reduce by similar amounts.

Overall, codification is considered to be the preferred approach to reducing CoNE of gaps in EU PIL. Codification would make it easier (and less expensive) for individuals, families and businesses considering decisions that could be affected by the absence of EU PIL in more than one area, to inform their choices. Codification would provide individuals and businesses with greater legal certainty. Such certainty leads to greater confidence in the legal system in all Member States, thereby reducing the deterrent effect currently existing when EU citizens consider exercising free movement within the EU. For example, an individual or family might be contemplating exercising their right to free movement within the EU but are put off from doing so by the costs of legal uncertainty affecting several gaps (e.g. a family could be faced with difficulties over both being in a de facto union and wishing to have freedom over how to name their offspring). The codification approach would provide a single source and perhaps some assurance to the couple that there would be a logical and speedy path to reconciling any difficulties they might encounter. This would ensure that EU citizens enjoy the benefits associated with free movement and the operation of the internal market.

1. Introduction

The "Cost of Non-Europe report: The perspective of having a European Code on Private International Law" is an assignment being undertaken by ICF GHK on behalf of the European Parliament.

The Research Paper fits into an on-going process concerning the review of Private International Law ('PIL') in the context of civil law and the assumption that gaps and inconsistencies in PIL lead to unnecessary costs and legal uncertainty, which in turn has a negative impact on the workings of the internal market that are exacerbated by the need for increased free movement of businesses and individuals within the EU.

1.1 Objectives of the Research Paper

The aim of the Research Paper is to provide the European Parliament with necessary information and assessments, including information on the following:

- "Gaps" currently existing in PIL which need to be filled;
- Concrete costs (economic, social costs, costs related to incomplete protection of citizen's rights) presently borne by various stakeholders related to the absence of harmonised provisions of PIL;
- Quantification of economic costs for various stakeholders;
- Wider economic effects of the gaps on the functioning of the internal market;
- Costs related to the complexity of the current framework for PIL including existing duplications and overlaps;
- The impact of the adoption of one single instrument on PIL in the form of a European code on the reduction of costs.

1.2 Key concepts and definitions

1.2.1 Private International Law

Private International Law aims to deal with the cross-border aspects of questions related to private law.[1] Private law is "the part of law that deals with such aspects of relationships between individuals that are of no direct concern to the state. It includes the law of property and trust, family law, the law of contract, mercantile law and the law of tort".[2]

Three types of questions are distinguished in private international law:

- Jurisdiction: Which court has to deal with a case with international elements;

[1] European Parliament, Directorate General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, "A European Framework for private international law: current gaps and future perspectives", Brussels 2012, page 7. Available at http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=79510

[2] Oxford Dictionary of Law

- Applicable law: What internal private law is applied to resolve the cross-border dispute;
- Recognition and enforcement of judgments: Whether a judgment can be recognised as decisive and final in another state and whether it can compel a party to undertake an action. [3]

It is difficult to find a European definition of PIL, since the understanding of the term is intrinsically linked to the specific legal tradition of each Member State. In this sense, in Germany the term PIL ("*Internationales Privatrecht*") is understood rather narrowly and only comprises legal rules on the question of what law is applicable to a certain set of facts. In comparison, in French Law, the term "*Droit International Privé*" covers not only the question of the substantive law applicable to a certain case, but includes questions of jurisdiction, of recognition and execution of foreign judgments and other aspects of civil procedure with foreign elements. This is reflected by the legislation of PIL in France and in those Member States influenced by the French legal tradition, such as Belgium, Italy or Spain.

The European concept of PIL is not quite clear. The scope of some Regulations, (i.e. Brussels I and Brussels II bis) is restricted only to the questions of jurisdiction and recognition of judgments. Other Regulations, (i.e. Rome I, Rome II and Rome III) only deal with governing law and totally exclude procedural aspects. A new type of Regulation, such as the Succession Regulation No. 650/2012 and the Proposals for Property Regulation of international couples (2011) cover all aspects of PIL in the wide French understanding of the concept.

For the purposes of this Research Paper, Private International Law will be understood as the area of Law that deals with: *The cross-border questions relating to aspects of private relationships between individuals with regard to the applicable substantive law, the jurisdiction and the recognition of judgments.*

1.2.2 Cost of Non-Europe

The Cost of Non-Europe ('CoNE') relates to the costs incurred by EU citizens and economic operators due to the differences existing in legal regimes between the Member States.

1.2.3 'Gaps in PIL'

Private International Law has traditionally been a matter of national law.[4] Each Member State has its own rules that deal with jurisdiction, applicable law and the recognition and enforcement of judgments from abroad. However, the integration process of the European Union has naturally meant that a European approach to certain PIL issues had to be introduced. The Amsterdam Treaty introduced a wider concept of judicial

[3] A European Framework for private international law: current gaps and future perspectives. Page 15.
[4] *Ibid*

cooperation and brought the three core issues of private international law into the scope of the EU. Hence, a number of instruments have been adopted at EU level in order to deal with some of the most crucial matters related to PIL (these are described in Section 1.4 below). Furthermore, the Treaty on the Functioning of the European Union (TFEU) entrusts the European Parliament and the Council with the task of adopting measures addressed at ensuring mutual recognition and enforcement of judgments and the compatibility of national rules with regards to conflicts of laws and jurisdiction (Article 81(2) a and c). Measures related to family law with cross-border implications have to be adopted by the Council unanimously (Article 81(3)).

In spite of all these efforts, several areas directly related to the citizen's day-to-day lives are still left unregulated at European level. The inexistence of legislation dealing with certain matters of private law with cross-border implications entails severe consequences and significant costs for both the administration and EU citizens.

The existing gaps have been identified on the basis of the lack of EU regulation covering one or more of the above mentioned elements of PIL (i.e., applicable law, jurisdiction and recognition of judgments). In some cases, an area is considered as a 'gap' since there is absolutely no EU PIL legislation on the matter, whereas in other instances, a gap has been found due to the absence of coverage of either the applicable law, the jurisdiction or the recognition of judgments. This is explained for each of the gaps.

All EU instruments in force relating to jurisdiction, applicable law and the recognition and enforcement of judgments fall under the term 'framework of private international law'.

1.2.4 Codification of PIL

As outlined in the European Parliament's Study on a European Framework for Private International Law[5]*, the process of 'codification' at European level should be understood in accordance with Point 1 of the Interinstitutional Agreement of 20 December 1994 whereby a Code would be the result of a "procedure whereby the acts to be codified are repealed and replaced by a single act containing no substantive change to those acts".*[6]

In this sense, the idea of a European PIL code would differ from the concept of codification stemming from certain national legal traditions, in which a particular area of the Law is systematised though the compilation of all rules applicable to it, regardless of their sources (customary law, case law or even general principles of the law).

This Research Paper follows the definition laid down by the European Parliament's study and considers that a European PIL Code would be the result of bringing about the different (existing) instruments regulating questions of PIL at the European level as well as initially adding those instruments newly enacted to deal with the closing of gaps (e.g.

[5] European Parliament, European Parliament , "A European Framework for private international law: current gaps and future perspectives", p. 79, *Ibid,* p.10
[6] *Ibid*

the proposed Regulations on Matrimonial Property Regimes and Registered Partnerships). Codification is further discussed in Section 6 below.

1.3 Existing instruments

In order to better identify where gaps in PIL can be found, it is important to first outline the scope of the existing PIL instruments at the European level. A number of instruments currently exist at EU level which set out rules relating to jurisdiction and conflicts of laws. Moreover, instruments are also in place, or are currently being proposed, to provide for Private International Law in certain subject areas, such as matrimonial property. The existing instruments are described in turn below.

1.3.1 Instruments at EU level relating to jurisdiction

1.3.1.1 Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)[7]

The Regulation adopted on 22nd December 2001 applies to civil and commercial matters. The **main principle** of the Regulation is that jurisdiction corresponds to the courts of the Member State where the defendant is domiciled. The domicile will be determined in accordance with the law of the country where the issue is brought before a court.

The following are excluded from the scope of the Regulation:[8]

- status or legal capacity of natural persons, matrimonial property rights, wills and succession;
- insolvency proceedings;
- social security; and
- arbitration.

The Regulation does not apply to Denmark. It covers two of the three PIL elements described above (i.e., jurisdiction and recognition of judgments)

Regulation (EU) No 1215/2012[9] of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was adopted in order to recast the Brussels I Regulation. The recast regulation simplified the system put in place by Brussels I by abolishing the procedure for the declaration of enforceability of a judgment in another Member State. The Regulation also included a rule on *lis pendens* which allows Member State courts to stay the proceedings, on a discretionary basis and dismiss proceedings where a court of a third state has been seized.[10]

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[7] OJ L 12, 16.1.2001, p. 1–23
[8] Article 1.2
[9] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF
[10] Information available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/134071.pdf

1.3.1.2 Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 (Brussels II)[11]

Adopted on the 27 November 2003, this Regulation applies to civil matters related to divorce, separation or annulment and parental responsibility.[12] The Regulation lays down a complete system of provisions governing the recognition of judgments and establishing the necessary rules to identify the competent courts. The Regulation does not apply to Denmark.

Article 1(3) specifies the areas which are not covered by the Brussels II Regulation:

- Establishment or contesting of a parent-child relationship
- Adoption
- Name and forenames of the child
- Emancipation
- Maintenance obligations
- Trusts or succession
- Measures taken as a result of criminal offences committed by children

1.3.2 Instruments at EU level relating to conflicts of law

1.3.2.1 Regulation 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)[13]

The Rome I Regulation determines the applicable law to contractual obligations in civil and commercial matters. The Regulation does not apply to Denmark.

The basic principle of the Regulation is outlined in Article 3 which provides that "contracts shall be governed by the law chosen by the parties". Article 4 determines the applicable law in cases where the parties have not agreed on a particular law. Article 13 regulates the applicable law in cases of incapacity where a contract has been concluded between persons who are in the same country. Nevertheless, gaps still exists with regards to distance selling contracts and for those areas excluded from the scope of the Regulation.

Article 1(2) excludes a number of matters from its scope, which relate to:

- Legal capacity;
- Matrimonial property rights;
- Maintenance obligations;
- Questions related to companies;
- Agency (the question of whether an agent is able to bind a principal); and
- Trusts.

[11] OJ L 338, 23.12.2003, p. 1–29
[12] Article 1
[13] OJ L 177, 4.7.2008, p. 6–16

1.3.2.2 Council Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II)14

Rome II establishes the applicable law to non-contractual obligations in civil and commercial matters with a cross-border dimension. Article 1(1) excludes questions such as revenue, customs or the *acta iure imperii* (acts by right of dominion) from its scope. The Regulation is not applicable to Denmark.

Article 4 establishes the general rule for determining the law applicable to non-contractual obligations providing that "unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

Obligations arising out of the following are excluded from Rome II as provided under Article 1(2):

- Family relationship (including maintenance obligations);
- Law of companies;
- Law governing trustees; and
- Violations of privacy rights.

1.3.2.3 Council Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III)15

As explained above, any PIL measure concerning family law at European level needs to be adopted through a special legislative procedure involving a unanimous vote in the Council, as provided for in Article 81(3) TFEU. In those instances where unanimity is impossible to achieve, the possibility of enhanced cooperation is given to those Member States who want to advance further in the establishment of European PIL rules concerning family matters.

The Rome III Regulation implements enhanced cooperation among a number of Member States (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia) in the area of divorce and legal separation.

The Regulation determines the law applicable to divorce and legal separation (Article 1.1). Article 1.2 lists the areas to which the Regulation shall not be applicable, even if they arise as a preliminary question within the context of divorce or separation. These excluded areas are:

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14 OJ L 199, 31.7.2007, p. 40–49
15 OJ n. L 343, p. 10 ff.

- the legal capacity of natural persons;
- the existence, validity recognition or annulment of a marriage;
- the name of the spouses;
- the property consequences of the marriage;
- parental responsibility;
- maintenance obligations; and
- trusts or successions.

Chapter II of the Regulation (Article 5 ff.) lays down the rules to determine the applicable law in cases of divorce and separation with a cross-border dimension.

1.3.3 Instruments at EU level covering specific areas

1.3.3.1 Succession

Regulation 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[16]

The "Succession Regulation", which "shall apply to the succession of persons who die on or after 17 August 2015" (Article 83.1), was adopted in July 2012 and will not enter into force in the UK, Ireland and Denmark. The Regulation will become applicable from 17 August 2015, as provided in Article 84 of the Regulation.

It regulates the three PIL elements identified above (applicable law, jurisdiction and recognition and enforcement of judgments) with regards to succession to the estates of deceased persons (Article 1.1.) Article 1.2 lays down an extensive list of exclusions to the scope of the Regulation that can instantly help to identify gaps in the current framework:

- property rights transferred by a manner other than succession;
- trusts;
- rights in rem; and
- rights in immovable or movable property.[17]

1.3.3.2 Maintenance

Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[18]

This Regulation, governs all relevant PIL matters with regards to maintenance obligations arising from a family relationship, parentage, marriage or affinity. Therefore, this instrument covers all necessary aspects of Private International Law with

[16] OJ n. L 201, p. 107 ff.
[17] Article 1(2) of Regulation 650/2012
[18] OJ L 7, 10.1.2009, p. 1–79

regards to maintenance obligations deriving from relationships with a cross-border implication. However, and as analysed below, the instrument is not applicable to "de facto" unions. The Regulation is not applicable to Denmark.

Chapter II establishes the rules applicable to the determination of Jurisdiction, Chapter III lays down the provisions for identifying the applicable law and Chapter IV deals with the recognition, enforceability and enforcement of decisions.

1.3.3.3 Insolvency

Council Regulation 1346/2000 on Insolvency Proceedings[19]

The Insolvency Regulation, which is currently under revision and is not in force in Denmark, applies to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator" (Article 1.1.). The Regulation excludes from its scope "insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings" (Article 1(2)). This Regulation is not applicable to Denmark.

Articles 3 and 4 determine the jurisdiction and the law applicable to insolvency proceedings with cross-border elements: the law of the Member State where insolvency proceedings are opened (*lex concursus*) applies (with the exception of certain elements excluded by Articles 5 to 15 of the Regulation). Likewise, Article 4 establishes that "the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency procedures".

The Insolvency Regulation also covers recognition and enforcement of judgments. The decision on the opening of insolvency proceedings made in one Member State is automatically recognised in all other Member States according to Articles 16 and 17 of the Regulation. Other judgments related to the insolvency proceedings are recognized according to Article 25 of the Regulation. Enforcement of such decisions is governed by the Brussels I Regulation (Article 25 (1), second sentence).

1.3.3.4 The Hague Conventions on Child Abduction (1980) and on the Protection of Children (1996), and the Protocol on the Law applicable to Maintenance Obligations (2007)

These three international instruments have now been integrated in EU law. The 1980 Child Abduction Convention is focused on cases where children are wrongfully removed or retained. The 1996 Convention on the Protection of Children (ratified by all Member States) excludes a number of issues from its scope which are either regulated in other instruments or are not considered as falling within the scope of child protection (paternity, name, succession etc…).

[19] OJ L 160, 30.6.2000, p. 1–18

Finally, the 1997 Protocol "shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents" (Article 1.1). The Hague Protocol is not applicable to the UK and Denmark. Danish and UK courts therefore continue to apply their national conflict of law rules in maintenance matters.

1.3.4 Proposed Instruments at EU level covering specific areas of law

1.3.4.1 Matrimonial Property Regimes

Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[20]

This Proposal for a Regulation, currently debated in the Council, will apply, if adopted, to matrimonial property regimes (Article 1.1). The Regulation would exclude from the scope of application the following matters (Article 1.3):

- the capacity of spouses;
- maintenance obligations;
- gifts between spouses;
- the succession rights of a surviving spouse;
- companies set up between spouses; and
- the nature of rights in rem relating to a property and the disclosure of such rights.

Some of these matters are excluded since they are already regulated in a different instrument (Regulations on Maintenance Obligations, Succession). Nevertheless, some others (like the gifts between spouses, e.g.), will still remain unregulated and as such can be identified as potential gaps, as examined below.

1.3.4.2 Registered Partnerships

Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships[21]

Together with the proposal on matrimonial property rights, the Commission has adopted a proposal dealing with property rights stemming from registered partnerships. This is a sensitive legal and political issue, since the existence, scope and validity of registered partnerships differs from one Member State to another.

Article 1(1) of the proposed regulation provides that the instrument "shall apply to matters of the property consequences of registered partnerships". Article 1.2 provides that the following shall be excluded:

[20] COM (2011) 126 final
[21] COM(2011) 127/2

- the personal effects of registered partnerships;
- the capacity of partners;
- maintenance obligations;
- gifts between partners;
- the succession rights of a surviving partner;
- companies set up between registered partners; and
- the nature of rights in rem relating to a property and the disclosure of such rights.

As with the Proposal on Matrimonial Property Rights, some of the issues are excluded given the fact that they are already covered by other legislative instruments (Regulations on Maintenance Obligations, Succession). Those areas which are not will as well remain as unregulated and hence, can be considered potential gaps in the European framework of Private International Law.

1.3.4.3 Proposal for a Regulation amending Council Regulation (EC) No 1346/2000 on insolvency proceedings[22]

In 2012, the Commission submitted a Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings. The Commission identified a number of shortcomings which required an amendment to the Insolvency Regulation. They related to (i) the scope of the Regulation which does not cover national pre-insolvency procedures; (ii) difficulties in determining jurisdiction for the opening of insolvency proceedings in cross-border cases; (iii) problems relating to secondary proceedings which can hamper the efficient administration of the debtor's estate; (iv) problems relating to rules on the publicity of insolvency proceedings and the lodging of claims; and (v) insufficient rules relating to the insolvency of groups of companies.

1.3.5 Instruments at International Level

1.3.5.1 The Hague Convention on the International Protection of Adults of 13 January 2000

This Convention, to which several Member States (Germany, France, Czech Republic, Estonia, Finland and Scotland) are Contracting States, regulates the respective PIL problems (jurisdiction, applicable law and recognition of judgments) with regards to the consequences of mental diseases on the capacity of natural persons and on the legal representation of persons who for reasons of mental diseases have entirely or partially lost their legal capacity. However, as an International instrument, the Convention only obliges those Member States who have accessed to it and will therefore leave a considerable number of gaps for those Member States which are not part to it.

[22] http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf

1.4 Method of approach

This Section provides an overview of the methodology used for the Research Paper.

The Research Paper centered around three main tasks, discussed in turn in the subsections below.

1.4.1 Task 1 Identification of gaps to be investigated

The identification of gaps to be investigated under Task 1 determined the scope of the Research Paper. Emphasis was placed on areas not covered by the existing Regulations already adopted at EU level in relation to PIL. An initial list of 'key gaps' was drafted. This list took account of the gaps identified by the Team when examining the European Parliament's 2012 Study on a European framework for private international law. In order to ensure that the Report examined gaps which affect day to day problems for EU citizens and businesses, a number of gaps identified by the 2012 Study were excluded following a first screening. These related to:

- State liability including nuclear damage – This was excluded since the report should focus, as far as possible, on everyday life problems which affect citizens rather than those gaps which create problems on rare occasions;
- Intellectual property law – This was excluded since work is currently being undertaken to establish measures for the creation of European Intellectual Property Rights. Article 118 TFEU provides a legal basis for creating European Intellectual Property rights in order to provide uniform protection of intellectual property rights throughout the EU to ensure the proper functioning of the internal market.[23] In 2011, the European Commission adopted a strategy on Intellectual Property Rights in order to boost creativity and innovation, with a Communication published on a "Single Market for Intellectual Property Rights" which outlined the work which could be undertaken by the Commission to create European Intellectual Property Rights including the creation of a European Copyright Code and a "unitary" copyright title[24];
- Administrative law, social security and tax law – Though administrative, social security and tax law can be impacted by the absence of PIL, these individual aspects are part of Public Law which is traditionally considered to be sovereign in many Member States.

[23] Article 118 TFEU provides "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.
The Council acting in accordance with a special legislative procedure, shall be means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament".

[24] COM(2011) 287 final

Following an initial screening of gaps existing, a consolidated list was drawn up by the Team, with the gaps classified into the following main headings covering the main areas of law falling under PIL:

- Law protecting individual rights;
- Family Law;
- Law of Succession;
- Property Law;
- Law relating to obligations;
- Law relating to incorporated and unincorporated bodies.

When drawing up the list, legislation outlined in Section 1.3 was taken into account. This was particularly the case in relation to the Commission's proposals for Regulations on matrimonial property, registered partnerships and insolvency since these instruments will have a significant impacts on gaps currently existing in PIL in these areas.

An Expert Panel meeting was held on 26 February 2013 where the list of gaps presented in the Interim Report was discussed with the external experts.

Following the Expert Panel meeting, a number of gaps which had initially been identified in the interim stages of the assignment were discarded. The gaps discarded and the reasons for doing so are outlined in Table 1 below.

Table 1 - Reasons for discarding Gaps identified at Interim stage

Subject Area	Gaps	Reasons for discarding
Family Law	Engagement and pre-nuptial relationships	The experts consulted considered that the number of cases relating to engagement and pre-nuptial relationships are extremely low. Moreover, when considering cross-border cases, these would be too few to cause a real problem. It is also envisaged that prenuptial contracts will be covered by the Proposal on Matrimonial Property Rights with Article 20 providing for the Law applicable to the form of marriage contract.[25]
Family Law	Existence/ validation and recognition of marriage	It was agreed with the Expert Panel that focus would only be placed on differences existing in relation to the regulation of same-sex marriages and registered partnerships in the Member States.

[25] Article 20 of the Proposal on matrimonial property provides for the law applicable to the form of marriage contract: (1) The form of marriage contract shall be that prescribed by the law applicable to the matrimonial property regime or by the law of the State where the contract is drawn up; (2) notwithstanding paragraph 1, the marriage contract must at least be set out in a document dated and signed by both spouses; (3) If the law of the Member State in which the spouses have their common habitual residence at the time the marriage contract is concluded provides for additional formal requirements for that contract, these requirements must be complied with.

Subject Area	Gaps	Reasons for discarding
Family Law	Inter-spousal relations	The consulted experts highlighted that though inter-spousal relations do not fall under the proposal relating to matrimonial property *per se*, it is expected that should a question arise in this regard, the Court of Justice would rule that inter-spousal relations are included.
Family Law	Rights and obligations from parenthood	In addition to the provisions in the Maintenance Regulation, the issues relating to rights and obligations from parenthood are already covered by the Convention of the Protection of Children 1996 (so-called Hague Convention) which all Member States have ratified. Article 4 of the Hague Convention outlines the rights which are not covered and does not refer to these exemptions to rights and obligations stemming from parenthood.
Family Law	Visiting rights for persons who are not part of the legal parent-child relationship	It was agreed that this gap would be excluded from the scope of the report since it was questioned whether this was not already covered by existing legislation. Moreover, the numbers of cases relating to this issue are currently small, with the numbers of cross-border cases being very small.
Family Law	Maintenance obligations	Maintenance obligations were initially included in the list of gaps in order for the Expert Panel to check whether any aspects were not covered by Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. It was concluded that all aspects of maintenance are covered by the Regulation and no gap therefore exists.
Property Law	Pension rights	There is currently no conflict existing on the applicable law relating to pensions, with problems arising concerning jurisdiction. Following discussions at the Expert meeting, it was outlined that there are only a few Member States (e.g. UK, Denmark) where pension funds can be divided equally among spouses (and children).[26] However, these Member States seem to have found solutions to the problems which arise. For other Member States, pensions are usually a pure matter of Social Security. Pensions are also highly regulated since they offer tax advantages.

[26] The most detailed regime on splitting of future pension rights between spouses in case of divorce in all Member States is provided for in Germany where a specific and comprehensive Statute on the subject exists ("Versorgungsausgleichsgesetz" of 2009). According to German understanding this Statute deals with private law, not with social security law.

Subject Area	Gaps	Reasons for discarding
		Case law of the CJEU has also considered pension rights to be a matter relating to maintenance. Problems arising with private pensions would subsequently be addressed by the Maintenance Regulation. Due to the strong link between pensions and social security, it was concluded that these do not fall under the scope of the Research Paper.
Property Law	Property rights arising out of marriage and partnership	Property rights arising out of marriage and partnership were excluded from the scope of the assignment since the proposed Regulations on matrimonial property and registered partnerships sufficiently cover the gaps existing in these areas. However, it was agreed that the gap relating to property rights arising out of de facto unions would be discussed in its place.
Property Law	Estates	Experts indicated that the gaps relating to estates are sufficiently covered by the Succession Regulations.
Law relating to Obligations	Collective agreements	Collective agreements were excluded from the scope of the Research Paper as expert opinion outlined that from a Constitutional point of view, parties should have the freedom to negotiate such agreements, with Member States not entitled to interfere. A satisfactory legal basis could therefore not be found.

Though some gaps were discarded, it was agreed that de facto unions should be included within the scope of the assignment, in addition to registered partnerships and same-sex marriages. Though de facto unions were discussed in the Commission's Impact Assessment relating to registered partnerships they were not subsequently included within the scope of the proposed legislative instrument as the Commission considered that EU action on de facto unions was "premature".[27] Gaps therefore still exist in relation to de facto unions since Member States treat these relationships in different ways. The Team considers it important to include the gaps relating to de facto unions in the report due to their high impact on citizens in the EU, with many couples being part of a de facto union and not choosing to formalise their relationship.

Following discussions on the list of gaps presented in the Interim Report, a revised classified list was created for the purposes of completing Tasks 2 and 3.

[27] The Commission stated in its Impact Assessment that "citizens who live together without being married or in a registered partnership may have made an active choice not to have their property relations governed by substantive law in most countries – if those citizens wish to have their property relationships governed by substantive law, they could choose to get married or register a partnership". The Impact Assessment also highlighted that "the vast majority of experts consider that an EU instrument will not provide appropriate answers to the problems faced by de facto unions" and "considered that EU level action on de facto unions is premature and cannot be justified at present".

1.4.1.1 Legal Basis for EU Action

The legal basis relating to the gaps was examined in depth when finalising the list of gaps.

Firstly, the provisions of the TFEU relating to free movement were examined. In order to simplify citizens' daily lives, rules have been adopted by the EU in order to take advantage of the right of free movement. Article 20(2) TFEU provides that "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States". Article 21(1) TFEU provides that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". Article 21(2) provides that "if action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1".

In addition to Article 21, Articles of the Treaty provide a legal basis for EU action in relation to civil justice.

Article 67(1) of the TFEU provides that "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States". Moreover paragraph 4 of the same article provides that "the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters".

Article 81 TFEU provides a specific legal basis for judicial cooperation in civil matters. Article 81(1) provides that "the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of laws and regulations of the Member States. For the purposes of this Research Paper, the provisions of Article 81(2)(a),(c) and (e) are particularly examined in relating to EU private international law. Article 81(2) provides that "for the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures particularly when necessary for the proper functioning of the internal market, aiming at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; […] (c) the compatibility of rules applicable in the Member States concerning conflict of laws and jurisdiction; […] (e) effective access to justice".

The proper functioning of the internal market is mentioned in Article 81(2) but no longer seems to be a strict requirement for the purpose of private international law measures. This therefore can be considered as extending the legal basis for EU competence in this area.

Though there is a legal basis for EU action in civil law, Article 81(3) substantially reduces the competence for the EU to act in relation to family law since measures in this area must be adopted by the Council through unanimity. This therefore reduces the ability of the EU to regulate without the acceptance of all Member States. This is further discussed in Section 3 below.

With regard to property law, Article 345 TFEU provides that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". This article substantially reduces the legal basis for the EU to regulate in this area since the law relating to property ownership in the Member States cannot be jeopardised.

The revised list is included in Table 2 below.

Table 2 - Proposed Classification of gaps currently existing

Subject Area	Main gaps identified
Law protecting individual rights	• Status and (passive and active) legal capacity of *natural persons* • Representation issues - Incapacity; and - Powers of Attorney • Names - Names of Adults; - Names and forenames of children
Family Law	• Marriage/partnership related matters - "De facto" unions - Existence, validity and recognition of same-sex marriage - Existence, validity and recognition of registered partnerships; • Parent-child relationships - Establishment or contesting of a parent child relationship; • Adoption - Recognition of adoption decisions • Maintenance - Maintenance obligations arising out of "de facto" unions
Property Law	• Declarations such as gifts and trusts • Property rights over movables/immovables (including recording of rights); • Security rights; • Nature of rights in rem
Law relating to Obligations	***Contractual*** • Agency; ***Non-contractual*** • Violation of privacy and rights relating to personality including defamation

Subject Area	Main gaps identified
Law relating to incorporated and unincorporated bodies	***Incorporated bodies*** • Foundation of commercial companies and organisations including implied companies; • Transfer of company seat; • Personal liability of company officers; • Internal organisation; ***Unincorporated bodies*** • Foundation of non-commercial organisations and not for profit organisations.

1.4.2 Task 2: The dimensioning of the broad scope of Costs of Non-Europe in the areas of gaps and deficiencies/weaknesses of existing PIL

Task 2 related to dimensioning the broad scope of Costs of Non-Europe in the areas of gaps identified through Task 1. In order to dimension these costs, a broad typology of costs was determined. This included costs relating to legal uncertainty, legal costs (e.g. cost of litigation), costs of non-recognition, cost of delays. Moreover, the emotional costs incurred by the citizen were dimensioned.

When dimensioning the inconvenience incurred by citizens due the gaps existing, the Team was mindful of the relevant provisions of the European Convention on Human Rights, namely Article 8 (on the right to respect for private and family life) and Article 12 (on the right to marry). Article 8 of the Convention provides that "everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Article 12 provides that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". Moreover, the provisions of the TFEU, mainly relating to the four freedoms of the EU were considered when assessing the problems caused by the existing gaps.

1.4.2.1 Approach to quantification of the CoNE

The first step in quantification of CoNE involved the identification of those stakeholders affected (individuals, household and businesses) and the impacts of relevance (economic and social) to each legal gap in PIL. The following categories of impacts were the most prevalent when considering the practical implications of legal gaps:

- Costs to the operation and conduct of business: This relates to situations where the gaps in PIL incur costs for business or which may constraint business activities (i.e. production, investment and employment). For example, debt owed to businesses which are unrecoverable or where contracts unintentionally

entered are not honoured cross-border generate losses in revenue for businesses;

- Administrative costs incurred by stakeholders in attempting to trade, applying to have their civil status recognised or requesting permission/ eligibility to entitlements cross border. The EU's Standard Cost Model (SCM) has been used in such cases where data is available to quantify these CONE;
- Legal costs incurred by stakeholders in advising of legal procedures or resolving uncertainty created by gaps in PIL are significant in many cases. Costs can relate to validation of a cross-border contract, recognition of civil status/documents in a Member State other than where it was issued, representation in case of a legal dispute arising cross-border or advising due to the complexity of ownership/guardianship in relation to trusts, gifts, estates and other assets. Again, the SCM can be applied in such cases where data is available. In others, unit costs estimates may be available in the literature and can be scaled up by the number of cases of relevance.
- Social (emotional) costs incurred by individuals and households for the inconvenience, loss of well- being and stress potentially caused by not having their civil status recognised, the discomfort of having to proceed through an often long and personal legal process (i.e. in relation to adoptions, marriage and divorce, or in the division of a deceased relative's estate). For simplicity, the emotional costs have been assumed twice those of any legal costs incurred by the relevant gap in PIL.
- Wider economic costs of gaps in PIL, driven primarily by the uncertainty and inconvenience described above due to business, legal and administrative costs which create a barrier to the movement of people, goods and services in the internal market. As a consequence, businesses and individuals are less likely to participate in the internal market and therefore are unable to realise the benefits it could potentially generate.

The EU's Standard Cost Model (SCM) applied where feasible, involved using data on the average earnings of persons providing legal support or undertaking administrative tasks as full-time equivalent earnings (FTE) and assuming a 35 hour working week, the time taken to complete PIL related tasks. Further assumptions are presented by each defined gap. In other cases, the literature provided unit costs on the average legal costs of resolving legal disputes or completing cross-border transactions. These costs were then scaled up based on the number of cases estimated to occur per annum or equally the number of individual affected per annum gathered from Eurostat statistics and the published literature. Where evidence could only be found for a handful of Member States, scaling to EU level was undertaking based on GDP (economic impacts) and population (family law related issues). This approach applied also to assessment of the business related costs. In each case, the source of the unit cost used is referenced in the accompanying text.

Finally, the wider economic costs have been based on the Commission's own estimates of the benefits of the single market achieved by 2008 in billion Euros. Assuming similar

rates of benefits can be generated from the internal market (2012-2020), it has been possible to estimate the monetary value of this potential. On the basis that PIL may have a marginal 1% impact on the achievement of this benefit, a conservative estimate of the wider CoNE is provided in the analysis. The wider costs of each gap are assumed additive, and as such the quantification of these is impacts do not double-count the costs.

Simple Microsoft Excel spreadsheets were used for each defined PIL gap. When scaling on the basis of unit costs obtained from Member States outside the Eurozone, appropriate exchange rates (i.e. £1=€1.2) have been applied and figures inflated to 2010 values where appropriate. Leading sources of published data referenced in the study includes:

- Cross border trade by EU households - EC(2009): Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Cross-Border Business to Consumer e-Commerce in the EU[28]
- Benefits of the internal market - EC (2012): COM(2012) 573 final - Single Market Act II: Together for new growth[29]
- Cross border population and births - Eurostat (2010: Number of citizens born in (other) EU Member States to the one they reside in[30]
- EU population statistics - Eurostat database 2012 figures[31]
- Property rights of international couple and costs – EC (2011): Clearer property rights for Europe's 16 million international couples[32]
- Charitable giving of individuals per annum - CAF (2006): CAF briefing paper - International comparisons of charitable giving, November 2006[33]

1.4.3 Task 3: The dimensioning of the scale of costs of non-Europe that could be "saved" through a Code addressing the gaps

Finally, Task 3 aimed to dimension the scale of costs of non Europe that could be "saved" through a code addressing the gaps. In order to dimension these costs, the Team took account of the reduction in costs that were anticipated through the existing PIL Regulations where these were estimated. Moreover, an intervention logic of the prospective Code applying to each area/gaps was rehearsed with the Experts in order

[28] Available at http://ec.europa.eu/consumers/strategy/docs/COM_2009_0557_4_en.pdf
[29] Available at: http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf ; and
http://ec.europa.eu/internal_market/top_layer/historical_overview/docs/workingdoc_en.pdf
[30] See http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF
[31] Available at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo_gind&lang=en
[32] Frequently asked questions, MEMO/11/175, 16/03/2011 available at:
http://europa.eu/rapid/press-release_MEMO-11-175_en.htm and
http://ec.europa.eu/danmark/documents/alle_emner/juridiske/110316_kom-125_en.pdf
[33] Available at:
http://www.cafonline.org/pdf/International%20Comparisons%20of%20Charitable%20Giving.pdf

to help identify how much of the direct costs could be realistically reduced. Consideration was also given on how the problem might evolve without the intervention of the Code.

The information provided in the following Sections is a combined result of the main tasks undertaken for the Research Paper.

1.5 Report structure

The remainder of the report has the following structure:

- Section 2: Law Protecting Individual Rights;
- Section 3: Family Law;
- Section 4: Property Law;
- Section 5: Law relating to Obligations;
- Section 6: Law relating to incorporated and unincorporated bodies;
- Section 7: The potential of PIL and codification to further reduce the costs of variations in legal regimes across the EU;
- Section 8: Concluding Remarks.

2. Law protecting individual rights

The gaps identified in relation to law protecting individual rights are the following:

- Status and (passive and active) legal capacity of natural persons;
- Representative issues (incapacity and powers of attorney); and
- Names and forenames.

These are discussed in turn below.

2.1 Status and (passive and active) legal capacity of natural persons

2.1.1 Existing PIL legislation and measures

The problems which derive from the conclusion of contracts with persons who may not have yet reached legal capacity are covered by Article 13 of the Rome Regulation which provides that 'in a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence'.

2.1.2 Problems due to variations in legal regimes between Member States

Article 13 of the Rome Regulation only refers to cases regarding legal capacity where the contract is concluded in the territory of the same Member State. This does not cover cross-border trade cases such as e-commerce trade or contracts concluded via telephone. This can therefore cause problems due to the variations existing in legal capacity within the EU Member States.

Legal capacity of natural persons is usually assigned through age with individuals (e.g. parents) being able to have capacity for another person (e.g. child) until they reach the minimum age.

Capacity of minors

The age to reach full legal capacity for minors is 18 in all Member States. Full details are provided in Annex. However, in a number of Member States, a minor has restricted active legal capacity until adulthood. This age differs between Member States: a child has no active legal capacity until the age of 7 (Germany, Austria), 10 (Greece) and 15 (Slovenia) respectively.

The active legal capacity of a minor can be extended if the minor enters into marriage. In some Member States (e.g. Slovenia), this extension is done by virtue of law, whereas in others (France), the minor requires the consent of their legal representative.

Ages for being eligible to have capacity extended also differ: 15 years in Slovenia and 16 years in France. A minor with extended active legal capacity may independently enter into transactions in the same way as an adult, though he/she does not have the right to be a merchant. Cross-border issues may be raised in cases where a person who has not fully reached their capacity enters into a contract in a different Member State, provided that this contract is made by remote means (i.e., that is not concluded in the territory of only one Member State).

Box 1 provides an example of problems which could exist.

Box 1 - Example relating to differences in extended legal capacity

Case Example

Martina, a 15 year old Slovenian student, enters into a contract via the internet with a French telephone company. Martina wishes to use her French phone contract to call her boyfriend Pierre in Paris due to cheaper rates. However, the phone company receives notification of Martina's age and declares the contract void since under French law Martina does not have extended legal capacity to enter into a contract.

Since PIL rules do not only deal with EU citizens but also with third-country nationals, the situation of those citizens who reach full capacity later than in the EU (for example a South African citizen who reaches capacity at 21 years-old) can also create cross-border problems when third-country nationals wish to reside in the EU. In Member States such as Austria, Germany, Spain, France, Portugal and the Netherlands, legal capacity is attached to nationality. In other Member States such as Denmark, Finland, Estonia, Latvia and Lithuania, capacity is assigned with residence. In the United Kingdom and Ireland, capacity of natural persons is governed by the *lex causae*, i.e. by the law applicable to the transaction performed by the minor. Although questions of capacity are excluded from the scope of application of the Rome I Regulation, English courts apply the *lex contractus* also to the capacity to conclude a valid contract as a rule of English national PIL.

Box 2 below provides an example of problems which can exist in relation to legal capacity.

Box 2 - Example relating to legal capacity of third-country national

Case Example

Oscar, a 20 year old South African national, is resident in Lisbon, Portugal. Portugal's legislation provides that legal capacity is attached to nationality and therefore does not consider Oscar to be capacitated until he reaches 21 years old.

However, Oscar then moves to Finland which assigns legal capacity with the place of residence. Since the age for legal capacity is 18 years old in Finland, Oscar has legal capacity and can enter freely into contracts.

2.1.3 Estimated unit costs of problems and hence total CoNE

As outlined in Section 2.1.2 above, the variation in legal capacity between the Member States causes problems in cross-border transactions and can constrain the development of cross-border trade. In effect, traders risk entering contracts with minors that can't be, or will not be, honoured. Whilst traders may be able to adopt "work-around" strategies (e.g. by ensuring that purchases are only made by those above a certain age), the effect of the differences in legal status is to increase the risk/cost of cross-border trade. In relation to costs to business of unrecovered consumer debt, it is calculated that the total consumer debt being recovered businesses through debt collection is €325 billion.[34] Taking into account the number of persons without status in the EU, it is reasonable to assume that 1% of all consumer debt is attributable to persons without status, thus amounting to €3.25 billion. Based on ecommerce consumer data, it is assumed that 8% of this debt (€260 million) is incurred cross-border. If a dispute only arises in 10% of cases (in others the debt is collected or resolved amicably by both consumer and business) then the costs would be in the order of €2.6 million per annum.

With regard to the legal costs incurred due to uncertainty arising, it is estimated that this will amount to approximately €1.1 million. This is based on an estimated 10,000 contracts affected between consumers and businesses per annum due to uncertainty of legal capacity (based on costs of €2.6 million divisible by an average contract value of €250). It is reasonable to assume that the average legal fees per case are €1,050, if the average hourly rate for lawyers is €150 for 1 working day (7 hours) using the EU's Standard Cost Model.

Additionally, it can be assumed that the uncertainty and costs to businesses created and can deter businesses and consumer from engaging in the internal market. It is estimated by the European Commission[35] that between 1992 and 2008, the single market increased EU GDP by 2.13% or €194.7 billion. Assuming that an additional 0.5% of GDP can be generated by the single market between 2008 and 2020 (i.e. €46 billion) of which 10% is hindered from being realised due to legal barriers, of which legal incapacity contributes 1%, €46 million in extra EU trade is potentially lost, equivalent to €3.8 million per annum. The overall total CoNE (costs to business, legal costs and costs of barriers to the internal market) is thus €7.5 million per annum.

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[34] This figure is scaled up from the UK figure to an EU total using GDP figures obtained from Eurostat. The original figure of £60 billion (€80 billion) relates to consumer debt collected by debt collection agencies (See: http://www.csa-uk.com/csa-news/72/data-gathering-initiative-q2-2012-results-announced) in the UK per annum.

[35] EC (2012): COM(2012) 573 final - Single Market Act II: Together for new growth, available at: http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf

There is little likelihood of the differences in the Member States being reduced and the scope for PIL to reduce these costs is limited.

Table 3 - Estimated costs relating to divergences in legal capacity rules per annum

Costs to business of unrecovered consumer debt due to uncertainty of legal capacity	
Total consumer debt being recovered by businesses through debt collection[36]	€325billion
Percentage of debt attributable to persons without status	1%
Percentage of debt incurred cross-border[37]	8%
Proportion of debt where dispute occurs between consumer and business	10%
Sub-total	€2.6 million
Legal costs from uncertainty	
Corresponding number of contracts affected between consumers and businesses[38]	10,000
Average legal fees per case due to uncertainty[39]	€1050
Sub-total	€1.1 million
Barrier to the internal market	
Increase in EU GDP from Single Market 1992-2008[40]	2.13%
Value increase in GDP[41]	€194.7 billion
Potential increase in GDP 2008-2020 [42]	€46 billion
Percentage of additional GDP hinder by legal barriers	10%
Contribution of legal incapacity status to this barrier	1%
Sub-total	*€3.8 million per annum (€45.7 million total)*
CoNE (per annum)	**€7.5 million**

[36] Scaled up to EU total by GDP from UK figure of £60bn (€70bn) of consumer debt collected by debt collection agencies

[37] Assume 8% of sales cross-border based on latest ecommerce consumer data, found in EC(2009): Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Cross-Border Business to Consumer e-Commerce in the EU, available at http://ec.europa.eu/consumers/strategy/docs/COM_2009_0557_4_en.pdf

[38] Based on average debt of €250

[39] Average legal fee of €150 per hour, assumes 7 hours (1 working day) extra spent on case due to uncertainty of legal capacity

[40] EC (2012): COM(2012) 573 final - Single Market Act II: Together for new growth, available at: http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf

[41] Scaled up from an increase in GDP of €164.5 bn or 1.8% of GDP from 1992-2002, see: http://ec.europa.eu/internal_market/top_layer/historical_overview/docs/workingdoc_en.pdf

[42] Assume an additional 0.5% increase in GDP (2.63% from 1992) can be achieved between 2008 and 2020

2.2 Representation issues (incapacity and powers of attorney)

2.2.1 Existing PIL legislation and measures

The Hague Convention on the International Protection of Adults 2000[43] deals with PIL problems relating to jurisdiction, applicable law and recognition of judgments for natural persons deemed to not have capacity as a consequence of mental disease. The Convention was created in order to address the needs of mobile populations, responding to demographic shifts in many countries, including Member States of the EU. The Convention provides for rules which determine which country is competent to take necessary measures relating to protection. [44] Article 5 of the Convention attributes jurisdiction primarily to the authorities where the adult is habitually resident. Some Member States (Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland and the United Kingdom) are signatories to the Convention.

2.2.2 Problems due to variations in legal regimes between Member States

In this context, incapacity refers to those persons who have been declared to have incapacity *a posteriori*. This is in contrast to children who have still not reached full legal age, as outlined in Section 2.1 above. In most cases, incapacity is linked to injury or mental illness, with an individual declared as not having capacity themselves to make rational decisions or to engage in actions, such as contractual arrangements.

Definitions and concepts of incapacity

While there is full harmonisation across the Member States on the consequences of being considered an adult with full capacity, there is no harmonisation in the concepts of lack of capacity (i.e. when a person is declared to be incapable). The lack of harmonisation in this area is a constraint on the operation of the Internal Market in the EU. The definition of incapacity can vary in Member States, with the consequences of being declared legally incapable also differing. These differences can have an impact on cross-border situations where a person is considered as not having capacity in one Member State, but having capacity in another. This can have an impact on contracts entered into by these individuals, as well as on the recognition of those representing the individual.

With regard to the different definitions and procedures for determining incapacity in the Member States, Germany and Spain make provisions for legal custodianship in their Civil Codes. A custodian is appointed in respect of a person who has reached the age of majority but is unable, partly or fully, to manage their affairs due to their mental illness or physical handicap. In Slovenia, distinctions are made between those persons who are

[43] Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=71

[44] Further information on the Hague Convention is available in the European Parliament's Note on the Hague Convention of 13 January 2000 on the International Protection of Adults, available at http://www.europarl.europa.eu/committees/en/juri/studies.html#menuzone

considered to be fully incapacitated and those who are partly incapacitated. If a person is fully incapacitated, the custodian performs its duty as if the person is a minor under fifteen years of age. However, if the person is partially incapacitated, the custodian is performing his duty as if the person is a minor over fifteen years old. The differences in treatment of the person can cause differences in relation to whether they have some type of legal capacity to act.

With regard to the reasons for incapacity, differences can also exist as to what can cause incapacity. In Denmark, a court may declare without active legal capacity a person who cannot manage and direct their affairs due to mental disability or mental illness, as well as a person who cannot manage and direct their affairs by reason of alcohol abuse.[45] In Slovenia a person is fully or partially incapacitated if they are unable to care for themselves alone due to mental illness, mental disability, alcohol or drug dependence. Problems may arise in cases where a person is considered as totally or partially incapacitated in a Member State but not in another. Furthermore, the different rules for procedures and definition of incapacity impact the recognition of those representing the individual (custodians).

With regard to mental disorder, differences also exist as to the classification of individuals. In some Member States, such as Estonia, mentally ill persons are regarded, due to their conditions, as having restricted legal capacity, while in Germany, they are considered to not have legal capacity. Moreover, in other Member States such as France and United Kingdom, incapacity by mental disorder needs to be declared as such by the court.

Box 3 below provides some examples of problems which can arise.

Box 3 - Examples of problems relating to incapacity

Case Example

Helena, an Estonian national, resident in Germany, suffers from a mental disorder. Due to her illness, she is declared to have restricted legal capacity. Though Helena is not able to deal with the majority of her affairs herself, she still has some capacity to contract. Helena enters into an e contract with a German supplier. In Germany, a mentally ill person is regarded as having no legal capacity. Helena's contract is therefore considered to be void.

Powers of Attorney

In addition to the absence of harmonised definitions and procedures relating to incapacity, there is also a lack of harmonisation relating to PIL rules on the existence, validity, extent and extinction of powers of attorney granted by an adult to be exercised when such adult is not in a position to protect his or her interests. As outlined in the

[45] http://www.juridicainternational.eu/?id=12621

note for the European Parliament on the Hague Convention, "issues concerning […] the management or sale of goods belonging to persons suffering from impairment in their personal faculties are arising with ever greater frequency".[46] The differences existing in the Member States may result in contractual obligations entered into by such an adult or by his legal representative being valid in one Member State and invalid in another. Though some Member States have ratified the 2000 Hague Convention, the differences existing in the Member States, particularly those not having ratified the Convention, can cause problems relating to the representation of incapacitated persons. Box 4 below provides examples of problems relating to representation of incapacitated persons.

Box 4 - Examples of problems relating to representation of incapacitated persons

Case Example

- Julian, an elderly man in Malta, has been diagnosed with Alzheimer's disease and has designated, in accordance with national law, his eldest daughter, Anna, to be his representative should he one day not be able to handle his own affairs. As his disease worsens, he becomes unable to independently care for himself or manage his own property. Nicolas, Julian's son, resides in Spain. Upon visiting his father, Nicolas decides to bring Julian to Madrid with him without informing Anna of his location. No legislation is in force between the Member States concerning the protection of adults regarding cooperation mechanisms and the exchange of information. Anna is therefore not able to have her powers of representation enforced and recognised in Spain.[47] This creates problems for Anna who wishes to ensure that Julian's needs are being respected.

- Greg, a Welshman, has been living in Lithuania following his retirement 15 years ago. He has assets, including property, in both countries. Greg suffers from dementia and is not able to manage his affairs. In order to raise funds to financially support Greg's living costs, his house in Vilnius needs to be sold. His son, Jasper, lives in Cardiff. Jasper was granted powers of attorney for Greg in the case that he was no longer able to look after himself due to an incapacitated illness. Since no common legislation is in force between these countries, the powers of attorney are not recognised in Lithuania, with Jasper not being able to act on Greg's behalf in selling his house in Vilnius.

[46]Note on the Hague Convention of 13 January 2000 on the International Protection of Adults, page 5.
[47] Case example influenced by European Parliament Note on the Hague Convention of 13 January 2000 on the International Protection of Adults.

2.2.3 Estimated unit costs of problems and hence total CoNE

It is estimated that approximately 1.3% (approximately 5.6 million) of adults in the EU population are incapacitated, with 0.16% of minors under 15[48] (thus approximately 125,000), also being incapacitated.[49]

The basis for determining incapacity and it implications varies between Member States. The differences may cause problems in current cross-border transactions and constrain the development of cross-border trade (traders may not realise they are entering contracts with those who have been deemed not to have capacity). In effect, traders risk entering contracts with those with no capacity that can't be or will not be honoured. The main CoNE are:

- Legal uncertainty and thus legal fees arising due to cross-border transactions; and
- Emotional costs.

Table 5 takes EU population data and estimates the number of incapacitated adults and children present in each population based on figures obtained on the respective number of persons incapacitated in France, in the absence of better data. With 13% of EU marriages international according to Eurostat, this seems an appropriate proxy for the proportion of incapacitated persons residing in a Member State other than their own, o.5% of who are anticipated to experience legal difficulties per annum. These assumptions generate estimates of 3,650 and 80 legal cases occurring per year in the EU, respectively for adults and children. This seems reasonable, given that in an aging population, we would anticipate numbers of incapacitated adults to be high and rising, requiring some form of legal guardianship.

The legal costs of resolving such cases occurring cross border where a lack of legal recognition exists or representation is contested is are estimated to require 10 hour of legal time at an average rate of €150 per hour. This rate is used throughout the Research Paper and was validated by practitioners of law as reasonable for our purposes. As a simplifying assumption, emotional costs suffered by individuals are twice those of the legal costs consistent with approaches used in the consumer policy field to measure consumer detriment. More accurate values can be found in the human health protection and academic literature varying by the valuation technique used (i.e. in relation to revealed preference and contingent valuation methods).

It is estimated that the average legal cost per case to resolve cross-border issues relating to legal capacity is €1,500, with the total legal costs relating to this gap estimated to be €5.5 million per annum for adults and €120,000 per annum for minors under 15.

[48] Minors under 15 years were chosen based on Eurostat demographics. Moreover, in many Member States minors over 15 years have some extended capacity and can be treated as adults.
[49] This estimate is based on French data which indicated that approximately 700,000 adults of 53 million in total are incapacitated, and 19.202 minors (of a total of 12 million).

For the purposes of this Research Paper, simplification is appropriate in gauging the magnitude of emotional impacts. It is estimated that these would be valued at twice the legal costs, thus totalling approximately €11 million for adults and €240,000 for minors under 15 years.

The total CoNE is therefore estimated to be €16.8 million per annum.

There appears to be scope for reducing differences in processes and legal implications of determining incapacity. In the meantime PIL in this area could reduce what is likely to be a growing problem in the EU, particularly due to the aging population.

Table 4 - Estimated costs of gap relating to incapacity per annum

Legal costs of resolving difficulties of representation		
	Adults	**Under 15 year olds**
EU population[50]	422.8 million	78.3 million
Percentage of the population incapacitated [51]	1.33%	0.16%
Percentage travelling cross-border per annum	13%	13%
Percentage suffering legal difficulties due to different rules on incapacity	0.5%	0.5%
Number of case per annum	3,651	81
Cost per case	€1,500	€1,500
Sub-total	€5.5 million	€0.12 million
Emotional costs		
Costs per case	€3,000	€3,000
Sub-total	*€11 million*	*€0.24 million*
CoNE	**€16.8 million per annum**	

2.3 Names and forenames

2.3.1 Existing PIL legislation and measures

The names and forenames of individuals, including minors, are important areas of law which have not, so far, been made object of legislative action at EU level. Names are governed by the law of the nationality or domicile of the person concerned. Similarly to the definition of citizenship, the definition and legal recognition of civil status remains

[50] Eurostat (2012) Demographic statistics of the EU
[51] Based on reported French data indicating 19,202 minors are legally incapacitated and 700,000 adults in a population of 12 million and 53 million respectively

the competence of the Member States. However, the recognition of civil status documents touches the field of Article 67 TFEU relating to cooperation in civil matters and Article 81(2)(c) relating to the compatibility of rules applicable in the Member States. The competence of the EU with regard to names and forenames has been significantly extended with the adoption of Article 81(2) TFEU since it "disconnected the measures taken by the EU from the requirement to be "necessary for the proper functioning of the internal market"".[52] However, the legal basis for significantly amending legislation in the Member States relating to names and forenames is limited since they are closely linked to family law issues, and thus pursuant to Article 81(3), competence in this area is submitted to specific requirements, among which the need for Member State approval by unanimity.

The European Court of Justice (CJEU) has highlighted, in a number of judgments, the importance of names and forenames, with jurisprudence developing guidelines on the interpretation of Article 21 TFEU which provides that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". The case law aims to avoid restrictions to the free movement of national person in the EU by national rules on names.

The decision in the *Garcia Avello*[53] judgment outlined the need to unify legislation in all civil status areas in the Member States and highlighted that all Member States should recognise civil status that a person has obtained in the territory of another Member State. In *Grunkin-Paul*,[54] the Court held that having to use a surname in the Member State of which the person is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the right to free movement. In *Sayn-Wittgenstein*,[55] the CJEU ruled that the application of national law prohibiting the acquisition, possession or use of a title of nobility, on the basis of which a Member State refuses to recognise the surname of one of its nationals, as acquired in another Member State, is justified on public policy grounds.[56]

The CJEU not only adopted minimum standards in the area of personal names but also adopted minimum standards for recognizing civil status in the EU.[57]

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[52] European Parliament study on "Life in Cross-Border situations in the EU – A comparative study on civil status", p. 37
[53] C-148/02 *Carlos Garcia Avello v Belgian State*
[54] C-353/08 *Stefan Grunkin and Dorothee Regina Paul*
[55] C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*
[56] Summary of judgment available at http://ec.europa.eu/dgs/legal_service/arrets/09c208_en.pdf
[57] Detailed information on civil status can be found in the European Parliament's study "Life in cross-border situations in the EU – A Comparative Study on Civil Status", available at http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=85590

2.3.2 Problems due to variations in legal regimes between Member States

As outlined in the European Parliament's Note on Civil Status Documents, "first name and surname are identification signs of each individual and a basic unit of data used in recording civil status". Different rules exist in the Member States for defining a child's first name and surname, changing a surname upon marriage, changing an individual's first name and surname upon request and making other changes to civil status. Member States also use different alphabetical characters to record first names and surnames.

Problems are encountered by individuals when they are prevented from exercising the right to select, define and use their first name and surname in their country of citizenship or residence. Some Member States have enacted more or less restrictive regulations governing names: In some Member States (e.g. Sweden,[58] Germany[59] or Spain[60]) the laws establish general requirements for registering children's names. In Denmark,[61] the Act on Names includes a list of allowed names. In Lithuania,[62] only traditional Lithuanian names can be given while in Latvia[63] all names have to be adapted to Latvian grammar rules (for example adding an "s" at the end of all male names). In comparison, in Slovenia[64] and the United Kingdom, individuals can be given any name.

Conflicts currently exist between the authorities of the home country of a Union citizen which is responsible for issuing personal documents and the country of his or her habitual residence where a different name has been registered and is being used by such person in daily life.

Differences in Member State legislation can also affect maiden names. For example, in **Belgium**[65] it is forbidden to change one's surname unless there is a very specific reason (with reasons restricted and listed in national law). Hence, a woman coming from a Member State where name change is allowed upon marriage cannot do so if marrying under Belgian law or marrying a Belgian national. This can therefore create problems where a person has changed their surname in one Member State but cannot enforce the change in another Member State.

An example is provided in Box 5 below.

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[58] Personal Names Act (1982:670)
[59] Civil Code
[60] Law on the Civil Register, 1957
[61] The Danish Act on Names
[62] Resolution of the Supreme Council of the Republic of Lithuania Concerning name and surname spelling in the passport of the citizen of the Republic of Lithuania, 31 January 1991
[63] Regulations on Spelling and Identification of Names and Family Names August 28, 2000 (Issued according to Part 3, Article 19 of the State Language law)
[64] Subject to some minor limitations
[65] Law of 15th May 1987 on names and surnames

Box 5 - Problems relating to names and forenames

Case Example

- Sinead, an Irish national resident in Belgium, marries her husband Brad, a US national resident in Belgium, in a religious ceremony in Dublin. Following her nuptials, Sinead returns to Belgium wishing to change her maiden name on her residence card in order to now use her husband's family name. Due to legislation in Belgium, Sinead is not able to do this and therefore needs to use her maiden name for all civil status documents;

- Astrid (Swedish) and Maximilian (German) have a child when living in Denmark. The Danish authority attributes a surname to the child according to Danish law. After three years, the family decides to move to Germany but the German authorities do not recognise the child's surname.[66]

- Luca (Italian), and Maria (Romanian) are married and reside in Germany without having a joint family name. They have a child who has triple nationality. In Germany, with the consent of both, their child is registered with the last name of the mother under German law. The father then registers the child with the Italian authorities under the father's family name.

- Mar Garcia, a Spanish national residing in Belgium, marries Geoffroy Laporte, a Belgian national. Three years later, they have a daughter called Sira who they wish to register under the name 'Sira Laporte Garcia', according to the Spanish legal tradition which gives the child the first surnames of both parents. The Belgian authorities refuse to register Sira with the two surnames since this would be contrary to Belgian rules.

Examples of additional existing problems include:

- A child who has different surnames and first names in two Member States.
- A person has changed his first name or surname in one Member State; however, he/she cannot enforce the change in another Member State.
- Citizens who have their first name and surname written in one form in their personal documents in one Member State, and in a different form in another Member State;
- Child of separated parents whose surname was chosen in one country and then follows one of the parents into another country. There are many children, particularly those with dual citizenship, who end up with one surname in the country of one of the parents and another one in the country of the other parent.[67]

[66] Example from European Parliament Note page 13 with names changed. Example close to *Grunkin-Paul*

[67] Examples from European Parliament Note page 13

2.3.3 Estimated unit costs of problems and hence total CoNE

According to other estimates by the European Commission, there are 2.2 million marriages per year in the EU of which 350,000 (16%) are transnational. There are also around 900,000 divorces per year, of which around 170,000 or 16% are international.[68] As to births, various comparisons show that the proportion of births in which at least one parent has foreign nationality or was born abroad is about twice as high as the proportion of non-nationals in these Member States. These individuals might be affected by gaps relating to names and forenames.

There are an estimated 13.8 million EU citizens resident in Member States other than their country of nationality.[69] Some have resided in other Member States and have returned. Moreover, independent of their nationality, citizens may have been born in a different Member State than the one they are residing in, may have married or have been divorced in a another Member State, may have had children born to them.

Difficulties can arise through their given names valid and used in one Member State not being deemed acceptable in the country in which there are residing. This can lead to: problems of recognition, the need to change names, restricted access to public services and costs in time and financial resources to resolve difficulties.

Most EU Member States place restrictions on the freedom of parents resident in their countries to choose the name of their child. EU citizens living in Member States other than their country of origin may face restrictions on the names they can give their children born in their country of residence. Such restriction may be problematic for the children concerned if they wish to return to their parents' country of origin.

Resolving issues by changing names or having more than one name can lead to difficulties as well as costs relating to:

- Administrative costs of checking documents or receiving civil status documents;
- Costs of changing names;
- Emotional costs.

Table 5 below provides an overview of the costs associated with this gap. Naming is known to be an issue for all citizens in Member States other than Ireland, Slovenia and UK. Taking this into account, the population of the EU potentially affected equates to around 433 million citizens. With 3.2% of EU citizens living in a Member States different to their EU nationality and that 25% have names which may pose a problem in another Member State, further assuming that 5% of these persons encounter a problem of recognition or are required to provide clarification to authorities in a Member state in which they reside, then 173,000 people suffer each year and incur subsequent administrative costs in resolving such issues. The costs of checking or receiving copies of civil status documents for those persons (EUR 7) is then applied to the number of cases per annum.

[68] Commission Press release IP/06/997 of 17 July 2006

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

For a further 1% of those persons affected, they may choose to change their name due to the difficulties they encounter per year and therefore incur an additional name changing cost of EUR 150 per person.

Finally, the emotional costs of changing a name is calculated consistent with the approach adopted in the rest of the Research Paper. It is estimated that the emotional costs associated with this gap would be twice the cost of actually changing the name in a Member State. The emotional costs are therefore estimated to be EUR 500,000.

The total CoNE is estimated to be EUR 2 million per annum.

Table 5 - Estimated costs relating to divergences in rules relating to names and forenames per annum

Administrative costs	
EU Population in Member States where naming potentially an issue[70]	433 million
Percentage of persons living in Member States other than their nationality[71]	3.2%
Percentage with names which might pose an issue in another Member State	25%
Percentage of persons having an issue or recognition/clarification per annum	5%
Administrative cost of checking documents or to receive civil status documents[72]	€7
Sub-total	*€1.2 million*
Costs of changing name	
Proportion who change name due to difficulties per annum	1%
Costs of changing name[73]	€150
Sub-total	*€0.3 million*
Emotional costs	
Cost per case[74]	€300
Sub-total	*€0.5 million*
CoNE	**EUR 2 million per annum**

[70] Eurostat (2012) Population of the EU-27 minus Ireland, Slovenia and UK where naming is not thought to be a problem for citizens

[71] Eurostat (2010: Number of citizens born in (other) EU Member States to the one they reside in, see: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF

[72] ½ hour admin cost per case, based on €14 per hour (€25,000 annual salary) of administrator. EP(2013): Life in cross-border situations in the EU (a comparative study on civil status – also notes that Italian citizens receive civil status documents free of charge, where as a fee of €11.80 is charged for each document in the Dutch system. Therefore an average of €7 seems reasonable.

[73] Based on £50 (€60) for deed poll, plus £72 (€85) for passport update renewal and €5 for other document changes.

[74] Emotional (or physiological) costs incurred by citizens due to stress, consumer detriment in trading or physical impacts are simply assumed in the analysis to be double the private costs incurred by individuals (i.e. administrative, legal, and transaction costs)

3. Family Law

When examining the gaps existing in family law, the legal basis for EU action needs to be clearly borne in mind. Though Article 81(2)(c) TFEU provides for the adoption of measures aimed at ensuring "the compatibility of rules applicable in the Member States concerning conflict of laws and of jurisdiction", a limitation is placed on measures concerning family law in Article 81(3) which requires the Council to act unanimously after consulting the European Parliament. Due to the major differences existing in Member States in this area, unanimity is difficult to achieve. Though the gaps discussed in the subsections below do cause problems for citizens in their day to day lives, the legal basis of the Treaty is restricted, with the provision of Article 81(3) therefore reducing the opportunity for Member states to fill the gaps existing in family law.

3.1 Existence/validity and recognition of 'de facto' unions

3.1.1 Existing PIL legislation and measures

De facto unions are excluded from the scope of the Brussels II Regulation as well as from the most recent Proposals on *jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships*[75] and on *jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.*[76] De facto unions (or non-marital cohabitation) are "situations in which two people live together on a stable and continuous basis without the relationship being registered with an authority".[77]

3.1.2 Problems due to variations in legal regimes between Member States

Differences arise in the Member States relating to the existence and recognition of de facto unions. Only nine Member States (Sweden, Belgium, Bulgaria, Hungary, United Kingdom (Scotland), Lithuania, Slovenia, Greece and Portugal) have specific rules for *de facto* unions. In Bulgaria, de facto unions may be treated almost equally to married couples in many aspects. In France and Italy, de facto unions are recognised in the form of a national definition ('concubinage' and 'registered cohabitation'). However, this recognition does not appear to have any legal consequences. Eleven Member States[78] do not provide specific rules concerning de facto unions although even then, there may be a legal relationship. As an example, in Germany, de facto unions in some aspects are treated similar to a family (especially with respect to social security benefits, to child support, to domestic violence and related rights to housing after domestic violence). In financial aspects they may be treated as a de facto company (Gesellschaft bürgerlichen

[75] COM (2011) 127/2
[76] COM(2011) 126
[77] Definition provided in Commission Impact Assessment on registered partnerships.
[78] These are: the Netherlands, United Kingdom - England and Wales, Finland, Germany, Luxembourg, Austria, Estonia, Ireland, Cyprus, Malta and Slovakia.

Rechts, known as 'GbR')[79] and in other aspects unjust enrichment may apply whereas in yet other aspects there may be no legal grounds for claims against each other.

Eight countries have not drawn up specific rules concerning de facto unions; however, certain aspects of the relationship are regulated through other legal provisions[80]. For example, in the Czech Republic it is possible for the partners to establish a contract concerning their property, in the Netherlands and Denmark partners have certain rights such as those relating to social security and residence, in Austria in case of dissolution of such a union the general civil law rules are usually applied, especially concerning unjust enrichment.

Finally, in Spain the legislation varies between different Spanish regions.

In the eight Member States where specific rules exist for de facto union, rules for property regimes apply, though these vary from being similar to those for matrimonial property to only applying to property acquired during the union.[81]

Due to the significant differences existing in the Member States, there is high legal uncertainty concerning property rights for individuals in these relationships when moving from one Member State to another.

Moreover, differences also exist in relation to taxes and social security benefits (though these are not covered for the purposes of the Research Paper).

3.1.3 Estimated unit costs of problems and hence total CoNE

Over the last decades, there have been changes in partnership formations, with living arrangements changing in Member States of the EU. "De facto" unions have increasingly become a stable alternative to marriage.[82] Since de facto unions are subject to different rules in the Member States, EU citizens who are part of a de facto union in a Member State other than their own with a partner from another EU Member State can face problems relating to the recognition and validity of their relationship. This can create legal uncertainty for the individuals in these relationships, deterring their right to free movement within the EU.

The costs associated with the diverging laws relating to de facto unions result in:

- Legal costs from uncertainty; and
- Emotional costs.

Table 6 provides an overview of the costs associated with the gap relating to de facto union. It is assumed that the proportion of de facto unions with a cross-border element

[79] A Gesellschaft bürgerlichen Rechts is a company founded under German civil law.
[80] These countries are: Czech Republic, the Netherlands, Denmark, Austria, Latvia, Spain, Poland and Romania.
[81] Contradictory information has been identified for Portugal in different sources.
[82] http://www.oecd.org/els/soc/41920080.pdf

are similar to the proportion of cross-border marriages. Of the 2.2 million marriages per annum in the EU, 286,000 (13%) are considered to be international marriages, with 30 %(approximately 86,000) of these considered to be with another EU national. If it is assumed that the number of de facto unions between a Member State national and another EU national is equivalent to the number of cross-border marriages, there are approximately 86,000 of these unions per annum. It has been assumed that 15% of these de facto unions are subject to breakdown per annum.[83] It is reasonable that 30% of those de facto unions subject to breakdown face legal disputes and legal uncertainty surrounding property and/or custody issues.[84] There are therefore approximately 3,870 problem cases occurring cross-border per annum resulting from the gap in PIL.

The value of the assets involved in such disputes is likely to be in the order of €50,000 per case on average (with low value assets not giving rise to disputes in the first place). The absence of PIL in this area will increase the legal costs of resolving disputes and the likelihood that one party in the relationship is likely to be unfairly treated. The financial cost of these problems is estimated to be 1.5% of the value of assets (50,000 euro) for 3.870 cases per annum. This thus leads to legal costs of €2.9 million per annum. The emotional costs associated with this gap are estimated to be 3% of the total value of the assets, thus amounting to €5.8 million. The total CoNE is thus €5.8 million per annum. The presence of PIL in this area could reduce such costs and the associated emotional harm.

Table 6 - Estimated costs relating to gaps existing in relation to de facto unions per annum

Legal costs from uncertainty	
Number of de facto unions between a Member State national and another EU national[85]	86,000
Percentage of de facto unions breaking down per year	15%
Percentage where dispute arises in breaking down of union	30%
Number of cases per annum	3,870
Average value of assets in dispute	€50,000
Typical legal fees on average as % of asset value[86]	1.5%
Subtotal	*€2.9 million per annum*
Emotional costs	
Cost as percentage of asset	3%
Sub-total	*€5.8 million*
CoNE	**€8.7 million**

[83]The median length of a marriage ending in divorce is 7-8 years, it is reasonable to assume that de facto unions have a higher rate of breakdown, though many of course lead to marriage.
[84] There is no hard evidence to inform this estimate, however, assuming the majority of de facto unions last more than 5 years this provides time for property to be accumulated and that factors similar to those encountered in divorce cases would occur.
[85] Assume equivalent to number of cross-border marriages (i.e. 2.2 million marriages per annum x 13% international x 30% with another EU national)
[86]On average the conveying fees on property assets are around 1.5% of the property price, see: http://ec.europa.eu/competition/sectors/professional_services/studies/csm_standalone_en.pdf

3.2 Existence/validity and recognition of same-sex marriage and registered partnerships

3.2.1 Existing PIL legislation and measures

No PIL rules currently exist regulating the personal effects of same-sex marriages and registered partnerships at EU level. Article 1 of the Commission Proposal for Regulation *on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships* specifically excludes the personal effects of registered partnership and other consequences (the capacity of partners, maintenance obligations, gifts between partners etc.) from the scope of the Regulation.

3.2.2 Problems due to variations in legal regimes between Member States

The key differences between the Member States firstly relate to the existence and recognition of same-sex marriages and registered partnerships with these not existing in all Member States. The recognition of these marriages and partnerships are therefore problematic within the EU.

Since tax and social security benefits are normally associated with same-sex marriages and partnerships, the difficulties in recognising these Unions cause problems for EU citizens travelling to another Member State where this is not recognised, with their free movement hindered.

Same sex marriage
Only five Member States recognise same sex marriage (Belgium, Denmark, Spain, Netherlands, Portugal, Sweden)[87] with ten Member States (Austria, Czech Republic, Germany, Finland, France, Ireland, Luxembourg, Slovenia and United Kingdom) recognising other types of same-sex union (such as registered partnerships).

Eleven Member States (Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania and Slovak Republic) do not recognise same-sex unions, five of which (Bulgaria, Estonia, Latvia, Lithuania and Poland) having a constitutional ban on same-sex marriage.

Registered partnerships
Registered partnerships (unions where two people live as a couple and have registered before a public authority in a Member State) are recognised as such in, at least, 14 Member States (Austria, Belgium, Czech Republic, Denmark, Germany, Finland, France, Hungary, Ireland, Luxembourg, Netherlands, Slovenia, Sweden and United Kingdom).
Differences in the conception and effects of registered partnerships exist all across the EU. For example, Belgium and France understand registered partnership as "registered

[87] It has to be noted that same sex marriages are in the process of being recognised in some other Member States such as France, Finland, Luxembourg and the UK.

contracts" between two people, whereas in other Member States, such as Germany or the Netherlands, the institution is closer to a "partnership". Some Member States, such as Spain, have regional registers for civil partnership unions which are separate from the Civil Register and hence, do not produce the same effects.[88] Additionally, in some Member States only same sex registered partnership are recognised (i.e., Austria) while in some others, only heterosexual registered partnerships are recognised.

The effects that registered partnerships have, on the partners and vis-à-vis third parties, differ also from Member State to Member State, as outlined in Box 6.

Box 6 - Case examples of problems existing

Case Example

- Paolo and Marco move to France where they conclude a civil partnership. They return to Italy and request recognition of this partnership in order to open a family business together, which in Italy is a particular form of business enterprise. The Italian authorities refuse the recognition of this partnership as Italy doesn't recognised civil partnerships. Paolo and Marco are therefore prevented from opening a family business.[89]

- Wojciech and Ian, both male and Polish, move to Spain where they get married. Some years later, they return to Poland and request their marriage be recognised under Polish law and they apply for a certain tax regime deriving from the marriage. However, Poland does not recognise same-sex marriages.[90]

3.2.3 Estimated unit costs of problems and hence total CoNE

There are no problems within the EU with respect to the recognition of heterosexual marriage. However, there are problems with respect to the recognition of same sex marriages because of differences between Member States. Problems may arise if same sex married couples move from a Member State where their marriage is recognised to one where it is not and/or they may be treated differently with respect to succession or on separation. Problems may also arise if marriages are dissolved and partners move between Member States and wish to remarry. The incidence of same sex marriage is however low as is the order of magnitude of the cost of absence of PIL or harmonisation in this area. However, the scale of the problem could increase.

[88] ASSER-UCL Consortium, Study in comparative law on the rules governing conflicts of jurisdiction and laws on matrimonial property regimes and the implementation for property issues of the separation of unmarried couples in the Member States. See: http://ec.europa.eu/civiljustice/publications/docs/regimes/report_regimes_030703_fr.pdf

[89] Case example in European Parliament Executive Summary: Life in cross-border situations in the EU

[90] Example of possible problem from EP Study on Life in cross-border situations in the EU – A comparative study on civil status, page 17.

Approximate figures for the number of same sex marriages occurring in a sample of Member States come from a variety of sources (in the absence on a single comprehensive source). Available for Belgium, Spain, Netherlands, Sweden and UK, as a proportion of total marriages, 2.5% were on average found to be same-sex. For those Member States where same sex marriage or partnership is recognised, over 41,000 legal unions per year are estimated to be same-sex. Assuming, as is the case for heterosexual marriages, 13% involve a national of another Member State of which 5% incur difficulties per year when moving to another Member State; around 270 cases are estimated to occur. To resolve what can be a complex issue as recognition can affect tax, social security, and ownership of property issues in more than one Member State, 35 hours or 1 week of legal time is assumed to be required at €150 per hour average cost. Legal and emotional costs are calculated accordingly.

The total CoNE, outlined in Table 7, is therefore calculated to be €4.2 million per annum.

Table 7 - Estimated costs relating to gaps with same-sex marriage per annum

Legal cost incurred from lack of recognition from same-sex marriage	
Number of same sex marriages[1]	41,111
% Marriages cross-border[2]	13%
% unrecognised	5%
Number of cases	267
Legal cost per hour	€150
Hours to resolve recognition/uncertainty	35
Cost per case	€5,250
Sub-total	*€1.4 million*
Emotional costs	
Cost per case	€10,500
Sub-total	*€2.8 million*
CoNE	**€4.2 million**

3.3 Establishment or contesting of a parent-child relationship

3.3.1 Existing PIL legislation and measures

In relation to establishing or contesting of a parent-child relationship, no rules on applicable law, jurisdiction or recognition of judgments exist in this area, due to the provisions of Article 81(3) TFEU which require unanimity when adopting measures relating to family law. Member States therefore apply their own PIL legislation.

[1] Scaled up to EU in countries recognising same-sex marriage, based on figures obtained for Belgium, Spain, Netherlands, Sweden and UK indicating approximately 2.5% of marriages on average are same-sex per annum

[2] http://europa.eu/rapid/press-release_MEMO-11-175_en.htm

3.3.2 Problems due to variations in legal regimes between Member States

Due to the absence of rules on applicable law, jurisdiction and the recognition of judgments, problems exist in relation to the establishment of parentage, particularly relating to (a) paternity and (b) surrogacy.

(a) Determination of paternity

The rules on whether unmarried fathers have parental responsibility differ in Member States: some Member States only require the acknowledgement of the mother, while some others ask for a decision by the court. In this sense, the determination of the national law applicable to the attribution of parenthood can lead to cases where from a Member State's point of view the father of the child is "A" (for example, the husband of the mother) whereas from another Member State's PIL point of view the father was "B" (the biological father, for example).

Some examples of problematic cases are included in Box 7.

Box 7 - Case example relating to paternity rights

Case Example

- Julie, a national of Germany, marries Nick from United Kingdom. Julie separates from Nick (though never divorces) and moves to France where she gives birth to her daughter Sophie. Sophie's father is a French national (Marc) with whom Julie and her daughter lived as a family until the couple broke up. Julie moves back to Germany with her daughter Sophie. However, problems occur when determining who is obliged to pay child support for Sophie. Each Member State has different PIL rules applying relating to the determination of the father and also therefore on the determination of the child's nationality. According to French law,[91] paternity shall be determined by a voluntary declaration or by the possession of state. French law would apply to the effects of the possession of state in those cases where one of the parents have their residence in France; hence, under French law, Marc would be declared the father, as he *acted* as such publicly.

However, under German[92] and UK law, Sophie would be considered as the daughter of Nick; in Germany, Marc's acknowledgement of the paternity (which requires Julie's approval) would not be effective as long as Nick's paternity is in effect. On the other hand, under UK Law, Marc's declaration of paternity would overturn the presumption of Nick being Sophie's father. This also impacts on social security support.

- Alfonso, an individual with French and Italian nationality, is declared as the father of Laura, a child of Hungarian nationality. Problems arise relating to the law of

[91] Civil Code, Articles 310-342
[92] Civil Code, Articles 1592-1600

succession since Alfonso holds several nationalities, with issues arising as to what the applicable national law should be.

(b) Surrogacy

Member States have contrasting legal regimes in relation to surrogacy. Some expressly prohibit it (Austria, Bulgaria, Germany, France, Italy, Sweden) while others have no specific legal rules (Belgium, Cyprus, Czech Republic, Spain, Finland, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania and Slovak Republic). Some Member States have some form of legal facilitation (e.g. Denmark)[93] and some others recognise surrogacy as a valid contract (Greece and United Kingdom). Hence, problems may arise when a surrogacy contract is carried out in a Member State which allows/recognises the agreement (e.g. **UK**) and then the parents move to one Member State where surrogacy is forbidden or not recognised (e.g. **France**). There have also been issues with surrogacy contracts concluded in third countries: for example, when German couples hire surrogate mothers abroad and later attempt to bring those children into Germany as German citizens, the German courts have denied those requests. Moreover, in France**,** in April 2011, in three different instances, the *Cour de Cassation* held that the birth certificates of children born to surrogate mothers in California and Minnesota could not be transcribed in the French civil registry.

Same-sex couples parentage

Furthermore, the determination of whether same-sex couples can be registered as parents of a child varies from one Member State to another: for example, **The Netherlands** permits the listing of two fathers or two mothers on the birth register and creates a parental relationship which may not be recognised in other Member States. Box 8 provides an example of problems which can arise.

Box 8 - Example of problems due to gaps relating to parentage by same-sex couples

Case Example

- Anneke and Swantje are married in the Netherlands and as a result have joint custody over a child born to Anneke during that marriage. The family vacations in Greece and are involved in an accident. While Anneke is unconscious and hospitalised, the child requires medical treatment and parental care and should return home to the Netherlands for school. However, Greece does not recognise Swantje's legal authority to act for the child.

- Another Dutch married same-sex couple with a child, Diewke and Ineke, separate after some years and while the child stays with Diewke, Ineke pays child maintenance. When Diewke moves to Germany with the child, Ineke stops payment. It is unclear whether German courts having jurisdiction will make Ineke pay.

[93] DK

3.3.3 Estimated unit costs of problems and hence total CoNE

Member States consider paternity, the obligations of paternity and the nationality consequences for offspring differently. This can considerably complicate the determination of paternity and has implications for the nationality of offspring. There are in the order of 3.2 million births in the EU per annum to couples in marriage and 2.1 million outside. Based on the proportion of births occurring in another Member State, the number of births cross-border is estimated at 107,000 and 75,000 respectively.

Literature on the rates of contested paternity indicates a wide range of rates from 1% to over 25%. However rates are shown to be higher for births outside of marriage. It is therefore assumed that 5% and 10% of births respectively are potentially contested, and that cross-border legal complexities occur in 20% of cases to which PIL is relevant.

Using the approach adopted in the other examples, the legal and emotional costs were estimated at €2,500 and €5,000 per case, reflecting the complexity of many parent-child relationships.

The total CoNE is therefore calculated to be €19.3 million per annum, as outlined in Table 8 below.

Table 8 - Estimated costs relating to parent-child relationship problems per annum

Legal costs of resolving complex paternity issues cross-border		
	In marriage	**Outside marriage**
Number of births per annum[94]	3.2 million	2.1 million
Number born in another Member State to which they are an national[95]	107,000	75,000
Percentage where paternity contested	5%	10%
Percentage where dispute arises, due complexity of parental relationship and movements cross-border[96]	20%	20%
Estimated number of cases	1,074	1,491
Average legal cost per case	€2,500	€2,500
Subtotal	*€2.7 million*	*€3.7 million*
Emotional cost		
Cost per case	€5,000	€5,000
Subtotal	*€5.4 million*	*€7.5 million*
CoNE	**€19.3 million**	

[94] Eurostat (2012):

[95] Eurostat (2012): Statistics in focus - 31/2012, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-031/EN/KS-SF-12-031-EN.PDF

[96] Rates of disputed parentage were found to be much higher for births outside of marriage, in total reported rates ranged from less than 1% to over 25% 5% and 10% therefore seems reasonable. See: Bellis MA, Hughes K, Hughes S, Ashton JR (September 2005). "Measuring paternal discrepancy and its public health consequences". J Epidemiol Community Health 59 (9): 749–54.

3.4 Recognition of adoption decisions

3.4.1 Existing PIL legislation and measures

PIL rules exist in relation to jurisdiction and the recognition of rulings but not on applicable law. The Hague Adoption Convention of 1993 (which is in force in all Member States) provide for rules regarding some issues relating to private international law connected to international adoptions but does not deal with many others, such as international adoption that has been carried out in a different Member State of that of residence not following the procedure of the Convention.

3.4.2 Problems due to variations in legal regimes between Member States

Differences arise between Member States with regards to the legal age thresholds for the adopting parents, to the person who needs to consent the adoption, to whether the parents can be of the same sex etc. Moreover, the problems may relate to the legal effects of adoption.

The origin of adopted children can also differ in the Member States. In the United Kingdom, it is easier to adopt a native born child, with inter-country adoption being considered very expensive. This is one of the reasons why the number of national adoptions in England, Wales and Scotland is higher than adoptions undertaken abroad. In other Member States like France, Italy and the Netherlands, only few children can be adopted nationally, with inter-country adoption considered to be easier.

Issues can arise also with regard to adoptions in third countries, for example, when parents from Member State A adopt a child from Country Z and then move to Member State B where adoptions for Country Z are not recognised. These differences may encourage forum shopping.

3.4.3 Estimated unit costs of problems and hence total CoNE

There are important differences between Member States in the rules affecting adoption, including: the age of the adopters; whether same sex couples can adopt; the age of the adoptee; the rights of biological parents. Furthermore, for 'international' couples and those living in Member States other than that of their origin concerning which rules might apply. It is estimated that there are in the order of 700,000 adoptions per annum in the EU. The majority of adoptions concern the adoption of 'non-national' children, many of these are from third countries. The absence of harmonisation of rules may lead to 'adoption tourism' and problems for adopters and adoptees when the adopters return to their country of normal residence. Although the number of cases that may experience problems are likely to be small (1%), the magnitude of the problems is large as the status of the adoptee and their associated rights may remain unclear. Further harmonisation in this area may take place but the introduction of PIL would reduce the current costs of legal uncertainty.

Based on the small number of cases encountering difficulties, 50% are assumed to end up in court or require professional legal assistance, the cost of which is thought to be high owing to the complexity and sensitivity around adoption issues. A cost of €5,000 on average is therefore sensible. Emotional costs are based on the same simplifying assumption of twice legal costs as used throughout the document.

The total CoNE, as outlined in Table 9, is therefore calculated to be €1.65 million.

Table 9 - Estimated costs of gap relating to recognition of adoption decisions per annum

Legal costs of resolving disputes of recognition and uncertainty	
No. adoption of under 15s[97]	668,981
Proportion living cross-border[98]	3.2%
Estimated number encountering difficulties	1%
Proportion reaching court/ legal proceeding	50%
Cost per case (€)	€5,000
Sub-total	*€0.54 million*
Emotional costs	
Cost per case	€10,000
Sub-total	*€1.1 million*
CoNE	**€1.65 million**

3.5 Maintenance obligations for 'de facto' unions

3.5.1 Existing PIL legislation and measures

Article 1 of Regulation 4/2009 covers jurisdiction, applicable law and recognition and enforcement of judgments regarding "maintenance obligations arising from a family relationship, parentage, marriage or affinity". Though the scope of the Regulation is broad, it is not considered that de facto unions are covered in the Regulation. It can be questioned whether the term "affinity" includes de facto union. The term "affinity" in English, "d'alliance" in French, "di affinita" in Italian, "aanverwantschap" in Dutch are all inconclusive as to their exact meaning, although the Dutch term is close to the meaning of a "family relationship" by blood or marriage. It is therefore not considered that this would encompass de facto unions. Moreover, the Polish word "powinowactwa", the Danish word "svogerskab" and the German word "Schwägerschaft" are used in place of the word "affinity" in the translations of the Regulation. These very clearly translate to "in law" relationships which are not

[97] Based on UN data on the number of the births adopted per annum in each Member State applied to the total EU under 15 population, Eurostat (2012)
[98] Eurostat (2010: Number of citizens born in (other) EU Member States to the one they reside in, see: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF

considered to include de facto unions. The German and Danish terms cannot be construed to mean anything else than such an in-law relationship.

Moreover, the European Union is a Contracting State of the Hague Protocol on the Law Applicable to Maintenance Obligations and of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, both from 23rd November 2007.[99] Regulation 4/2009 uses exactly the same terms as the Hague Protocol. The European Commission released, in 2011, a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on "Bringing clarity to property rights for international couples",[100] where the problems attached to property rights for married and unmarried couples are considered.

3.5.2 Problems due to variations in legal regimes between Member States

The remaining gaps which exist relate to maintenance agreements between parties who are not under a legal obligation to pay maintenance. Since Member States have different rules in place in relation to de facto unions, as outlined in the Section above, maintenance agreements also diverge. Though some de facto unions in Member States are considered to be the same as marriage, with maintenance rights therefore being more guaranteed, other Member States do not recognise these unions in law. This therefore creates a problem for settling child maintenance issues in cross-border situations.

3.5.3 Estimated unit costs of problems and hence total CoNE

There are an estimated 86,000 international marriages in the EU between nationals of different Member States. It is reasonable to assume that there are a similar number of de facto unions. It is reasonable to assume that around 25% of these unions break down per year. There are in the order of 194,000 births to international de facto unions per year. It is reasonable to assume that de facto unions with children are relatively robust compared with unions without children. However, if just 15% of de facto 'international' unions with children broke down each year then around 12,901 couples could potentially be affected by maintenance issues. Assuming 5% are affected by child maintenance issues per annum. Member States have different policies towards the responsibilities of parents in these circumstances and towards the validity of pre-existing agreements. Failure to resolve these issues can have high legal costs and impacts on large numbers of children. Indeed, €3,000 in legal fees are assumed on average based on 10 hours of legal time at €150 per hour for each parent involved in the case.

The total costs are outlined in Table 10.

[99] However, it must be taken into account that none of these Conventions has yet entered into force

[100] COM(2011) 125/3

Table 10 - Estimated costs relating to maintenance of de-facto unions per annum

Legal costs of resolving cross-border disputes	
Number of EU births[101]	5.3 million
Number of births to international parents who are EU nationals[102]	194,171
Percentage where dispute arises in breaking down of union	15%
Number of cases where maintenance is an issue per annum	5%
Number of cases per annum	1,456
Costs per case[103]	€3,000
Subtotal	*€4.4 million*
Emotional costs	
Cost per case	€6,000
Sub-total	*€8.7 million*
CoNE	**€13.1 million**

[101] Eurostat (2012): Population demographics
[102] Based on 13% having an international dimension (as marriages) multiplied by proportion with another EU national by Member State.
[103] Assumes €150 per hour lawyer rate, 10 hours of additional work per side of the dispute due to difference in PIL

4. Property Law

4.1 Declarations such as gifts and trusts104

4.1.1 Existing PIL legislation and measures

Trusts have been excluded from all Regulations on European PIL. The Hague Conference adopted a Convention on the Law Applicable on Trusts and on their Recognition which has entered into force in some Member States (Italy, Luxembourg, the Netherlands, Malta and the United Kingdom) on 1 July 1985. However, in most Member States, like Germany, Spain and Poland, PIL rules on trusts are totally lacking.

With regard to gifts and donations, no PIL instruments currently cover these declarations. Moreover, the PIL instruments currently existing at EU level explicitly exclude gifts from their scope.

4.1.2 Problems due to variations in legal regimes between Member States

Gifts and donations
Differences exist in the Member States relating to declarations concerning property such as gifts and donations. Differences can arise concerning the donation of property located in different Member States with different civil and fiscal risks and obligations associated.

Other problems which can arise relate to the differences in national legislation as to who has the legal capacity to donate and to receive donations (e.g. children). Moreover, differences exist in other areas such as the moment where the obligations of the donation arise for the receiver of the donation; the scope for limitations on donations; and the causes of potential revocations of donations (i.e. situations in which a national of Member State A donates all their assets to a national of Member State B assuming that their children are dead and subsequently discovering that they are not, which results in revocation).

The manner in which gifts are given also vary in the Member States. In the United Kingdom, some form of consideration is required in relation to the donation of gifts, in accordance with Common Law principles. This is in contrast with rules in Germany where a gift can be given through a verbal agreement.

Examples of real-world problematic cases are included in Box 9.

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104 In some Member States such as Austria, Germany and Slovenia, gifts are considered to be bilateral declarations. In other Member States, such as the United Kingdoms, gifts are considered as unilateral declarations.

Box 9 - Examples relating to gifts and donations

Case Example

- Gretta, a German national residing in the United Kingdom bestows her jewellery to Francoise, her French niece. The jewellery is stored in a safe-deposit box in Spain. Under German law, Gretta's gift is valid whether it is written on a piece of paper or given orally over the phone. However, under Common Law rules in the United Kingdom, the gift may not be considered as valid since possession is not turned over directly, or without the provision at least of the key to the safe-deposit box. In Spain, national law enables banks to refuse to accept a donation without a notarial contract. Problems could therefore arise regarding the validity of the gift, depending on the Member State legislation to be applied.

- Jacques donates his assets to his son-in-law Pierre. A few years after the donation, Pierre divorces Jacques daughter Marie due to an extra-marital affair. Jacques, furious, wishes to revoke the donation due to Pierre's treatment of his daughter. Though revocation is allowed under Member State A, Pierre now lives in Member State B where revocation is not allowed. This therefore causes cross-border issues.

Trusts

Trusts pose an even more complicated question, since it is a genuinely Common Law principle which has only been accepted, to some extent, in a few Civil Law countries (for example in the Civil Code in **France** in 2007). There are differences which apply relating to the regulation of trusts among the Member States: firstly, the creation of a trust is not recognised in all Member States, which therefore impacts on its recognition in a cross-border situation. This also impacts the administration and dissolution of the trust when it is recognised in one Member State but not in another. Moreover, problems may arise when one of the persons involved in the trust (donor, trustee or beneficiary) or the property itself are located outside the country recognising the trust, resulting in significant differences as to the allocation of the property held.

4.1.3 Estimated unit costs of problems and hence total CoNE

The variations in Member State legislation relating to gifts, donations and trusts can create obstacles for EU citizens who wish to move to other Member States without having their assets negatively affected by their freedom of movement.

These differences can lead to legal costs of uncertainty for individuals who receive gifts and donations as well as those who hold assets in trust who might have their assets diminished.

With regard to gifts and donations, it is estimated that the EU value of personal gifts and donations per annum is €39.9 billion. It is estimated that approximately 8%, therefore approximately €3 billion, of the total value relate to cross-border transactions. It is

reasonable to assume that 5% of those gifts and donations with a cross-border dimension would encounter a PIL issue. The value of assets affected by the gaps currently existing in PIL would therefore amount to €160 million approximately. If it is assumed that 1.5% of the total value of assets is linked to legal costs resolving the uncertainty which currently exists, the cost would be calculated at €2.4 million per annum.

Concerning trusts, the number of trusts existing in the EU mainly relate to those existing in Common Law (i.e. United Kingdom and Ireland). It is estimated that there are approximately 220,000 trusts existing in the EU, with about 220 (0.1%) going to court per annum to resolve a dispute, approximately 55 of which relate to cross-border assets. If half of all these cases involve disputes linked to uncertainty due to PIL, it is estimated that the total cost of the gap relating to PIL is approximately €400,000 per annum, with the legal cost per case estimated at €10,000 due to the complexity of cases relating to trusts.

In total, the CoNE per annum arising from gaps relating to gifts, donations and trusts is 5.6 million. This includes a deterrent multiplier which assumes that the costs and inconvenience of gaps in PIL deter business and individuals from engaging cross-border to a value twice that actually estimate to occur. A full overview of costs (and assumptions) is provided in Table 11.

Table 11 - Estimated costs of gaps relating to gifts, donations and trusts per annum

Legal costs of uncertainty in relation to gifts and donations	
Estimated EU value of personal gifts and donations per annum[105]	€39.9bn
Proportion cross-border[106]	8%
Percentage where PIL is an issue	5%
Value of assets	€160 million
Legal costs as proportion of gift value	1.5%
Sub-total	*€2.4 million*
Legal costs of uncertainty in relation to trusts	
Number of trusts	220,000
Proportion going to court per annum to resolve dispute	0.1%
Percentage relating to cross-border assets	25%
Percentage where dispute involves PIL uncertainty	50%
Cost per case	€10,000
Sub-total	*€0.4 million*
Deterrent multiplier	2
CoNE	**€5.6 million**

[105] Estimates based on personal charitable giving (excluding trusts and tax recovery) proportions of GDP by Member State, correlated with personal tax rates where data missing, See CAF (2006): CAF briefing paper - International comparisons of charitable giving November 2006, available at: http://www.cafonline.org/pdf/International%20Comparisons%20of%20Charitable%20Giving.pdf

[106] Based on proportion of e-commerce now conducted cross-border, see Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Cross-Border Business to Consumer e-Commerce in the EU, available at http://ec.europa.eu/consumers/consumer_research/market_studies/e_commerce_study_en.htm

4.2 Property rights over movable/immovable property including recording of rights (real property)

When examining the legal basis for EU action in relation to property rights, the provisions of Article 345 TFEU must be considered. This article provides that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". While it is important to examine the gaps which currently exist with regard to applicable law for property in the Member States, it must be borne in mind that the EU does not have the right to act to harmonise legislation in order to entirely remove the gap which currently exists.

4.2.1 Existing PIL legislation and measures

The Brussels I Regulations covers questions of jurisdiction and recognition/enforcement of judgments in cases dealing with real property law. Article 22(1)[107] of the Regulation establishes that jurisdiction corresponds to the courts in which the property is situated in proceedings which have their object rights in rem in immovable property.

With regard to movable property, the revised Brussels I Regulation provides, in Article 7, for special jurisdiction with regard to claims for recovery of certain cultural objects based on ownership.

Concerning ownership and rights in rem in other movable property, it is considered that related claims are covered by the wide concept of 'civil and commercial matters' in the meaning of Article 1 of the Brussels Regulations. Jurisdiction lies, as a rule, with the courts of the Member State in which the defendant party is domiciled.

Recognition and enforcement of judgments regarding claims based on movable or immovable real property is also guaranteed between the Member States under Articles 33 of the Brussels I Regulations.[108]

Though there are rules in relation to jurisdiction and the recognition of judgments, there are no rules regarding conflicts of law. The lack of provisions on the law applicable to real property is one of the main gaps in European PIL. The only existing rules are those regarding cultural objects unlawfully removed from the territory of a Member State (covered by directive 93/7/EC).

4.2.2 Problems due to variations in legal regimes between Member States

Though there are no rules relating to applicable law for movable and immovable property, it is considered that a harmonisation of conflict of law rules regarding

[107] Now Article 24(1) of Brussels I Regulation following the adoption of the revised Regulation No. 1215/2012 of 12 December 2012.
[108] Article 36 revised Brussels I Regulation.

immovable property is not relevant for CoNE since the so-called *lex situs* rule is accepted unanimously in the Member states in this regard.

4.2.2.1 Immovable Property

It is generally agreed that immovable property is being covered by the *lex rei sitae* i.e. by the law of the Member State in which the immovable property is situated. Transformation of this rule into a European conflict of law rule would not change anything compared to the present situation where the same rule is being applied by the courts of all Member States as a rule of national PIL.

4.2.2.2 Movable Property

With regard to movable property, in principle the *lex situs* rule applies in all Member States, as well as to questions of ownership and rights in rem in movable property. For example, this is applied in Article 87(1) of the Belgian PIL Code, Article 43(2) of the German Introductory Law to the Civil Code, Article 51 of the Italian PIL Code and Article 41(1) of the Polish PIL Code.

Apart from this principle, however, many differences exist in the PIL of the Member States with regard to particular aspects of real property law in movables which may lead to considerable costs in cases having connections with two or more Member States.

(a) Deviation clause

Whereas the application of the *lex rei sitae* is considered as an imperative rule in most Member States to questions of ownership and rights in rem, it is mitigated in German PIL by Article 46 of the Introductory Law to the Civil Code which provides that the court has to apply a law different from the *lex rei sitae* to ownership and rights in rem in movable property if there is a 'substantially closer connection' to the law of such other State. Though such a deviation clause is applied, it is considered that it would not have considerable costs.

(b) No recognition of unknown rights in rem

Different solutions have also been developed in the Member States to deal with the problem of rights in rem established in a foreign State which are not known to the real property law of the State into which the property has been brought afterwards. According to Article 43(2) of the Introduction Law to the Civil Code in Germany, rights in rem established in another State may not be exercised in Germany in contradiction to German law. This means that rights in rem, such as an Italian car mortgage or a French registered lien in movable property, are recognised in Germany only if and to the extent that they can be transformed into a similar right in rem existing under German real property law. If such transformation is not possible, the foreign right in rem cannot be invoked by the owner after the property has crossed the German border. This is also the case in Article 10:130 of the Dutch civil code.

(c) Real property in ships, vessels and aircraft

A variety of connecting factors also exist with regard to real property in ships, vessels and aircraft. While some Member States generally refer to the law of the State of registration (e.g. Article 42 of the Polish PIL Code), other Member States distinguish between the singular types of means of transportation and use a different connecting factor for each type (i.e. Article 45(1) of German Introductory Law to the Civil Code, Article 137(2) and 137(3) of Dutch Civil Code).

Harmonised conflict of law rules with regard to the international recognition of security interests in aircraft exist according to the respective Geneva Convention of 19 June 1948. This Convention is in force in 16 Member States (Belgium, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Portugal, Romania, Slovenia and Sweden). By contrast, no harmonised rules are in force with regard to security interests in other means of transportation. In particular, the International Convention on Maritime Liens and Mortgages dated 6 May 1993 has not yet entered into force. The respective conflict of law rules in the Member States differ widely.

(d) Goods in transportation

The ownership in movable property in transportation through two or more Member States is also governed by different conflict of law rules in the Member States. Whereas Polish courts apply the law of the State from which the goods were sent (Article 43 Polish PIL Code), the Belgian, Dutch and Italian courts apply the law of destination (Article 88 of Belgian PIL Code, Article 10:133 Dutch Civil Code, and Article 52 of Italian PIL Code).

An example of problems arising in relation to goods in transit is presented in Box 10.

Box 10 - Example of problems with property gaps

Tomatoes from Spain are picked up from a farm in Spain and sold to the farmer's cooperative while they are already on a truck in Spain. The tomatoes move from the farm to an exporter, to a Dutch trader and subsequently to a German trader who then sells the tomatoes to a UK trader who sells the goods to a wholesale distributor in Denmark who sells the tomatoes to a supermarket chain. Throughout this entire process, the tomatoes are located on a truck in Spain, then through France, Belgium, Germany and eventually Denmark. The contracts between the parties, regulating as to who pays what amount and under what conditions and the obligations associated are fully covered by European PIL, Rome I and Brussels I. However, these contracts are independent of the issue as to who the real owner of the tomatoes is at any given point and the rights related thereto.

Property rights become a problem when something goes wrong. For example, issues would arise if the tomatoes were not delivered to the proper owner, if the tomatoes were stolen, or if the tomatoes suddenly became a public hazard and someone had to be made responsible for wastage costs and damages.

(e) Sale of goods with retention of title

Commercially selling goods with "title retention" is a practice which is widespread in a few Member States. Retention of title is used as a tool for commercial credit. For title retention, it is contractually provided that the goods remain the property of the seller until they are paid in full and if such goods are sold to third parties, such ownership shall prevail. Moreover, if the goods are used to produce a new product, the original seller shall become owner and have property rights to the newly produced goods. The retention of title is particularly useful in the event of bankruptcy of the buyer as the goods may be removed from the premises and do not become part of the estate. Moreover, payments by the third party may be forward to the original owner.

In Germany (Article 449 Civil Code relating to 'Eigentumsvorbehalt'), approximately two thirds of all standard contract clauses for B2B sales contain retention of title clauses, even if this is often irrelevant in practice. Only in cases where the buyer is commercially much stronger than the seller, such as in the auto parts industry, a retention clause will not be likely to be part of the contract.

Rights relating to retention of title may be lost when goods are moved across borders by the buyer. Retention of title clauses are most notably used in Germany, the Netherlands and Austria, are also accepted in the United Kingdom. In some Member States, notarial deeds are required which make such clauses rare, while in others the agreement must be recorded in a registry in order to protect third parties.

At EU level, the rights of the seller are protected in the event that the purchaser goes bankrupt, with Article 7(1) of the Insolvency Regulation providing that the "opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings, the asset is situated within the territory of a Member State other than the State of opening of proceedings".[109] In contrast, the enforcement of a right of retention depends on the recognition of such right under the law of the State where the good is situated. Therefore, the right of retention might be lost if the good is exported to a Member State where such right is not acknowledged or where the maintaining of such right requires compliance with certain formalities of the new *lex situs*.

In order to protect the seller, legislators of some Member States have enacted special conflict of law rules on retention of title. For instance, under Article 10:128(2) of the Dutch Civil Code, parties may agree that the real effects of a retention of title for goods intended to be exported, shall be governed by the law of the State of destination if according to that law the seller's right of ownership shall not be lost until the price has been paid fully to him. In other Member States, the courts have developed similar rules in order to protect the sellers' rights. However, the situation in Europe is far from being

[109] Article 7(2) provides that "the opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings, the asset sold it situated within the territory of a Member State other than the State of the opening of proceedings".

transparent for a seller exporting goods to several other Member States. A unified European conflict of law rule under which a retention of title validly established in a certain Member State has to be recognised in each Member States to which the goods are being exported afterwards would save a lot of money which is currently spent on the provision of information on foreign conflict of law rules and the compliance of the requirements set by the rules.

With regard to retention of title, Article 9 of Directive 2011/7/EU on combating late payment of commercial transactions provides that Member States should provide the possibility of retention of title, with details left to the Member States. For all but few examples, Member States do appear to agree in general that *lex rei sitae* should govern the property rights over movables and immovable alike.

4.2.3 Estimated unit costs of problems and hence total CoNE

As mentioned in Section 4.2.2 above, the gaps relating to movable/immovable property mainly relate to movable property due to the application of the *lex rei sitae* rule in the Member States which resolves many problems of applicable law. The problems arising therefore relate to ownership rights and the retention of title. Due to the large amount of intra-EU trade (including imports and exports), and limited data available concerning problem cases in the Member States, it has been difficult to estimate CoNE in relation to this problem.

However, if it is estimated that 5% of the total value of intra-EU trade (both imports and exports valued at €5,569 billion) is relevant in relation to movable and immovable property and that 0.0001% of this trade is affected by problems caused by the gap in national legislation in the Member States, it is estimated that the CoNE could amount to €5.56 million per annum. Table 12 provides further information on the costs and their assumptions.

Table 12 - Estimated costs of gaps relating to movable/immovable property per annum

Value of trade deterred due to uncertainty	
Total value of intra-EU imports[110]	€2,744bn
Total value of intra-EU exports[111]	€2,825bn
Total intra-EU trade	€5,569bn
Percentage of trade relevant to movable and immovable property	5%
Percentage of trade where problem arises	0.001%
Deterrent multiplier[112]	2
Cost of Non-Europe per annum	**€5.56 million**

[110] Eurostat (2012): COMEXT
[111] Eurostat (2012): COMEXT
[112] Assume deterrent effect is twice the value of trade affected (i.e. twice the value of trade is forgone due to PIL)

5. Law relating to obligations

5.1 Agency

5.1.1 Existing PIL legislation and measures

The Rome I Regulation does not apply to "the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or incorporates, in relation to a third party", as provided in Article 1(2)(g). However, the law applicable to the employment relation (i.e. the relation between the agent and the principal) is covered by Article 19(2) which lays down the rule of habitual residence, which should be understood as "the place where the branch, agency or any other establishment is located".

Though the EU Regulations do not apply to agency, the Hague Convention on the Law Applicable to Agency 1978 covers both the employment relation and the external relation (between the agent and a third party). This Convention is only in force in a few Member States however (France, Netherlands, Portugal). Article 5 and 6 of the Convention provide that "the internal law chosen by the principal and the agent shall govern the agency relationship between them (…) In so far as it has not been chosen in accordance with Article 5, the applicable law shall be the internal law of the State where, at the time of formation of the agency relationship, the agent has his business establishment or, if he has none, his habitual residence". For the agent's relationship with third parties, Article 11 provides that "the existence and extent of the agent's authority and the effects of the agent's exercise or purported exercise of his authority shall be governed by the internal law of the State in which the agent had his business establishment at the time of his relevant acts", except for certain cases.

5.1.2 Problems due to variations in legal regimes between Member States

Though some Member States have adopted the Hague Convention, the solutions found in this Convention are not accepted by the majority of the Member States. Most contracts in international commerce are concluded either by the organs of a company or by agents. As the national PIL rules on agency differ widely, the lack of European PIL provisions on agency is a gap which has far reaching practical consequences.

In Germany, the applicable law is that of the place where the power of attorney is used. In Spain, if the parties have not chosen the law to be applied, Spanish legislation shall apply for agency contracts which are being executed in Spain or where one of the parties is Spanish.[113] In the United Kingdom, the law applicable to the relationship between the principal and the third party is that governing the contract concluded

[113] Law 12/1992, of 27th May, on the Contract of Agency

between the agent and the third party, with it being that law which will determine whether an agent has the capacity to bind the principal.[114]

Hence, problems may arise in cases where no applicable law has been chosen between the parties and there is a doubt casted over the capacity of the agent to bind the principal in a cross-border case, as outlined in Box 11.

Box 11 - Example of problems with gap relating to Agency

Case Example

- Max, a German principal is represented in Austria and Italy by Ulrich, an Austrian agent having its business establishment in Innsbruck. Ulrich concludes a contract in Italy with an Italian shoe producer at a value of €150,000. Max refuses to fulfil the contract asserting that Ulrich was not authorised to bind the principal to contracts at a value of more than €100,000 without previous specific consent of the principal. The question whether the contract is binding on the Max is governed from a German point of view by Italian Law (law of the country where the agent made use of its power of attorney), whereas from an Italian point of view Austrian law applies (law of the country where the agent has its business establishment, Article 60 Italian PIL Code 1995). Finally, from an Austrian point of view the law chosen by the principal applies if such choice of law was evident to the third party (Article 49(1) Austrian PIL Code 1978).

- Pierre, a French agent, enters into an agency contract with Rodney, a UK national law in order to represent him in contractual relationships. The agency contract does not include a provision determining the applicable law. Pierre concludes a contract with Hans, a German national, on behalf of Rodney. A dispute arises which requires the applicable law to be determined, with the three different national laws providing alternate solutions. Though under French and German legislation, the law applicable to determine whether or not the principal is bound would be that of the Member State where the business is done, the UK law disposes that the applicable law should be that of the place where the contract between the agent and the principal was concluded.

Though Member States have the freedom to choose the applicable law, it is not considered to be absolute. In *Ingmar*,[115] the CJEU held that Article 17 of Directive 86/653/EU on the Coordination of Laws of the Member States related to self-employed commercial agents and applied in a case where the law chosen was that of a third country.

It must be noted that though rules on agency would be welcomed and would resolve cross-border conflicts, it seems that it would be politically difficult for Member States to find an agreement on such rules, with political feasibility being the reason why agency was excluded from the scope of the Rome I Regulation.

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[114] http://www.lexology.com/library/detail.aspx?g=3e608b31-61ff-459a-a577-a1ca83e21e26

[115] C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*

5.1.3 Estimated unit costs of problems and hence total CoNE

The CoNE arise because the rules affecting the abuse of agency/power of attorney vary between Member States. For example, within most median to large companies it is necessary to provide employees (not necessarily those legally responsible for the company) with agency rights in order to enter into contracts on behalf of the company. Such employees may, however, enter contracts without authorisation in which case there may be uncertainty as to whether the company or the individual is liable since different laws apply in the Member States. This also is the case for basic agent-principal relationships involving individuals. This has implications for the administrative and legal costs of companies/individuals establishing bases/ operating in different Member States. The differences also have implications when disputes arise due to the high costs of clarifying responsibilities. Given the very large numbers of transactions entered into, the potential number of problems is high.

It is estimated that there are approximately 277 billion EU transactions between the Member States, of which approximately 166 billion (60%) involve agents. It is also assumed that approximately 13 billion transactions are cross-border (8%). It is reasonable to assume that approximately 130 million of these transactions would result in a dispute and that 0.1% of the 130 million transactions would be due to differences in agency relationships in the Member States. If 5% of these disputes lead to legal action, it is estimated that there are approximately 6,600 cases per annum which are caused by agency problems due to the lack of harmonisation of PIL.

If the cost per case in this regard is €1,050, the total CoNE is estimated to be €14 million per annum, including deterrent multiplier. Table 13 outlines the costs calculated.

Table 13 - Estimated costs of gap relating to agency per annum

Legal costs of resolving uncertainty or lack of recognition of agent	
Total EU transactions (minus DD & credit transfers)	277 billion
Proportion of transactions involving agent	60%
Assumed proportion of transactions cross-border	8%
Percentage where dispute arises	1%
Percentage agency is reason for dispute	0.1%
Percentage court/legal action taken	5%
Number of cases	6,642
Cost per case	€1,050
Sub-total	*€7 million*
Deterrent multiplier[116]	2
CoNE	**€14 million**

[116] Assume deterrent effect is twice the value of transactions affected (i.e. twice the value of transactions are forgone due to PIL)

5.2 Violation of privacy and rights relating to personality, including defamation

5.2.1 Existing PIL legislation and measures

PIL rules relating to applicable law on non-contractual obligations resulting from the violation of privacy or personality rights are expressly excluded from the scope of the Rome II Regulation.

Articles 2 and 5(3) of the Brussels I Regulation provide for jurisdiction in proceedings on non-contractual obligations including obligations from the violation of privacy and personality rights. Article 5(3) of the Brussels I Regulation enables plaintiffs to choose the forum for their actions. The Brussels I Regulation is also applicable to the recognition and enforcement of respective judgments.

5.2.2 Problems due to variations in legal regimes between Member States

A number of problems exist within the EU relating to violation of privacy and rights relating to personality since the law differs significantly in the Member States. These differences create significant problems for both individuals whose privacy has been breached as well as for media companies who undertake cross-border activities. Legal actions relating to the media have increased, as shown by case law, particularly with the global rise in electronic publications and dissemination of online news on various platforms.

Problems faced by individuals

Different standards exist in the Member States in relation to privacy rights, with limitations imposed on the freedom of speech varying. This includes differences in the the threshold for determining whether published information infringes an individual's right to privacy. In Denmark, the limitations imposed are largely regulated by criminal law, with the Penal Code having provisions relating to intrusion of privacy, dissemination of private information, defamation, libel etc.[117] In other Member States, the protection of the right to privacy is a civil law matter. In Estonia, the right to privacy is provided in Article 26 of the Constitution which provides that "everyone has the right to the inviolability of private and family life". Protection of reputation against defamation is provided for in Article 17 of the Constitution, with Article 131 of the Law of Obligations Act providing for compensation in relation to defamation.

The legislation in the Member States has different thresholds in relation to disclosing information which would be in the public's interest. In Italy, the 'social utility criterion' implies that the right to report and comment can only lawfully encroach upon other rights, such as the right to privacy, if it can contribute to the formation of public opinion

[117] The European Parliament's study found Danish media law and regulation to be balanced in securing the protection of media sources, on the one hand, and protecting the citizens against the media's violation of privacy on the other.

regarding facts which are objectively relevant to society.[118] The varying threshold is evident in Member States such as France where the right to privacy can be infringed when it is in the public's interest. This differs from the law in the United Kingdom where stricter provisions are imposed.

Since the press is regulated differently in the Member States, privacy rights are not protected in the same manner. Box 12 provides an example of a problem which can arise.

Box 12 - Example of problems of applicable law for individuals' right to privacy

Case Example

Julia, an English duchess, is a target for the media due to her charitable work and popularity with the nation. One summer's day in the Cotswolds, England, Julia sunbathes topless. Paparazzi take photos of her. However, due to strict privacy laws in the United Kingdom, the newspaper receiving the photos decide not to publish the photos in order to avoid Julia filing (and winning) a lawsuit for invasion of privacy. Two weeks later, Julia arrives at her villa in the French Riviera and takes advantage of the sunny weather. Paparazzi take photos of Julia sunbathing, with a French glossy magazine publishing the photos. Julia sues the company for invasion of privacy but loses her case since the court considers the photos are in the public's interest.

Problems faced by the media

As outlined in the Final Report of the High Level Group on Media Freedom and Pluralism, "the existence of divergences between national rules can lead to distortions in the framework of cross-border media activities, especially in the online world".[119]

With regard to jurisdiction, the Brussels I Regulation enables plaintiffs to choose the forum for their actions. Since no PIL rules exist in relation to applicable law relating to the infringement of privacy, plaintiffs can often choose to sue publishers and journalists in a particular Member State in order to benefit from the most favourable judicial proceedings regarding (a) the choice of the forum and consequently (b) the choice of law that will apply to that case. This is determined by national conflict of law rules. This encourages a plaintiff to seek redress for local damages in multiple countries and according to different laws. The differences existing between the standards of protection of the right to privacy and free speech in the Member States and the diverging conflict of law rules to establish the applicable law increases the risk of forum and law shopping.

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[118] http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=75131

[119] Page 3

The variations can impact on the free movement of persons. Broadcasters and journalists increasingly face a risk of being sued in various Member States. They also face being sued outside of the EU on the grounds of violation of privacy rights. This reduces the legal certainty for media companies and journalists when they publish and report articles in cross-border situations.

Box 13 - Example of problems for companies relating to forum shopping

Case Example

Edward, an English actor, is a target for the media throughout the world due to his film success and relationships with his co-stars. Edward has photos taken of him on holiday in Italy where he is seen with a woman who is not his wife. The photos are published in "Allo?" magazine with national editions in Italy, France and the United Kingdom. Edward feels that his privacy has been infringed by the publication of the photos and sues the magazine for invasion of privacy. Due to stricter rules in the United Kingdom, Edward decides to choose the UK as jurisdiction for the case even though the photos were taken in Italy.

5.2.3 Estimated unit costs of problems and hence total CoNE

There are differences between Member States in the level of protection of privacy afforded to individuals in general and also individuals in particular circumstances (e.g. suspects in criminal cases). There are also differences in whether individuals can seek compensation for breaches of privacy and the harm resulting. This may lead to situations where, in effect privacy is breached in one Member State, but not in another. However, the advent of the internet means that media are by no means restricted to Member States and identifying those responsible for breaches of privacy is problematic. There are administrative legal costs of media organisations that are in the business of invading privacy (in the public interest or to increase sales) when operating and publishing in different EU countries. When disputes arise there would be advantages in having PIL to reduce costs of determining the applicable law.

From examining cases in the Member States, the number of complaints in the EU to press and media regulators is estimated to be approximately 59,000 cases per annum. It is reasonable to assume that a third of all cases relate to privacy rights (due to the protection of privacy playing an important role in the freedom of speech and control of the media) and a third relate to complains where codes and standards were breached. However, only 1% of all cases are assumed to result in actions being taken in court. If the cross-border assumption of 13% is applied, it is estimated that only 7 cross-border cases per annum are due to the gap existing in PIL. This would be in accordance with the low number of cases in some Member States.

Though the number of cases would be low, the legal costs associated with them are significant, estimated to be approximately €50,000 per case. The legal costs are therefore calculated to be €350,000 per annum.

With regard to emotional costs, the costs associated are estimated to be double the legal costs, totalling €700,000 per annum.

The total CoNE, as outlined in Table 14, is therefore calculated to be roughly €1 million.

Table 14 - Estimated costs caused by gap in privacy laws per annum

Legal costs of due to differences in privacy law in cross-border cases	
Number of complaints to EU press/ media regulators	59,000
Proportion related to privacy	30%
Proportion of complaints where code/standards breached	30%
Proportion court action taken	1%
Proportion cross-border	13%
Number of cases per annum	7
Cost per case	€50,000
Subtotal	*€350,000*
Emotional costs	
Cost per case	€100,000
Subtotal	*€700,000*
CoNE	**€1 million**

6. Law relating to incorporated and unincorporated bodies

6.1 Foundation of commercial companies and organisations

6.1.1 Existing PIL legislation and measures

Article 54 TFEU provides that "companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, […] be treated in the same way as natural persons who are nationals of Member States".

The Brussels I Regulation covers questions of jurisdiction and of recognition and enforcement of judgments on all issues of company law (see for instance *Hasset/SouthEastern Health Board*[120]; *Berliner Verkehrsbetriebe*[121]). Article 22 (2) of the Regulation provides for exclusive jurisdiction of the courts of the Member State in which the company, legal person or association has its seat in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs. The same provision is maintained in Article 24 (2) of the revised Brussels I Regulation No. 1215/2012 of 12 December 2012.

There is, however, a lack of provisions on the law applicable to companies and other bodies or entities. On its part, the CJUE has developed some guidelines for European company law, especially on the recognition of companies founded in another Member State and on the transfer of a company's seat from one Member State to another (particularly in the following judgments: *Centros*[122]; *Überseering*[123]; *Inspire Art Ltd.*[124] and *Cartesio*[125]). A public consultation was launched by the Commission in 2013 on the "cross-border transfers of registered offices of companies" in order to get more in-depth information on (i) the costs faced by companies currently when transferring their registered offices abroad and (ii) the benefits that could be brought by EU action on cross-border transfers.[126] This consultation followed an Impact Assessment undertaken by the Commission in 2007 on the Directive on the cross-border transfer of registered office.[127]

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[120] C-372/07
[121] C-133/10
[122] C-212/97
[123] C-208/00
[124] C-167/01
[125] C-210/06
[126] The consultation was launched on 14 January 2013 and closed on 16 April 2013. Further information on the consultation is available at http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.htm
[127] Available at http://ec.europa.eu/internal_market/company/seat-transfer/index_en.htm

6.1.2 Problems due to variations in legal regimes between Member States

Problems relating to the registered seat of the company have, to a great extent, been resolved with case law of the CJEU. While there is no harmonisation on company law itself, there is, in general an agreement on PIL between the Member States.

Though the case law of the CJEU seems to have reduced the problems arising following the formation of a company, problems can still arise as to the formation of a company. An example is provided in Box 14.

Box 14 - Costs relating to gaps in corporation law

Three Austrians agree (over the phone) to set up a limited company in the United Kingdom with its seat in Cardiff. One of the parties is a minor while another is a company. In accordance with legislation in the United Kingdom, articles of incorporation are drafted as well as other statutory documents (e.g. declarations). All documents are sent to the three parties in order for them to be signed. The documents are then submitted to the Companies House in order to register the company in the UK.

Due to the cross-border element of this case, uncertainty could arise in relation to applicable law in certain instances.

For example:

- Should Austrian law requirements (e.g. use of a notary) apply in relation to the formation of the company?
- Since one of the parties forming the company is a minor, should parental consent take Austrian or UK form?
- Does Austrian or UK law apply to the officer signing the formation papers on behalf of one of the parties which is a company? What law applies as to the liability of that person who has been entrusted to file the registration?

The legal capacity of company officers could also lead to difficulties when companies are involved in cross-border activities. Legal capacity of companies could create a particular issue when a contract is entered into in one Member State which does not recognise the legal capacity of the company officer in question.

Differences also exist among Member States with relation to the role of employees in corporate governance: in Austria, Denmark, Germany, Luxembourg and Sweden, employees of companies of a certain size have the right to elect some members of the supervisory board. In Finland and France, company articles may provide employees with such a right. In France, when employee shareholding reaches 3%, employees are given the right to nominate one or more directors, subject to certain exceptions. In all other EU Member States (except self-selecting board in the Netherlands), it is the shareholders who elect all the members of the supervisory board.[128]

[128] This information is extracted from the 'Comparative Study Of Corporate Governance Codes

6.1.3 Estimated unit costs of problems and hence total CoNE

The differences existing in the Member States in relation to the formation of corporations as well as the lack of PIL relating to applicable law creates difficulties for companies when wishing to enter into cross-border transactions. It is considered that this gap creates significant costs for businesses in order to ensure that they are in compliance with the laws in the Member States in which they have commercial activities. Moreover, the differences in national legislation have a dissuasive impact on businesses wishing to trade cross-border and therefore have an impact on the free movement of capital and the freedom of establishment.

Table 15 - Estimated costs of gap relating to incorporated companies per annum

Legal costs to business in establishing corporation in another Member State	
Number of active enterprises in the EU[129]	21 million
Percentage of businesses with a branch in another Member State[130]	0.4%
Percentage of cross-border businesses establishing a corporation per annum	10%
Average cost of incorporation[131]	€2,000
Average number of other Member States where business is trading[132]	2
Sub-total	*€33.6 million*
Dissuasive impact on business wishing to trade cross-border in the internal market	
Increase in EU GDP from Single Market 1992-2008[133]	2.13%
Value increase in GDP[134]	€194.7 bn
Potential increase in GDP 2008-2020 [135]	€46bn
Percentage of additional GDP discouraged by complex corporation procedures, preventing cross-border trade	1%
Sub-total	*€38.3 million per annum (€460 million total)*

Relevant to the European Union And Its Member States' elaborated by Weil, Gotshal & Manges LLP for the European Commission and available at http://ec.europa.eu/internal_market/company/docs/corpgov/corp-gov-codes-rpt-part1_en.pdf

[129] Eurostat (2011) – European facts and figures http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-ET-11-001/EN/KS-ET-11-001-EN.PDF

[130] Based on insolvency figures which indicate that of 200,000 businesses which go bankrupt in the EU each year, 700 businesses have a branch in another Member State. See EC(2012): COM(2012) 744 - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings: executive summary of impact assessment, available at: http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf

[131] The average cost of lodging a claim for foreign creditors per cross-border situation are €2,000, assume the same for registering and checking legal status of company in another Member State, Ref: ibid.

[132] Assume when choosing to trade cross border, it occurs in at least 2 other Member States.

[133] EC (2012): COM(2012) 573 final - Single Market Act II: Together for new growth, available at: http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf

[134] Scaled up from an increase in GDP of €164.5 bn or 1.8% of GDP from 1992-2002, see: http://ec.europa.eu/internal_market/top_layer/historical_overview/docs/workingdoc_en.pdf

[135] Assume an additional 0.5% increase in GDP (2.63% from 1992) can be achieved between 2008 and 2020

Table 15 provides an overview of the costs associated with this problem. Eurostat data provides that there are 21 million active enterprises in the EU. It is estimated that approximately 0.4% of these enterprises have a branch in another Member State, in accordance with figures from the Impact Assessment on Insolvency. It is reasonable to assume that 10% of these cross-border businesses establish another business per annum and therefore could face problems when forming a company in another Member State. If the average cost of incorporation is estimated to be €2,000, the total legal costs to businesses is calculated to be 33.6 million.

With regard to the dissuasive impact on businesses, this is estimated to be €38.3 million per annum, with the calculation based on increases in GDP from the Single Market, as outlined in Table 15.

6.2 Foundation of non-commercial organisations and not for profit organisations

6.2.1 Existing PIL legislation and measures

Article 54 TFEU defines "companies or firms" as "companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit making". Non-commercial organisations and not for profit organisations are therefore not covered under the scope of Article 54 TFEU and therefore do not benefit from the same protection as commercial organisations, as described in Section 5.1 above.

The PIL related to unincorporated companies is completely unregulated, with no harmonisation on substantive law.

6.2.2 Problems due to variations in legal regimes between Member States

In principle, the same legal issues which arise with respect to commercial organisations re-appear with respect to non-commercial and not-for-profit organisations. However, these types of organisations are more complex since these organisations are often subject to tax reliefs and other privileges by Member States. These privileges come with formal rules attached in order to protect the public. It may be possible that an individual case involves high stakes, either politically or financially, if a large non-for-profit international organisation becomes involved in a cross-border dispute about its formation. Moreover, with regard to non-profit organisations, mutual acceptance of general practice is even more difficult due to the existence of diverging concepts.

There are no clear and common definitions of non-commercial organisations and not-for-profit organisations, with variations existing between common law and civil law traditions. Under common law, the treatment of non-profit organisations is distinguished by the concept of 'charity'. Under civil law, the treatment of such

organisations is not based upon activity but rather upon the legal forms of association and foundation.

With regard to foundations, civil laws set out requirements which need to be fulfilled in order to be able to operate. Some Member States only allow specific forms of establishment for foundations. Moreover, foundations and their donors are subject to relevant tax rules in various Member States. This can function as both an incentive and disincentive for donors and is also relevant for the investment of foundations. Variations exist with regard to the internal governance of foundations. The differences in internal governance cause obstacles for foundations moving from one Member State to another. In 2012, the European Commission adopted a proposal for a Council Regulation on the Statute for a European Foundation. By creating a single European legal form entitled 'the European Foundation', the Regulation aims to facilitate the cross-border activities of public benefit purpose foundations and to make it easier for these foundations to support causes of public benefit throughout the EU.[136]

Though a gap exists in this area, the PIL of non-profit organisations only has a rather small relevance in the Member States. Most of the national PIL Codes do not address them in particular conflict of law rules. Moreover, there is practically no case law which exists with regard to PIL problems of non-profit organisations. Developments are currently occurring in the area of mutual society, however, with the European Parliament requesting the Commission to make a legislative proposal concerning a Statute for a European mutual society, including in particular democratic rules for governance.[137]

In the Dutch PIL Code, foundations are mentioned as one type of so-called 'cooperations' which under Dutch law include corporations, associations, cooperatives, foundations and any other bodies or ways of collaboration that act as an independent entity or organisations. In the code, it does not matter in this context whether such an organisation is a profit or a non-profit organisation. In the Italian PIL Code, foundations are expressly mentioned as one type of legal persons. The Belgian PIL Code (Article 110) and the Polish PIL Code (Article 17) refer generally to legal/moral persons without making any distinction between profit or non-profit organisations.[138]

For PIL purposes, it follows from this concept that non-profit organisations are treated the same way as corporations and commercial associations. Under Dutch PIL, a foundation or other non-profit association which has its seat, or in the absence therefore, its centre of its outward activities at the moment of its formation, within the territory of the State under the law of which it is formed, shall be governed by the law of that State.

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[136] Further information available at http://ec.europa.eu/internal_market/company/eufoundation/

[137] Information available at http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/2039%28INI%29

[138] Information on recent codifications in Belgium, the Netherlands and Poland available in 'A European Framework for private international law: current gaps and future perspectives', p.60

In Belgium and Poland, the law of the principal establishment of the legal person applies. The same rule is applied under German PIL where no written conflict of law rules exists in the field of company law and of non-profit organisations. By contrast, in Italy, the basic rule is that legal persons are governed by the law of the State where they have been constituted, and only if they have their main establishment in Italy. Italian law prevails over the foreign law of incorporation or constitution.

Finally, most national PIL systems provide for special rules on the transfer of the principal establishment of a company, association, foundation or other profit or non-profit organisations from one State to another State. As a rule, such transfer is only possible if the laws of the two States involved allow for it and recognise the continuation of the legal entity without any change of status.

6.2.3 Estimated unit costs of problems and hence total CoNE

There are only a small number of non-commercial organisations and not-for-profit organisations who are active cross-border in the sense that they enter into activities/contracts which lead to disputes and that are difficult to resolve in the absence of EU level PIL. It is likely that should such non-commercial organisations and not-for-profit organisations trade in a manner similar to commercial organisations then either the organisations would need to modify their status or the PIL associated with commercial organisations would apply. In these circumstances it has not been possible, and would arguably be inappropriate to estimate the CoNE. In any case, as discussed with experts, the economic costs would be small.

7. The potential of PIL and codification to further reduce the costs of variations in legal regimes across the EU

This Section discusses the potential of PIL and codification to further reduce the costs due to variations in legal regimes across the EU and the absence of EU level PIL. EU Treaty developments are firstly discussed before a comparison is made between the codification and sectoral approaches. Estimates of the potential reductions in costs are then discussed.

7.1 EU Treaty Developments

In the area of PIL, the main reason for the EU's choice of a sectoral approach was the lack of general competence to harmonise PIL in the Treaties. The lack of competence changed, however, with the adoption of the Treaty of Amsterdam in 1997 which introduced provisions relating to civil matters in Articles 61 and 65 of the Treaty.[139] However, this competence was dependent on the fact that harmonisation was necessary for the functioning of the internal market. The adoption of the TFEU changed these provisions, with Article 81(2) mentioning the functioning of the internal market as an aim of harmonisation without including it as a prerequisite for action of the European legislator in the field of PIL.[140]

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[139] Article 61 of the Treaty of Amsterdam provided that "In order to establish progressively an area of freedom, security and justice, the Council shall adopt: (a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union; (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63; (c) measures in the field of judicial cooperation in civil matters as provided for in Article 65; (d) appropriate measures to encourage and strengthen administrative cooperation, as provided for in Article 66;
(e) measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union.
Article 65 provided that: 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, shall include: (a) improving and simplifying: the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

[140] Article 81(2) provides that "for the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflicts of laws and of

Due to the changes in the Treaty, the EU's legal competence to codify cannot be questioned anymore, with codification now considered as a real possibility to improve the situation in relation to PIL.

7.2 PIL codification and the sectoral approach

The European Parliament's Study in 2012 on a European Framework for Private International Law[141] provided an in depth analysis of the features and consequences of codification (gradual or simultaneous) in comparison to a pure sectoral approach. Though such an in-depth legal analysis is beyond the scope of this report, a brief overview of existing approaches to a potential codification of PIL is provided insofar as it informs the Research Paper's aim to assess the costs and impacts of codification at European level.

In the European Parliament's study, a distinction is made between the enactment of a code as such (a compilation of existing legislation *stricto sensu*) and a sectoral approach (the adoption of Regulations covering the different gaps identified in the area of PIL). In the study, it is suggested that the elaboration of a code should be preceded by the adoption of a number of instruments aimed at filling the existing gaps in European PIL. The study argues that it would neither be feasible or advisable to take a holistic approach and to embark on the considerable task of creating a European PIL code, especially when the EU is not familiar with the institution of a code.

In order to overcome the problems envisaged by the 2012 study for the European Parliament, it is considered that a successive framework approach could be employed. In a first step, a framework Code could be created which would provide the possibility of gradually adding new areas of law. Initially, only those instruments newly enacted to deal with the closing of gaps (e.g. the proposed Regulations on Matrimonial and Registered Partnership Property rights) would immediately become part of the Code. Existing legislation could be merged later on, whenever it is significantly amended (e.g. the Succession Regulation). The division into three areas proposed by the 2012 Study (civil procedure in civil and commercial cases in general, choice of law for non-family law cases and private international law for family law cases[142]) could be respected with the inclusion of different Chapters where the instruments could be included on the basis of their completeness (e.g. The Brussels I Regulation and the Insolvency Regulation would constitute the first part on civil procedure which is quite consolidated, whereas Rome I and II could be part of the second with Rome III being included when more

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jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable to the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff.

[141] Available at http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=79510

[142] *Ibid*, p. 93

relevant case law is developed etc.). This approach would however be a novelty to European legislation.

The method of codification is not a new concept in EU Member States. The Napoleonic Code itself and its successors in civil law Europe is a good example of a Code regulating many different areas of law in one "book". France has a long tradition of using Codes. In particular, the Consumer Code ("Code de la consummation") and the Environment Code ("Code de l'environnement") are recent examples of a set of regulations of different issues relating to one area of law within a general framework. In Germany, since 1969, a process began to consolidate the major legislation relating to social security into one Social Security Code ("SGB"). Part One of the German SGB now contains general definitions, general rules and statements as to which legislation shall be considered a part of the Code, and Part Ten of the German SGB contains procedural rules applicable to all other parts. It took many years to fill in parts 2-9 and, in the meantime, additional parts 11 and 12 have been added. In Common Law, code books are a traditionally less common type of legislation and rare in the United Kingdom. However, in the United States, the entire federal legislation has been organised in the form of a code book and sub-books (U.S.C.) and, even in the United Kingdom, certain acts can be considered as codes covering a selected area of law quite comprehensively (e.g. the Corporation Tax Act 2010, or the Environment Act 1995 and its Schedules).

7.2.1 Impact of sectoral approach

Through the sectoral approach, more than 20 legislative instruments affecting PIL have been put in place at European level over the last decade. It is clear that the current status of European PIL with scattered provisions and a difficult implementation scheme does not facilitate the day-to-day lives of European citizens and the smooth functioning of the Internal Market, as outlined in the previous sections describing the gaps (and their associated problems) currently existing.

The current lack of knowledge and comprehension of EU PIL among legal professionals is a major obstacle to fully applying this legislation. By being scattered among a number of legal instruments with very similar (albeit not fully equal) structures, definitions and principles, comprehension is made even more difficult.

7.2.2 Impact of codification

There are a number of advantages and disadvantages associated with codification. These are described in turn in the sub sections below.

7.2.2.1 Advantages of codification

Transparency of PIL

PIL is relevant for European citizens in their daily life. They buy goods from sellers being established in other Member States, are involved in accidents in other Member States, and maintain family relations with partners from other Member States.

Therefore, the relevant PIL provisions which govern these legal relations – purchase contracts, non-contractual liability, family relations etc. – should be easily accessible for the citizens. This is not the case under the existing sectoral approach, where those provisions are dispersed over a large number of legal instruments. However, some reservations has to be made in this context: PIL is a highly complex matter which in many cases would not be understandable for a normal citizen even if it were codified in a uniform European piece of legislation. Therefore, it is more important that the accessibility of European PIL will be improved by such codification for legal practitioners.

Simplification of PIL

A codification of European PIL could help to simplify the application of law in international cases. However, the problem of conflicting sources of law could not be done away with entirely by codifying PIL. Even if the conflict of law rules contained in the Rome II Regulation should form a part of a European PIL codification, the problem of deciding whether such rules are superseded by international conventions (such as the Hague Convention on the protection of children 1996) would remain to the same extent as before such a codification.

Moreover, it is doubtful whether in a general Part of a European PIL codification, general rules, could be formulated to solve the conflicts between European PIL and concurring international conventions being in force for the Member States.

Reduction of provisions by creating a general part of European PIL

From a perspective of legislative clarity, legal certainty and paperwork reduction, a Code would help to reduce provisions by creating a general part of European PIL: certain definitions of legal terms and statements relating to the scope of the various legal rules which are currently repeated in every new legal instrument would need to be only made once. Similarly, rules which relate to some procedures, relating to mutual recognition, or to *lis pendens* need to be made only once. This avoids both repetitions, and unwanted differences in wording which may lead to disputes regarding different interpretation. At the same time, where differentiation is actually desired by the European legislator (because of differences in the area to be regulated), this can be made clear. Any new legal instrument, and any revision, can build directly on the existing definitions and groundwork, thus significantly reducing the manpower and the cost for new legislation. All this leads to lesser legislative work, and to more legal certainty.

Opt-ins and opt-outs would also be made much clearer with the creation of a code. For each relevant regulatory area, i.e., for each chapter of the Code, there can be a statement as whether it applies to all or to some Member States.

Not only would the legislator itself profit from a Code. The CJEU would need to rule once on some repeating questions. Judgments stating that, a definition in one European

regulation shall be read the same as in another would become an unnecessary thing of the past. [143]

Saving costs

Whereas European citizens are in a position to inform themselves of their basic legal rights and obligations with regard to purchase or employment contracts, family matters or succession rights in domestic cases by looking into their national codifications of civil law, they don't have a comparable possibility in international cases. In order to learn which law governs their contractual obligations, non-contractual responsibility, financial consequences of a divorce or succession rights in a case with foreign elements they are bound, as a rule, to contact a lawyer with specific expertise in PIL. A part of these lawyer's fees could be saved if all relevant PIL rules would be contained in a European Code of PIL which is easily accessible and where citizens could find answers to their questions.

Translations and printing costs could also be reduced on various EU levels.

Facilitating communication between lawyers in different Member States

If all lawyers in the EU dealt with the same set of conflict of law rules, communication between lawyers from different Member States would be facilitated and misunderstandings as to the governing law to a certain case would be reduced. This also might help to avoid litigation on this question and save costs for the parties.

Improving recognition of judgments

Mutual recognition and enforcement of judgments between the Member States, which is one of the main goals of Title V of the TFEU relating to an area of Freedom, Security and Justice (e.g. Articles 67(4), 81(2)), would be facilitated if all gaps in European PIL were closed and this were evident through codification.

Prevention of forum shopping

One of the main reasons of forum shopping is the interest of the parties to manipulate the law governing the subject of litigation. Therefore each party will go to the courts of the Member State which will apply to the claim raised a law favourable to the claimant, under its national PIL rules. This interest to bring an action to the courts of a specific Member State would not exist anymore if PIL was codified at European level since the courts of all Member States would then apply the same law to a certain case.

Facilitating exchange of students and of university teachers of PIL

The EU has been interested, since a long time, in an exchange of students and university lecturers and has supported such exchange by its Erasmus and Socrates programs. For law students it would be an incentive to study PIL at universities of other Member States if the content of the lecture was the same as in their home

[143] E.g., the ECJ repeatedly needed to decide that, the definitions of the Brussels Regime and Rome I and II should be interpreted autonomously, and uniformly: ECJ C-29/10 of 15 March 2010, *Koelzsch*, joined Cases C-585/08 and C-144/09 of 7 December 2010, *Pammer and Hotel Alpenhof*

university, i.e. a European codification of PIL. The same is true for the exchange of law professors and university lecturers in the field of PIL because they could teach the same subject to for example, German, French, English or Polish students.

7.2.2.2 Disadvantages of codification

Legislative effort of creating Code

A major obstacle and disadvantage of a code could be the legislative effort of creating the code itself. Any new piece of legislation inevitably involves legislative work. A European PIL Code would involve very complex, and therefore time consuming, legislation. The added value of such extensive work must be questioned particularly since, in many areas, codification might simply re-regulate something which has already been regulated. However, the proposed successive framework approach (outlined in Section 7.2 above) would help reduce all these additional costs.

Volume of the Code

The estimation is that a European PIL Code, which combines all existing EU Regulations and Proposals on governing law, jurisdiction, recognition and enforcement of judgments, and all related matters, such as service abroad, taking evidence abroad etc., and which additionally closes all existing gaps would comprehend 800 to 1.000 articles. Such a Code might, by its pure length, create new difficulties relating to transparency.

Difficulties of reforming the Code

All existing EU Regulations contain so-called revision clauses. Under these clauses the Commission has the obligation to present to the European Parliament and to the European Council after five or seven years a report on the functioning of the respective Regulation and of proposals to improve the effectiveness of its provisions.

It is hardly feasible to revise and amend the whole European PIL Code every five years. Consequently, there is a certain risk that a codification might lead to less flexibility in European PIL and make adaptation to new developments more difficult.

Table 16 below summarises the advantages and disadvantages of a European PIL code versus a sectoral approach on the basis of the practical and the legal feasibility, the time scale, the economic consequences and other additional constraints.

Table 16 - Advantages and disadvantages of Codification and Sectoral Approach

	Codification in a Codex		Sectoral Approach	
	Advantages	**Disadvantages**	**Advantages**	**Disadvantages**
Practical feasibility	• General reduction of paperwork; • Reduction of translation costs; • Increased user friendliness (very high value); • Increased use by legal practitioners; • Fewer errors in application by practitioners; • Reduction of erroneous decisions, fewer appeals, fewer requests for preliminary rulings by the CJEU; • Increased and improved legal education in European PIL; • Increased knowledge and acceptance by legal professionals, by citizens and businesses; and • EU positioning itself as a source of legal certainty and making cross-border transactions easier and safer	• Novel approach; • "Recasts" or updates necessary; • Requires novel types of practical procedures to integrate new rules or amendments in existing text; • Creation of additional legislative work at the beginning; • Difficulties in conceptual design, especially with respect to initial chapters; • Potential realisation by Member States of the high degree of harmonisation already achieved leading to negative political reactions.	• Legislation for closing of gaps is simpler; • Practitioners active only in one practice area (e.g. family law), need only obtain copies (and know) those legal rules related to their area and not others; • Publishers can easily combine topic related European rules with national laws on the same topic in one publication, possibly with a combined commentary.	• Practitioners may miss out on relevant rules; • Knowledge of European PIL is generally lacking because it is viewed as "exotic" and not relevant; • Training in European PIL is generally lacking because it is viewed as "exotic" or niche subject and not relevant in practice; • Practitioners active in more than one field need several publications.

	Codification in a Codex		Sectoral Approach	
Legal feasibility	**Advantages**	**Disadvantages**	**Advantages**	**Disadvantages**
	• Increased legal certainty • Better logical structure • Avoidance of conflicting rules • Increased comprehensiveness • Fewer repetitions • Room available for general definitions and boiler plate provisions applicable to all sectors • Room available for "fall-back" and failsafe provisions to resolve accidental gaps (as opposed to voluntary gaps)	• Increased legal certainty (some Member States or lobby groups may be content with more ambiguity); • Potentially higher complexity; • General definitions and provisions may infringe on national legal principles; • Fall-back provisions may lead to gaps being closed by the CJEU without Member State "approval".	• Lesser complexity; • Individualised general terms and definitions related to a specific sector only may be better suited.	• Potentially more ambiguity; • Possible lack of comprehensiveness.
Time scale	**Advantages**	**Disadvantages**	**Advantages**	**Disadvantages**
	• Once enacted, lesser time is needed for amendments and closing of gaps as only individual provisions need to be changed each time, leaving the remainder of the code intact; • The code-structure could be	• Initially time consuming to draft; • Requires a very complex impact assessment study; • Requires a long time to discuss and revise; • Lengthy legislative process • Minimum time for first step:	• Individual legal instruments (or amendments to existing instruments) to close gaps can be drafted in a reasonable time scale.	• In the long term, repeated necessity of gap closing legislation; • In the long term, repeated necessity of recasts; • Each time the general definitions and "boiler plate provisions" need to

	Codification in a Codex		Sectoral Approach	
	initially developed as a separate project independently of sectoral initiatives.	2-3 years, and for full integration of all previously enacted rules 10 years or more.		be repeated.
Economic consequences	• Paperwork reduction and reduced legislative effort in the long term; • Reduced legal transaction costs to Member States (administration and courts); • Increased legal certainty; • Reduced legal transaction costs for parties; • Increased legal certainty in cross-border legal interactions -> more competition and added value in European economic growth.		• Less legislative effort in the short term for closing of gaps and amendments improving current European legislation	
Additional Constraints	• Cowardice of EU legislators towards a novel approach; • Potential political bias against "too much Europe" (even if only existing legal rules are re-enacted and combined in one place)		• Current "chaos" and lack of knowledge by practitioners may become even worse with increased legislation over time; • Europe and European law are seen as intruder when it "suddenly" appears to be needed.	

8. Concluding Remarks

8.1 Estimates of the potential reductions in costs in areas covered in the Research Paper

Table 17 provides an overview of the total CoNE estimated in relation to the current gaps in EU level PIL, which amounts to approximately €138 million per annum. The approach taken to estimating the CoNE of gaps in EU level PIL has been to isolate specific costs directly associated with particular gaps. If either sectoral or codification legislative solutions were applied to reduce or eliminate these gaps, the costs would be expected, on a gap by gap basis, to reduce by similar amounts.

Table 17 - Estimated Cost of non-Europe per annum

Gap	CoNE (€ million)
Legal Capacity	7.5
Incapacity	16.8
Names and forenames	2
Recognition of de facto unions	8.7
Recognition of same-sex marriages	4.2
Parent-child relationships	19.3
Adoption decisions	1.65
Maintenance of de facto unions	13.1
Gifts and trusts	5.6
Movable and Immovable property	5.56
Agency	14
Privacy	1
Corporations	38.3
Total	**137.71**

These costs, indicated in Table 17 are, however, only the direct costs. The existence of such costs are likely to have wider impacts on individuals, families and companies, particularly small companies, considering decisions to move between Member States or to invest 'cross border'. There are of course many factors that affect such decisions, including: language; cultural differences; prices; and, access to services. However, the uncertainty resulting from the absence of EU level PIL in these areas coupled with the 'difficult to understand' differences between the laws in different Member States (for example, States imposing restrictions over child naming are likely to be considered 'odd' by EU citizens from states where no such restrictions apply) may combine to stop families taking choices they would otherwise prefer. The uncertainties about whether supposed straightforward family matters could be resolved may act as a 'tipping point' that undermines free movement. For a small company, trading in products or services geared towards young people, concerns about differences in legal capacity and uncertainties about whether difficulties, if they arose, could be resolved easily, may

well have the effect of the company deciding that cross border trading is 'not worth the potential hassle'.

Such effects undermine free movement and the operation of the internal market and thus contribute to the wider and high CoNE, reflected in the variations between Member States and higher prices than would otherwise be the case, paid by EU citizens for similar goods and services.

8.2 The advantages of codification

The main potential additional impact on reductions of costs of the codification approach lies in its potential cumulative effect. That is, codification would make it easier (and less expensive) for individuals, families and businesses considering decisions that could be affected by the absence of EU PIL in more than one area, to inform their choices. There are several ways in which this could manifest, for example:

- An individual or family might be contemplating exercising their right to free movement within the EU but are put off from doing so by the costs of legal uncertainty affecting several gaps (e.g. a family could be faced with difficulties over being in a de facto union and wishing to have freedom over how to name their offspring). Even if there were sectoral EU level PIL, as discussed above, it would not necessarily be straightforward for the couple involved to clarify how they might be affected without having several discussions with lawyers unused to such enquiries. In contrast, the codification approach would provide a single source and perhaps some assurance to the couple that there would be a logical and speedy path to reconciling any difficulties they might encounter. Thus barriers to free movement of citizens may be reduced more under the codification approach.

- A small or medium sized company might be considering operating cross border within the EU. However, its business model relies on devolving decision making and its products and services are of interest to minors. The company is put off by the combination of problems that they might encounter and the costs of reducing legal uncertainty. The CoNE in relation to the internal market fall disproportionally on SMEs who have limited experience of the law and, like consumers, lack confidence to engage in the single market due to overly complex legal procedures, legal uncertainty and differences in language. Larger enterprises with in-house legal counsel enjoy a competitive advantage in this respect, limiting the growth of some of Europe's most innovative companies, resulting in a loss in employment and EU value added. Under the sectoral approach, the costs of gaps in PIL would be reduced but the company would probably still need to seek legal advice from several sources and/or pay a premium for that advice. Although involving some initial costs, a codification of PIL would simplify exist legal procedures, providing a greater magnitude of benefits for SMEs and the EU as a whole. To achieve the full potential of the

internal market, improve understanding and simplification of legal procedures is seen as essential if smaller enterprises are to thrive and achieve their potential growth, despite what seems a high initial cost of implementation and development. Thus the codification approach would reduce further constraints on cross border trade compared with the sectoral approach because of its cumulative and comprehensive approach.

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152 OJ n. L 201, p. 107 ff.

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- Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Cross-Border Business to Consumer e-Commerce in the EU COM(2009) 557 final
- Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on "Bringing clarity to property rights for international couples" COM(2011) 125/3
- European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)
- European Union Agency for Fundamental Rights, Opinion of 31 May 2012, on the Proposal for a regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, (FRA Opinion 1/2012)
- Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions, Single Market Act II, Together for new growth, COM (2012) 573 final

Instruments at International Level

- The Hague Convention on Child Abduction (1980)
- The Hague Convention on the Protection of Children (1996)
- The Protocol on the Law applicable to Maintenance Obligations (2007)
- The Hague Convention on the International Protection of Adults of 13 January 2000

National substantive law (other than Civil Codes)

- Spanish Law on the Civil Register, 1957
- The Danish Act on Names
- Swedish Personal Names Act (1982:670)
- Belgian Law of 15th May 1987 on names and surnames
- Resolution of the Supreme Council of the Republic of Lithuania Concerning name and surname spelling in the passport of the citizen of the Republic of Lithuania, 31 January 1991
- Spanish Law 12/1992, of 27th May, on the Contract of Agency
- Latvian Regulations on Spelling and Identification of Names and Family Names August 28, 2000 (Issued according to Part 3, Article 19 of the State Language law)

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- **Belgium,** Code de Droit International Privé (Code of Private International Law) 2004
- **Bulgaria,** Private International Law Code, 2005
- **Italy,** Riforma del sistema italiano di diritto internazionale privato (Reform of the Italian system of Private International Law), 1995
- **Netherlands,** Book 10 Private International Law (Civil Code), 1992
- **Poland,** Act of 4 February 2011 Private International Law

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- Eurostat (2010) Number of citizens born in (other) EU Member States to the one they reside in
- Eurostat (2012) Population of the EU-27 minus Ireland, Slovenia and UK where naming not thought to be a problem for citizens
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- European Parliament, "Recognition of parental responsibility: biological parenthood v. legal parenthood i.e., mutual recognition of surrogacy agreements: what is the current situation in the MS. Need for a EU action?", 2010
- European Parliament, "The Citizen's right to information: Law and policy in the EU and its Member States", 2012
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- European Parliament, "The Hague Convention of the 13 January 2000 on the International Protection of Adults", 2012
- European Parliament, "Civil status documents-challenges for civil registrars to circumvent problems stemming from the legal void", 2012
- European Parliament, "Why is mediation not used more often as a means of alternative dispute resolution", 2012
- European Parliament, "The problem of under compensation of victims of cross-border road traffic accidents in the EU", 2012

- European Parliament, "Proposals for Regulation dealing with property regimes of couples", 2012
- European Parliament, "Current gaps and future perspectives in European private international law: towards a code on private international law", 2012
- European Parliament, "Fraud with respect to civil status", 2012
- European Parliament, "Cross-border implications of the legal protection of adults", 2012
- European Parliament, "Which legal basis for family law?. The way forward", 2012
- European Parliament, "Choice of Law for Cross Border Road Traffic Accidents", 2012
- European Parliament, "Regulation (EC) n. 650/2012 of July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession", 2013
- European Parliament, "Life in cross-border situations in the EU (a comparative study on civil status", 2013
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- Weil, Gotshal & Manges LLP Comparative Study Of Corporate Governance Codes Relevant to the European Union And Its Member States' elaborated by for the European Commission available at http://ec.europa.eu/internal_market/company/docs/corpgov/corp-gov-codes-rpt-part1_en.pdf

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- "Do EU citizens enjoy free movement?", Workshop on Civil Law and Justice with the participation of EU National Parliaments, European Parliament, Brussels, Wednesday 23 January 2013

ANNEX – MAPPING OF DIFFERENCES IN MEMBER STATES

Law protecting individual rights		
Topic	**Member State**	**Legislative provision**
Legal capacity of natural persons	Austria	Civil Code: A child has no active legal capacity until the age of 7 (Article 21). Children reach legal emancipation by marriage (Article 175)
	Belgium	Civil Code, Articles 476-484: persons reach legal emancipation by marriage, Art 476 para 1 CC; Judicial emancipation is reached from 15 years, Article 477 ff CC; the legal consequence of emancipation: no full legal capacity (Art 481-484 CC)
	Bulgaria	Law on Persons and Family: limited capacity is reached at the age of 14 (Article 4). Children reach legal emancipation by marriage (Art. 6 CC)
	Czech Republic	Civil Code (to be replaced in 2014): Children reach legal emancipation by marriage
	Denmark	VormG: limited capacity is reached at the age of 14 (Articles 42 and 43). Children reach legal emancipation by marriage (Art. 1)
	England and Wales	Contracts on "necessaries" will be binding to the minor cf § 3 Sale of Goods Act 1979. Other contracts may be approved by the minor after reaching full capacity or appeal, (Minors Contracts Act 1987)
	Estonia	Civil Code: limited capacity is reached at the age of 7 (Articles 11 and 12). Judicial emancipation in case of marriage from 15 year old (Article 1)
	Finland	Family Act: there are no fixed age limits to reach limited legal capacity (Article 23). Legal capacity can be reached through marriage (Article 3)
	France	Civil Code: [153] active legal capacity of a minor can be extended with the consent of their legal representative or by virtue of the law if the minor enters into marriage (Article 476). No specific age limits are given to reach limited legal capacity. A minor can reach legal capacity through a Court decision from the age of 16 (Article 477).

[153] Available at: http://www.juridicainternational.eu/?id=12621

Law protecting individual rights		
Topic	**Member State**	**Legislative provision**
		Consequences of emancipation are regulated in Articles 481 and 482. A minor with extended active legal capacity may independently enter into transactions in the same way as an adult but has not the right to be a merchant
	Germany	Civil Code: A child has no active legal capacity until the age of 7 (106, 112 and 113).
	Greece	Civil Code: A child has no active legal capacity until the age of 10. Limited legal capacity can be reached from 14 year old (Articles 135 and 136), children reach legal emancipation by marriage (Article 137)
	Ireland	Age of Majority Act 1985: children reach legal emancipation by marriage (Article 2)
	Italy	Civil Code: Legal emancipation can be reached by marriage with limited effects (Article 390 CC). minimum age to reach limited capacity is 16 (Art 84 para 2)
	Latvia	Civil Code: limited legal capacity can be reached from 16 year old (Articles 195). Children reach legal emancipation by marriage (Article 221). Courts can declare emancipation from 16 years old (Article 220 and 221)
	Lithuania	Civil Code: two different levels are identified: children under 14 year-old (Article 2.7) and those in between 14 and 18 years-old (Article 2.8). Children reach legal emancipation by marriage (Article 2.5). Courts can declare emancipation from 16 years old (Article 2.9)
	Luxembourg	Civil Code: there are no fixed age limits to reach limited legal capacity (Articles 389-3).). Children reach legal emancipation by marriage (Articles 476-481)
	Malta	Civil Code: limited legal capacity can be reached from 16 year old (Articles 156). Children reach legal emancipation by marriage
	Netherlands	Civil Code: there are no fixed age limits to reach limited legal capacity. Children reach legal emancipation by marriage and registered partnership (Article 233)
	Northern Ireland	Special rules apply to contracts of minors, Minors' Contracts [Northern Ireland] Order 1988

Law protecting individual rights		
Topic	**Member State**	**Legislative provision**
	Poland	Civil Code: limited legal capacity can be reached from 13 years-old (Articles 18-22). Children reach legal emancipation by marriage (Article 10)
	Portugal	Civil Code: Minors are always considered as not capable (Article 123 CC), but may have part of capacity in accordance with Art 127 CC. Children reach legal emancipation by marriage (Article 132,133)
	Romania	Decree 31 on natural and legal persons: limited legal capacity can be reached from 16 years-old (Article 10). Children reach legal emancipation by marriage (Article 8)
	Scotland	Age of Legal Capacity (Scotland) Act 1991: [154] the legal age of capacity is 16 and over this age individuals can provide consent to treatment. In the rest of the UK, the legal age of capacity is 18 but those over the age of 16 can provide consent to treatment.
	Slovakia	Civil Code: Children reach legal emancipation by marriage (Article 8)
	Slovenia	Marriage and Family Relations Act, Article 117: a minor has restricted legal capacity at the age of 15. If a minor is employed, they may dispose of their personal income. Active legal capacity of a minor can be extended by virtue of law if the minor enters into marriage or following the rule of the court if the minor becomes a parent. [155] Children reach legal emancipation by marriage (Article 117)
	Spain	Civil Code: emancipation can be reached through marriage (Article 314.2), approval of the parents (Article 314.3), court decision (Article 314.4 and 320), each at 16 years-old Consequences are regulated in Article 323
	Sweden	**Parenthood Act: :** limited legal capacity can be reached from 16 years-old (Articles2,3 and 5 from Chapter 9 and 12 from Chapter 6)

[154] Available at http://www.advancedpractice.scot.nhs.uk/legal-and-ethics-guidance/consent/establishing-legal-capacity-and-competence.aspx
[155] Available at: http://www.fu.uni-lj.si/mediawiki/index.php?title=Opravilna_in_poslovna_sposobnost

Law protecting individual rights		
Topic	**Member State**	**Legislative provision**
Incapacity	Denmark	A court may declare without active legal capacity a person who cannot manage and direct their affairs due to mental disability or mental illness, as well as a person who cannot manage and direct their affairs by reason of alcohol abuse.[156] Mentally ill persons should be declared as not having active legal capacity by a court
	Estonia	Code of Civil Procedure: A custodian is appointed in respect of a person who has reached the age of majority but is unable, in whole, to manage their affairs as a result of mental illness, or a physical, mental or psychological handicap (Section 256). If a person is fully incapacitated, the custodian performs its duty as if the person is a minor under fifteen years of age. However, if the person is partially incapacitated, the custodian is performing his duty as if the person is a minor over fifteen years old. Mentally ill persons are regarded due to their conditions as having restricted active legal capacity. However, restriction of active legal capacity shall only be considered as a last-resort measure.
	France	Civil Code (Articles 414 to 515): Persons with mental disorders can be placed under guardianship or judicial protection. In case they have a tutor, these persons will be considered as not having legal capacity, whereas in the remaining cases they can be deemed as having limited legal capacity.
	Germany	Civil Code: the Code makes provision for a form of protection of adults with incapacity known as legal custodianship. A custodian is appointed in respect of a person who has reached the age of majority but is unable, in whole or in part, to manage their affairs as a result of mental illness, or a physical, mental or psychological handicap (Article 1896). Mentally ill persons are regarded due to their conditions as having no active legal capacity.

[156] P. Varul, A. Avi, T. Kivisild, « Restrictions on Active Legal Capacity », Juridica International, Vol. IX 2004, pp.99-107, page 103

Law protecting individual rights		
Topic	**Member State**	**Legislative provision**
Names and forenames	Belgium	Law of 15th May 1987 on names and surnames: it is forbidden to change one's surname unless there is a very specific reason (which are restricted and listed in the law).
	Denmark	The Danish Act on Names: there is a list with the allowed names.
	Germany	Civil Code: the laws establish general requirements for registering children's names
	Latvia	Regulations on Spelling and Identification of Names and Family Names August 28, 2000 (Issued according to Part 3, Article 19 of the State Language law): all names have to be adapted to Latvian grammar rules
	Lithuania	Resolution of the Supreme Council of the Republic of Lithuania Concerning name and surname spelling in the passport of the citizen of the Republic of Lithuania, 31 January 1991: one can only be given a traditional Lithuanian name
	Slovenia	No rules on names exist
	Spain	Law on the Civil Register, 1957: the law establish general requirements for registering children's names
	Sweden	Personal Names Act (1982:670): the law establish general requirements for registering children's names
	UK	No rules on names exist

Family Law		
Topic	**Member State**	**Legislative provision**
Engagement and pre-nuptial relationships	Austria	The Hague Convention on the Law Applicable to Matrimonial Property Regimes: Pre-nuptial agreements are authorised and determines that the applicable law in case of disputes when marriage has not be concluded is that of the place of residence of the engaged couple.
	Belgium	Pre-nuptial agreements are recognised as valid
	Finland	Pre-nuptial agreements are recognised as valid
	France	The Hague Convention on the Law Applicable to Matrimonial Property Regimes: Pre-nuptial agreements are authorised and determines that the applicable law in case of disputes when marriage has not be concluded is that of the place of residence of the engaged couple. Furthermore, the legislature has enacted specific provisions concerning pre-nuptial agreements. Under French domestic law, future spouses who wish to enter into a pre-nuptial agreement must appear together before a *notaire* prior to the wedding and select one of the *regimes matrimoniaux* offered by the French Civil Code.[157]
	Germany	Pre-nuptial agreements are recognised as valid. Germany's domestic provisions expressly authorise the use of pre-nuptial agreements and statutorily regulate their validity or otherwise. An agreement must be executed in writing by both parties in the presence of a notary, although interestingly independent legal advice is not a pre-requisite for its provisions to be deemed enforceable. Once the necessary formalities are complied with, the validity of the agreement will be determined on the basis of fairness and equity in the circumstances.[158]
	Luxembourg	The Hague Convention on the Law Applicable to Matrimonial Property Regimes: Pre-nuptial agreements are authorised and determines that the applicable law in case of disputes when marriage has not be concluded is that of the place of residence of the engaged couple.

[157] Ministry for Justice, Equality and Law Reform, Ireland, Report of the Study Group on Pre-nuptial Agreements, April 2007, page 35, available at http://www.inis.gov.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf

[158] *Ibid* page 34

Family Law		
Topic	**Member State**	**Legislative provision**
	Netherlands	The Hague Convention on the Law Applicable to Matrimonial Property Regimes: Pre-nuptial agreements are authorised and determines that the applicable law in case of disputes when marriage has not be concluded is that of the place of residence of the engaged couple. Parties may enter into a pre-nuptial agreement at the time of concluding their marriage, or a post-nuptial agreement during the marriage itself, but in the latter case the approval of the courts is required.[159]
	Poland	Pre-nuptial agreements are recognised as valid
	Portugal	The Hague Convention on the Law Applicable to Matrimonial Property Regimes: Pre-nuptial agreements are authorised and determines that the applicable law in case of disputes when marriage has not be concluded is that of the place of residence of the engaged couple.
Interspousal relations	Spain	Civil Code: Art. 1301 of the Civil Code establishes that a contract can be declared void if it is concluded by one spouse without the consent of the other in the cases where this consent is necessary. The action shall be presented within four years of the dissolution of the marriage or of the time where the non consenting spouse knew about the contract.
	European Union	Interspousal relations are excluded from the Commission Proposal for a Regulation on matrimonial property rights. With regards to the marital home it has to be noticed, however, that the Commission has made a Proposal for a Regulation on Mutual Recognition of Protection Measures in Civil Matters (COM (2011) 274 final). According to Article 2 lit (a) (iv) of the Proposal a protection measure is inter alia "a decision attributing the exclusive use of the common housing of two persons to the protected person"
Establishment of contesting of	Austria	Legal parenthood of a child born to a surrogate mother is only recognised through adoption. Surrogacy is

[159] *Ibid*, page 35

Family Law		
Topic	**Member State**	**Legislative provision**
a parent-child relationship		prohibited. Motherhood is recognised at birth of the child[160]
	Belgium	Legal parenthood of a child born to a surrogate mother is only recognised through adoption. There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Bulgaria	Surrogacy is prohibited. Motherhood is recognised at birth of the child
	Cyprus	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Czech Republic	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Denmark	Legal parenthood of a child born to a surrogate mother is only recognised through adoption There is some form of legal facilitation for surrogacy .Motherhood is recognised at birth of the child
	Finland	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	France	Civil Code (Articles 310-342): paternity shall be determined by a voluntary declaration or by the possession of state. Surrogacy is prohibited. Motherhood is recognised at birth of the child.
	Germany	Civil Code (Articles 1592-1600): the married man is presumed to be the father of his wife's child. Legal parenthood of a child born to a surrogate mother is only recognised through adoption. Surrogacy is prohibited. .Motherhood is recognised at birth of the child

[160] References in this table are based on the EP study (DG for Internal Policies.), "Recognition of parental responsibility: biological parenthood v. legal parenthood i.e., mutual recognition of surrogacy agreements: what is the current situation in the MS. Need for a EU action?", 2010. Available at: http://claradoc.gpa.free.fr/doc/394.pdf ; on A. de Werd, "International Couples and Their Children", December 2013, available at http://www.gmw.nl/en/articles/international-couples-and-their-children.html; and on "The ethical case against surrogate motherhood. What can we learn from the law of other European countries. A paper prepared by the Iona Institute, available at http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf

Family Law		
Topic	**Member State**	**Legislative provision**
	Greece	Surrogacy is recognised. Motherhood is recognised at birth of the child
	Italy	Surrogacy is prohibited. Motherhood is recognised at birth of the child
	Lithuania	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Luxembourg	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Malta	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Netherlands	The Netherlands permits the listing of two fathers or two mothers on the birth register. motherhood is recognised at birth of the child. The unmarried father has parental responsibility only if the acknowledgement of the mother to paternity is given or if it is determined by a court. Legal parenthood of a child born to a surrogate mother is only recognised through adoption. There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Portugal	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Romania	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Slovakia	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Slovenia	Motherhood is recognised at birth of the child. The unmarried father has parental responsibility only if the acknowledgement of the mother to paternity is given or if it is determined by a court
	Spain	There is no specific law on surrogacy. Motherhood is recognised at birth of the child
	Sweden	Surrogacy is prohibited. Motherhood is recognised at birth of the child
	United Kingdom	The married man is presumed to be the father of his wife's child. Motherhood is recognised at birth of the

Family Law		
Topic	**Member State**	**Legislative provision**
		child. Surrogacy is recognised. Motherhood is recognised at birth of the child
Rights and obligations from parenthood (other than maintenance obligations)	European Union	These issues are covered by the Convention on the Protection of Children- 1996 (Hague Convention) which all Member States have ratified. The European Judicial Network provides information on parental responsibility on its Website.
Maintenance obligations	European Union	These issues are covered by the Maintenance Regulation n. 4/2009. Furthermore, the European Union is a contracting party of the Hague Protocol on the Law Applicable to Maintenance Obligations and of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, both from 23rd November 2007
Property rights rising out of marriage and partnership	European Union	These issues are covered by 1.2.4.10. Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127/2

De facto unions[161]	
Member State	**Legislative provision**
Austria	No rules concerning de facto unions exist
Belgium	De facto unions (two persons-regardless of their sex- living together and having a common budget) are recognised.
Bulgaria	No rules concerning de facto unions exist
Cyprus	No rules concerning de facto unions exist
Czech Republic	No rules concerning de facto unions exist, but property regimes can be established through a contract in accordance with civil law.
Denmark	No legal provisions on de facto unions exist. There are laws referring to 'marriage-like cohabitation' with some very limited effects
Estonia	No rules concerning de facto unions exist
Finland	No rules concerning de facto unions exist.
France	The Civil Code provides a definition of de facto unions since 1999 in Art. 515-8 ('concubinage').
Germany	No rules concerning de facto unions exist
Greece	Adults of different gender can, if they fulfil the requirements of the legislation, draw up a 'de facto union contract' at a notary. The property can also be regulated in the contract or by the default law
Hungary	Rules on de facto unions exist. From a family law perspective, the legislation does not have any implications. However, partners of a de facto union can during the time they live together acquire common property, which should be divided upon the dissolution of the union.
Ireland	No rules concerning de facto unions exist.
Italy	No rules concerning de facto unions exist at national level, although registered cohabitation for same and different sex partners is offered in some regions, with very few legal consequences
Latvia	No specific rules concerning de facto unions exist. Other legislation is used in individual cases.
Lithuania	The partners can register their union after one year leading to a property regime similar to that of marriage
Luxembourg	No rules concerning de facto unions exist
Malta	No rules concerning de facto unions exist.
Netherlands	No rules concerning de facto unions exist
Poland	No rules concerning de facto unions exist
Portugal	De facto unions are possible both for same-sex and heterosexual couples. However, no legal provisions on property exist
Romania	No rules concerning de facto unions exist.
Slovakia	No rules concerning de facto unions exist.

[161] Sourced from ICF GHK Impact Assessment on Matrimonial Property

De facto unions[161]	
Member State	**Legislative provision**
Slovenia	A long-lasting de facto union between a man and a woman have the same legal effects as a marriage.
Spain *Legislation varies between different Spanish regions*	No rules concerning de facto unions exist at the national level. There are, however, rules in the Autonomous Communities
Sweden	"Sambos" (two persons-regardless of their sex- living together and having a common budget) are recognised.
United Kingdom (England Scotland and Wales) Information for Northern Ireland to be identified *Matrimonial property regimes do not exist in classical terms*	*England and Wales* No specific rules concerning de facto unions exist. Scotland Rules on cohabitation exist in Scotland. In order for these rules to be applicable, the partners need to live together 'as spouses'. Rules on property are established

Same-sex marriages and registered partnerships in the Member States[162]		
Member State	**Same-sex marriage**	**Registered partnerships**
Austria	Marriage for same-sex couples does not exist.	Registered partnerships exist.
Belgium	Same-sex marriages are officially recognised	Registered partnerships exist.
Bulgaria	Marriage for same-sex couples does not exist.	Registered partnerships do not exist.
Cyprus	Marriage for same-sex couples does not exist.	Registered partnerships do not exist.
Czech Republic	Marriage for same-sex couples does not exist.	Registered partnerships exist.
Denmark	The Law allowing same sex marriages entered into force on 15 June 2012	Registered partnerships exist with almost the same rights than marriages.
Estonia	Marriage for same-sex couples does not exist.	Registered partnerships do not exist.
Finland	Marriage for same-sex couples does not exist.	Registered partnerships exist with almost the same rights than marriages.
France	The Law opening the marriage to couples of the same sex, which has been approved but is not yet into force, recognises same sex marriages.	Registered partnerships exist (PACS). The parties to a PACS generally do not have the same rights and obligations as spouses.
Germany	Marriage for same-sex couples does not exist.	Registered partnerships exist.
Greece	Marriage for same-sex couples does not exist.	Registered partnerships do not exist.
Hungary	Marriage for same-sex couples does not exist.	Registered partnerships exist with almost the same rights than marriages.
Ireland	Marriage for same-sex couples does not exist.	Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: recognises same-sex couples but calls them "civil" and not "registered" partnerships
Italy	Marriage for same-sex couples	Registered partnerships do not

[162] Sourced from ICF GHK Impact Assessment on Matrimonial Property

Same-sex marriages and registered partnerships in the Member States[162]		
Member State	**Same-sex marriage**	**Registered partnerships**
	does not exist.	exist at federal level, but in some regions.
Latvia	Marriage for same-sex couples does not exist.	Registered partnerships do not exist.
Lithuania	Marriage for same-sex couples does not exist.	Registered partnerships do not exist.
Luxembourg	Marriage for same-sex couples does not exist.	Registered partnerships (for both same-sex and heterosexual couples) exist but only for persons who live in Luxembourg
Malta	Marriage for same-sex couples does not exist.	Registered partnerships do not exist.
Netherlands	Law 21.12.2000, Stb. 2001, 9: Same-sex marriages are officially recognised	Registered partnerships exist with the same property regime than marriages.
Poland	Marriage for same-sex couples does not exist.	Registered partnerships do not exist.