

1. The impact of the European Union and the European Court of Justice on European family law*

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1. INTRODUCTION

In past literature, European family law was referred to as 'Cinderella' on account of its apparent neglect in comparison to the attention given to other fields of European private law.¹ Yet, at present, European family

* This chapter generally reflects the state of the law on 1 January 2014.

¹ See, eg, Masha Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective* (Intersentia 2006) 3–5. This has also been noted with respect to the field of succession law, which often accompanies the discussion of family law in the European context: see, eg, Antoni Vaquer, 'The Law of Successions' in Mauro Bussani and Franz Werro (eds), *European Private Law: A Handbook* (Vol 1, Bruylant/Sellier 2009) 555, 555–6. This may also arise in

law could more aptly be called ‘Sleeping Beauty’, now awakened in full splendour amidst a flurry of initiatives, measures and case law at the European level, not to mention the ongoing scholarly research devoted to this topic that also incorporates events taking place at the national and international levels. Indeed, the extent of recent developments concerning matters related to family law in the European Union (EU), including the entry into force of the Lisbon Treaty, the increasing volume of legislation within the rubric of the Area of Freedom, Security and Justice (AFSJ) and the evolving jurisprudence of the Union courts in various domains, makes the time particularly ripe for renewed reflection on the role of the EU through its various institutions and bodies,² particularly that of the European Court of Justice (ECJ or the ‘Court’),³ in this context.

The objective of this chapter is therefore to examine the impact of the EU and the ECJ on European family law in light of recent institutional and jurisprudential developments. This will be done in three main parts. In the first of these, Part 2, the field of family law will be situated within the European context in order to clarify the meaning and scope of European family law in relation to the EU. In Part 3, the impact of the EU on European family law will be explored with regard to both the internal and external aspects of the Union institutions’ competence in family law. In Part 4, the impact of the ECJ on European family law will be considered, with particular regard to salient case law illustrating its role in family law through its interpretation of Union law and its formulation of judge-made rules of Union law by virtue of what is known as European ‘federal common law’.

other contexts besides European family law, for instance in connection with American family law: see, eg, Sylvia Law, ‘Families and Federalism’ (2000) 4 *Washington University Journal of Law and Policy* 175, 177 (acknowledging that in contrast to constitutional law, ‘family law is Cinderella’s stepsister’). For further discussion of topical issues in American family law, see n 176.

² For detailed background on the ‘official’ institutions of the Union as listed in the second para of article 13(1) of the TEU (including, inter alia, the European Parliament, the Council and the Commission), as well as the various bodies of the Union, see Koen Lenaerts and Piet Van Nuffel, *European Union Law* (3rd edn, Robert Bray and Nathan Cambien (eds), Sweet & Maxwell 2011) ch 13.

³ Under the first para of article 19(1) of the TEU, the institution of the Court of Justice of the EU encompasses the Court of Justice, the General Court and specialized courts (at present, the EU Civil Service Tribunal (‘Civil Service Tribunal’)). For reasons of clarity, this chapter refers to the Court of Justice as the European Court of Justice (ECJ or the ‘Court’) in the sense of the highest court of this institution.

The analysis presented here does not claim to be comprehensive or exhaustive. As discussed in the next section, the breadth of European family law is immense, taking account of the various sources of family law at the national, European and international levels as well as the extent of Union measures and case law of the Union courts touching on this subject just within the EU context.⁴ In fact, this may explain why publications concerning EU activities and ECJ case law in family law typically deal with selective topics or discuss the role of the ECJ in tandem with that of the European Court of Human Rights in this setting.⁵ Consequently, this chapter merely intends to highlight the key features of the EU's legislative and judicial activities in European family law, while not discounting the importance of other factors that may be relevant in the study of family law in the European arena.

2. FAMILY LAW IN A EUROPEAN CONTEXT

2.1 Nature of European Family Law

In a recent proposal, the Commission offered a definition of family law, namely that it is meant to 'govern above all the legal relationships linked to marriage and partnerships, filiation and the civil status of persons'.⁶

⁴ See Part 2 below.

⁵ See, eg, Clare McGlynn, 'Challenging The European Harmonisation of Family Law: Perspectives on "the Family"', in Katharina Boelki-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) 219; Helen Stalford, 'EU Family Law: A Human Rights Perspective', in Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen (eds), *International Family Law for the European Union* (Intersentia 2007) 101; Torsten Stein, 'The Notion of the Term Family on European Level with a Focus on the Case Law of the European Court of Human Rights and the European Court of Justice', in Alain-Laurent Verbeke, Jens M. Scherpe, Charlotte Declerck, Tobias Helms and Patrick Senaevé (eds), *Confronting the Frontiers of Family Law and Succession Law – Liber Amicorum Walter Pintens* (Intersentia 2012) 1375; Bea Verschraegen, 'The Right to Private and Family Life, The Right to Marry and to Found a Family, and the Prohibition of Discrimination', in Katharina Boelki-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe – National, Cross-Border and European Perspectives* (fully rev 2nd edn, Intersentia 2012) 255.

⁶ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM (2009) 154 final, 14.10.2009, point 3.1, second

This is certainly an accurate description, and as illustrated by the scholarly literature, European family law comprises various matters commonly grouped under the headings of matrimonial matters and issues relating to the parent-child relationship, such as the formation of marriage, divorce, marital property, non-marital cohabitation, registered partnerships and other types of partnerships applicable to same-sex and/or opposite sex couples, parental responsibility and the custody, birth and adoption of children.⁷

Even so, at present, there appears to be no standard, universal definition of European family law in the scholarly literature and documents issued at the European level. Similarly to other fields of European private law,⁸ European family law may essentially be viewed in broad or narrow terms.⁹ On the one hand, broadly speaking, European family law

para. 3. Notably, the Commission did so in the context of distinguishing the aim of family law from that of succession law, with a view to arguing that in light of the autonomy between these two branches of civil law, the exception under what is now article 81(3) of the TFEU, requiring a special legislative procedure with unanimity in the Council and consultation of the European Parliament, did not apply and hence the ordinary legislative procedure stipulated under article 81(2) of the TFEU should be applied. This was taken up in the adoption of this measure as Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 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 [2012] OJ L201/107. See further n 49.

⁷ See, eg, Katharina Boele-Woelki, 'Cross-Border Family Relations in Europe: Towards a Common European Matrimonial Property Law Based Upon Cooperation Between Private International Law and Substantive Law', in Anne LM Keirse and Marco BM Loos (eds), *Alternative Ways to Ius Commune – The Europeanisation of Private Law* (Intersentia 2012) 33, 33; Dieter Martiny, 'Is Unification of Family Law Feasible Or Even Desirable?' in Arthur S Hartkamp, Martijn W Hesselink, Ewoud H Hondius, Chantal Mak and C. Edgar du Perron (eds), *Towards a European Civil Code* (4th rev and expanded edn, Kluwer 2011) 429, 443–9. Certainly, other matters may be included, such as the law of the elderly: see eg Jonathan Herring, 'Family Law and Older People in a European Perspective', in Jens M. Scherpe (ed), *European Family Law Vol. III: Family Law in a European Perspective*.

⁸ This should not be interpreted as discounting the discussion in the literature as regards the classification of family law as purely 'private law' and the extent to which political and institutional factors play a role: see, eg, David Bradley, 'Family Law', in Jan M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 314.

⁹ See Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (OUP 2014), ch 1.

may be considered to comprise various sources emanating from the international, European and national levels. Some of these main sources include:

- (1) *international instruments* adopted by private and public bodies, such as the United Nations and the Hague Conference on Private International Law;¹⁰
- (2) *primary and secondary Union law*, such as relevant provisions of the Treaties, the Charter of Fundamental Rights of the EU ('Charter') and a wide variety of Union measures adopted by the Union institutions and bodies pursuant to such Treaty provisions;
- (3) *other (extra-EU) European instruments* adopted outside the EU but linked thereto, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) adopted under the auspices of the Council of Europe to which all member states are (and in the near future the EU will itself be)¹¹ parties;¹²
- (4) *national rules and principles* stemming from the legal systems of the member states (and possibly third States); and
- (5) *comparative materials*, often embodying efforts to formulate common rules and principles underpinning the laws of the member states (and possibly third States) on issues of family law, ranging from works of individual jurists to those of academic projects, such as the Commission on European Family Law.¹³

On the other hand, more narrowly, European family law may be used to spotlight the measures, initiatives and other activities of the EU as listed in the second point above. This may be equated with the term, 'EU family law', which has been advanced by scholars in the discussion of

¹⁰ See Hannah Baker and Maja Groff, 'The impact of the Hague Conventions on European family law', chapter 5 in this volume.

¹¹ TEU, article 6(2).

¹² See Dagmar Coester-Waltjen, 'The impact of the European Convention on Human Rights and the European Court of Human Rights on European family law' and Nigel Lowe, 'The impact of the Council of Europe on European family law', chapters 2 and 3 respectively in this volume.

¹³ See Katharina Boele-Woelki, 'The impact of the Commission on European Family Law (CEFL) on European family law', chapter 6 in this volume. That being said, the comparability of family law and issues relating to the purported 'national' or 'cultural' character of family law are heavily debated in the literature: for a summary of the various arguments, see Bradley (n 8) 314.

the emergence and development of the EU's role in family law.¹⁴ As a result, it is important to recognize the interaction of the international, European and national sources in the dynamics surrounding European family law, and that even focusing on the EU's activities in family law must necessarily take into account these other sources.

2.2 Scope of European Family Law

In light of the various sources feeding into the definition of European family law, it is difficult to pin down its scope. Within the EU sphere alone, the breadth of European family law is extensive and continues to grow on account of its intersection with so many areas of EU law. These include, for example, social policy, free movement law, Union citizenship, discrimination, fundamental rights, the AFSJ with special regard to the field of judicial cooperation in civil matters and the discourse on European private law. As will be seen, much of the EU's key activities and the ECJ's noteworthy case law in family law emanate from these main areas.

As illustrated by the foregoing list, European family law comprises matters that fall within the domains of both public ('constitutional' or institutional) law and private law in the EU setting. With respect to the former, it is remarkable the extent to which European family law is a constitutional topic *par excellence*,¹⁵ taking into account its linkage to the subjects of Union citizenship, discrimination and fundamental rights, as well as to recent institutional developments that are of 'constitutional' importance to the EU, such as the recourse to enhanced cooperation for the first time in connection with the 'Rome III Regulation' on divorce,¹⁶ or that beg important 'constitutional' questions for the functioning of the

¹⁴ See, eg, Clare McGlynn, *Families and the European Union – Law, Politics and Pluralism* (CUP 2006) 152 et seq.; Stalford (n 5) 101; Eugenia Caracciolo di Torella and Annick Masselot, 'Under Construction: EU Family Law' (2004) 29 ELR 32; and as regards the former (pre-Lisbon) Treaty framework, see also, eg, Peter McEleavy, 'First Steps in the Communautarisation of Family Law: Too Much Haste, Too Little Reflection', in *Perspectives for the Unification and Harmonisation of Family Law in Europe* (n 5) 509, 510 (referring to 'A European Community Family Law').

¹⁵ In fact, scholars have coined the term 'European constitutional family law' to spotlight the subset of the Union's activities in family law related to the Charter: see, eg, Walter LJ Pintens, *Naar een Ius Commune in het Europees Familie- en Erfrecht?/Towards a Ius Commune in European Family and Succession Law?* (Intersentia 2012) 52 and citations therein; Martiny (n 7) 435.

¹⁶ See nn 64–66 and accompanying text.

EU, such as those concerning the division of competence between the Union and the member states to conclude international agreements or take other actions in international fora.¹⁷

With respect to the latter, it may not be surprising, given that family law is generally considered a specific field of private law,¹⁸ that there exists an increasing volume of scholarship on the unification or harmonisation¹⁹ of family law in the EU. This scholarship parallels, and is inextricably intertwined with,²⁰ the more general debate on European private law,²¹ in terms of, for instance, whether such unification or harmonisation is needed, its feasibility, the methods for bringing it about, the role of academic groups, the methodology and drafting of common rules and principles, and the extent of the Union's competence to take far-reaching action in substantive family law.²² This debate is presently centred for the most part on the field of contract law at the European level,²³ and in the recent activities taking place in this setting, such as the

¹⁷ See Part 3.3 below.

¹⁸ See, eg, Guido Alpa, *Markets and Comparative Law* (British Institute of International and Comparative Law 2010) 164; also referred to as 'civil law': see, eg, Ewoud Hondius, 'Towards a European Civil Code', in *Towards a European Civil Code* (n 7) 3, 7.

¹⁹ The distinction drawn by commentators between unification and harmonisation in the EU context generally relates to the intensity or extent of the process of eliminating differences in national laws and the resulting leeway afforded to the Member States. See further, eg, Katharina Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflicts of Law* (Hague Academy of International Law 2010) 298–300; Gutman (n 9) ch 1; Eva J. Lohse, 'The Meaning of Harmonisation in the Context of European Union law – A Process in Need of Definition', in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011) 282, 309–13.

²⁰ See, eg, the Council's 2001 Report on the need to approximate Member States' legislation in civil matters (DOC 13017 LIMITE JUSTCIV 129, dated 29 October 2001), which contained its response to the Commission's seminal 2001 Communication on European contract law (Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, 11.7.2001), as well as specific discussion of the field of family law.

²¹ See, eg, Reinhard Zimmerman, 'The Present State of European Private Law' (2009) 57 AJCL 479; citations in nn 1, 8 and 18.

²² See, eg, Martiny (n 7); the various contributions in *Perspectives for the Unification and Harmonisation of Family Law in Europe* (n 3).

²³ For detailed discussion, see, eg, Gutman (n 9) chs 4–6.

Draft Common Frame of Reference²⁴ and the proposal for a Regulation on a Common European Sales Law,²⁵ family law has been left out. Yet, questions remain about the linkage of family law to other fields of private law, which may need to be confronted as this debate continues.²⁶

The bottom line is that the study of family law in the EU is not neatly confined to one field of activity, but in fact traverses a wide range of subjects, each of which is in a constant state of legislative and jurisprudential development. This in turn filters into the analysis of the impact of the EU and the ECJ on European family law in the sections that follow.

3. IMPACT OF THE EU ON EUROPEAN FAMILY LAW

3.1 Overview of the Union's Competence in Family Law

As repeatedly emphasised by the Union institutions over the years, in principle the Union has no competence over family law, which instead falls within the competences of the member states.²⁷ In other words, as

²⁴ Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (Full edn, Sellier 2009/OUP 2010), particularly the Introduction, point 29.

²⁵ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final, 11.10.2011; see also the accompanying Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market, COM (2011) 636 final, 11.10.2011.

²⁶ See, eg, Masha Antokolskaia, 'The Harmonisation of Family Law: Old and New Dilemmas' (2003) 11 ERPL 28, 47; Martiny (n 7) 442.

²⁷ For instance, as regards the *Commission*, see, eg, Written Question No. 1099/96 by Nel van Dijk and Claudia Roth to the Commission – Ban on marriages between two persons of the same sex and European legislation [1996] OJ C280/117; Written Question No 1285 by Per Gahrton to the Commission – French ban on homosexual weddings at the Swedish Embassy in Paris [1996] OJ C280/122; Written Question – Impact of restrictive definitions of 'family' on EC law – E-000495/2012, accessed at <http://www.europarl.europa.eu>; as regards the *Court of Justice of the EU*, see, eg, the judgments in *Johannes*, C-430/97, EU:C:1999:293, para 18; and *Römer*, C-147/08, EU:C:2011:286, para 38. Similar statements may also be found in the Opinions of the Advocates General: see, eg, the Opinions of Advocate General Ruiz-Jarabo Colomer in *Maruko*, C-267/06, EU:C:2007:486, point 77; and Advocate General Jääskinen in *Römer*, C-147/08, EU:C:2010:425, points 75–76.

matters stand now, there are no legal bases in the Treaties governing the EU allowing the Union institutions to adopt measures concerning substantive family law.²⁸ In practice, however, this has not prevented the Union from acting in matters of family law pursuant to the competences that have been conferred on it under the Treaties. As a result, the Union has had an impact on family law indirectly in various areas, which has evolved with successive Treaty amendments.²⁹

One of the EU's first major forays into family law concerned the field of free movement law, starting as early as 1968 with the adoption of Regulation 1612/68,³⁰ as part of carrying out the EU's economic objectives.³¹ As explained by one commentator, 'although the first aim of the [then] EEC in adopting these measures was to facilitate the free movement of workers by granting rights to their families, in doing so, it entered controversial terrain regarding the legitimacy of particular family forms and the favouring of some individuals over others'.³² This has continued with other areas linked to free movement law, such as Union citizenship and Union policies on asylum and immigration, as illustrated by Directive 2004/38³³ consolidating the rights of free movement and

²⁸ Since the 1980s, various documents have been circulated by the institutions concerning the development of a so-called 'family policy' for what was then the European Community [now Union]. While the aspirations outlined in some of these documents have a bearing on the approach taken to family issues at the European level, its development has largely been concerned with demographic changes taking place in the Member States and thus associated with the EU's free movement and immigration objectives, as opposed to constituting an agenda for EU law-making policy in substantive family law. See further McGlynn (n 14) 153–5.

²⁹ See, eg, Martiny (n 7) 435; Marie-Thérèse Meulders-Klein, 'Towards a Uniform European Family Law? A Political Approach – General Conclusions', in Masha Antokolskaia (ed), *Convergence and Divergence of Family Law in Europe* (Intersentia 2003) 271, 274.

³⁰ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L25/7, now repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

³¹ See, eg, McGlynn (n 14) 119; Stalford (n 5) 107.

³² Clare McGlynn, 'The Europeanisation of Family Law' (2001) 13 *Child and Family Law Quarterly* 35, 36.

³³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/

residence for Union citizens and by Directive 2003/86³⁴ on family reunification, both of which touch on issues of family law as part of setting down rules on the status of persons entitled to receive benefits accorded by the measure concerned.³⁵

The EU's activities bearing on family law have certainly not been limited to the achievement of its economic objectives. For example, in the field of social policy, the Council adopted the so-called 'Pregnancy Directive'³⁶ in order to improve the health and safety of pregnant workers, thereby regulating matters ranging from unfair dismissal to maternity leave. Another important area of EU action touching on family law relates to its efforts to combat discrimination in accordance with the relevant rules set forth in primary and secondary Union law. In particular, this includes the Union legislature's adoption of measures under what is now article 19(1) of the TFEU³⁷ to combat various forms of discrimination, including that based on sexual orientation. This is exemplified by Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation,³⁸ which plays a pre-eminent role in helping to ensure equal treatment for individuals in same-sex registered partnerships.³⁹

At the same time, the fact that competence over family law lies primarily with the member states does not exempt them from compliance with their obligations under Union law, regardless of whether the

EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

³⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

³⁵ With particular regard to the treatment (or lack thereof) of same-sex relationships: see, eg, McGlynn (n 14) 127–36; Mark Bell, 'Holding Back the Tide? Cross-border Recognition of Same-Sex Partnerships within the European Union' (2004) 12 ERPL 613; Helen Toner, 'Migration Rights and Same-Sex Couples in EU Law: A Case Study', in *Legal Recognition of Same-Sex Relationships in Europe* (n 5) 285, 286–9.

³⁶ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of article 16(1) of Directive 89/391/EEC) [1992] OJ L348/1, adopted under the former article 118a of the EEC Treaty [now article 154 of the TFEU].

³⁷ See also articles 2 and 3(3) of the TEU.

³⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³⁹ See Part 4.2 below.

particular rule falls within this reserved area ('*domaine réservé*').⁴⁰ For instance, as illustrated in the next part, a particular national rule may violate the EU rules on Union citizenship and equal treatment. In fact, this issue is destined to take on increasing significance in the area of fundamental rights especially in light of several provisions of the Charter, now having the status of primary Union law with the entry into force of the Lisbon Treaty,⁴¹ which are relevant to the regulation of matters of family law. Among others, article 7 on the respect for private and family life, article 9 on the right to marry and found a family and article 21's proclamation against discrimination on any ground including sexual orientation figure prominently in the discussion of same-sex marriage and other non-marital relationships.⁴² Moreover, article 24 on the rights of the child dovetails with new provisions introduced by the Lisbon Treaty proclaiming the protection of the rights of the child as part of the Union's objectives enshrined in article 3 of the TEU.⁴³ As is well known, the Charter applies to the member states 'only when they are implementing Union law'.⁴⁴ Likewise, it does not extend the field of application of Union law or the Union's competences beyond what is set down in the Treaties.⁴⁵ Nevertheless, important issues bearing on family law may arise within the context of the EU's regime of the protection of fundamental rights.⁴⁶

⁴⁰ See, eg, the judgment in *Hubbard*, C-20/92, EU:C:1993:280, paras 18–20 (concerning the law of succession); and the accompanying Opinion of Advocate General Darmon, EU:C:1993:96, points 36–40; see also the Opinions of Advocate General Ruiz-Jarabo Colomer in *Maruko* (n 27), point 77 and citations therein; and Advocate General Jääskinen in *Römer* (n 27), point 77. See also Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *AJCL* 205, 220; Toner (n 35) 308.

⁴¹ TEU, article 6(1).

⁴² See, eg the Opinions of Advocate General Mischo in *D and Sweden v Council*, C-122/99 P and C-125/99 P, EU:C:2001:113, point 97 on article 9 of the Charter; and Advocate General Ruiz-Jarabo Colomer in *Maruko* (n 27), point 78 on article 21 of the Charter.

⁴³ For the first time, article 3(3) of the TEU tasks the Union to 'promote ... protection of the rights of the child'. See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An EU Agenda for the Rights of the Child, COM (2011) 60, 15.2.2011, which places emphasis on the fundamental rights aspect, among other things.

⁴⁴ Charter, article 51(1). See in this regard the judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paras 18–19.

⁴⁵ TEU, article 6(1), second para; and Charter, article 51(2).

⁴⁶ See Part 4 below.

In truth, as with attempts to pinpoint the scope of European family law in the EU context, there are numerous areas of EU law in which the Union institutions (and conceivably Union bodies, offices and agencies) may adopt measures or take other sorts of actions that affect family law matters indirectly as part of carrying out the competences conferred on them under the Treaties, or conversely, which may implicate such matters as part of ensuring the member states' compliance with their obligations under Union law. Still, the emergence and development of the Area of Freedom, Security and Justice has been a significant catalyst for propelling Union action further into the family law domain.

3.2 Impetus of the Area of Freedom, Security and Justice

With the amendments brought by the Nice Treaty, the first time – and only time to date – that the term ‘family law’ is expressly mentioned in the Treaties concerns the Union’s competence to act in the field of judicial cooperation in civil matters (JCCM), which is part of the Union’s overarching objectives concerning the establishment of the Area of Freedom, Security and Justice (AFSJ). Under article 81 of the TFEU, the Union is tasked with developing judicial cooperation in civil matters through measures adopted by the European Parliament and the Council, in accordance with the ordinary legislative procedure⁴⁷ aimed at ensuring, *inter alia*, the mutual recognition and enforcement of judgments, the compatibility of national rules concerning the conflict of laws and jurisdiction, and the elimination of obstacles to the proper functioning of civil proceedings.⁴⁸ However, by way of exception, article 81(3) of the TFEU provides that ‘measures concerning *family law* with cross-border implications’ require the use of a special legislative procedure: unanimous voting in the Council and consultation of the European Parliament.⁴⁹ The fact that the sole reference to ‘family law’ appears in the

⁴⁷ See articles 289(1) and 294 of the TFEU.

⁴⁸ See article 81(1)–(2) of the TFEU.

⁴⁹ Article 81(3), first para (emphasis added) of the TFEU. However, the Council may adopt a decision, on a proposal of the Commission, to determine ‘those aspects of family law with cross-border implications’ which may be the subject of acts adopted by the ordinary legislative procedure, provided that there is no opposition from a national Parliament: see article 81(3), second and third paras, of the TFEU. The scope of the ‘family law’ exception – which has not yet been the subject of any judgments of the Court of Justice of the EU – has arisen in respect of several proposals in this context. See, eg, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 final,

specific chapter devoted to the JCCM is telling. This is because it has been the achievement of the Union's objectives related to the JCCM, and more generally the AFSJ, which have led to the promulgation of a steady stream of Union measures dealing with the private international law aspects of family law. The fact that family law is carved out for 'special' treatment in the EU decision-making process also signals the sensitivities that this topic engenders.

The first measure concerning family law to be adopted in the field of JCCM was the 'Brussels II Regulation'⁵⁰ on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses,⁵¹ which was later replaced by the 'Brussels II *bis* Regulation'.⁵² It was also one of the measures in the JCCM that had formerly taken the form of a convention, but was converted into what was then a Community instrument as part of the transfer of certain matters from the former EU Treaty to Title IV of the EC Treaty with the entry into force of the Amsterdam Treaty and thus jumpstarted the work of the then Community, now Union, to achieve its objectives to create an AFSJ.

With the entry into force of the Lisbon Treaty, the former provisions concerning the AFSJ spread across Title IV of the EC Treaty (visas,

16.3.2011, point 3.1, 4; 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 final, 16.3.2011, point 3.1, 4; see also n 6 above; Communication – Bringing legal clarity to property rights for international couples COM(2011) 125 final, 16.3.2011, point 6.3, third para, 8; Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005) 649 final, 15.12.2005, point 3.1, sixth–seventh paras, 7.

⁵⁰ Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/19 ('Brussels II Regulation'). For background, see the Commission's proposal, COM (1999) 220 final, 04.05.1999, points 1–2, 3–4.

⁵¹ See, eg, Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM (2006) 399 final, 17.7.2006, point 1, fifth para, 2.

⁵² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1 ('Brussels II *bis* Regulation'). For background, see the Commission's proposal, COM (2002) 222 final/2, 17.5.2002, point 1, 2–4.

asylum, immigration and other policies related to free movement of persons) and Title VI of the EU Treaty (Police and Judicial Cooperation in Criminal Matters) have been consolidated in Title V of the TFEU devoted to the AFSJ.⁵³ Its general provisions delineate the Union's objectives to be achieved following from the overarching aim set forth in article 3(2) of the TEU to offer 'its citizens an area of freedom, security and justice without internal frontiers in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.⁵⁴

In tandem with the Amsterdam Treaty's introduction of the AFSJ into the Treaty framework, considerable momentum for Union action in this setting has stemmed from the European Council's three seminal Tampere,⁵⁵ Hague⁵⁶ and Stockholm⁵⁷ Programmes, which have outlined the work to be achieved in the AFSJ for successive five-year periods.⁵⁸ These three Programmes, in combination with documents issued by the other Union institutions to put the Union's AFSJ objectives into effect,⁵⁹ set in train many Union initiatives regulating the private international law aspects of family law within the rubric of the Union's development of the field of JCCM.

⁵³ Title V of Part Three of the TFEU on the AFSJ contains five chapters concerning: (1) general provisions (articles 67–75 of the TFEU); (2) policies on border checks, asylum and immigration (articles 77–80 of the TFEU); (3) judicial cooperation in civil matters (article 81 of the TFEU); (4) judicial cooperation in criminal matters (articles 82–86 of the TFEU); and (5) police cooperation (articles 87–89 of the TFEU).

⁵⁴ See, in particular, article 67 of the TFEU. That being said, it should be noted that not all aspects of this area have been 'mainstreamed', eg, there are still special arrangements with respect to the participation of the UK, Ireland and Denmark in Union measures adopted in the AFSJ: see generally Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) para 2.2.3 et seq.

⁵⁵ Presidency Conclusions, Tampere European Council, 15–16 October 1999, point 34.

⁵⁶ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1, points 3.4.1 and 3.4.2, fourth para.

⁵⁷ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, point 3.1.2, second para.

⁵⁸ This practice is now codified in article 68 of the TFEU.

⁵⁹ See, eg, Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice [1999] OJ C19/1 ('Vienna Action Plan').

In addition to the Brussels II *bis* Regulation,⁶⁰ two key Union measures concerning family law⁶¹ have been adopted so far. The first, Regulation No 4/2009,⁶² regulates the private international law aspects (jurisdiction, applicable law, recognition and enforcement of judgments) of maintenance obligations. The second, Regulation No 1259/2010 ('Rome III Regulation'),⁶³ lays down rules on the applicable law in divorce and legal separation. Famously, it constitutes the first time⁶⁴ that the Union has made recourse to the mechanism of enhanced cooperation, thereby involving the participation of about half of the member states at present.⁶⁵ There are also several measures on the

⁶⁰ Brussels II *bis* Regulation (n 52).

⁶¹ The Union has also adopted the first measure dealing with the private international law aspects of succession, although as framed in the proposal, it is considered distinct from family law and thus does not require recourse to the special legislative procedure: see n 6.

⁶² Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1. For background, see Proposal, n 49, point 1.1, 2–3.

⁶³ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10 ('Rome III Regulation'). It only deals with applicable law and thus does not cover jurisdiction, in contrast to the broader proposal submitted by the Commission: see Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 (n 51).

⁶⁴ There has since been additional instances in which enhanced cooperation has been authorised: see Council Decision 2011/67/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection [2011] OJ L76/53; Council Decision 2013/52/EU of 22 Jan 2013 authorising enhanced cooperation in the area of financial transaction tax [2013] OJ L22/11.

⁶⁵ Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L189/12. As indicated in this Decision, 14 Member States decided to take part in the Rome III Regulation; Lithuania joined thereafter: see Commission Decision 2012/714/EU of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation [2012] OJ L323/18. For detailed discussion, see, eg, Katharina Boele-Woelki, 'For Better or For Worse: The Europeanization of International Divorce Law' (2010) 12 YPIL 1; Jan-Jaap Kuipers, 'The Law Applicable to Divorce as Test Ground for Enhanced Cooperation' (2012) 18 ELJ 201; Steve Peers, 'Divorce, European-Style: The First Authorization of Enhanced Cooperation' (2010) 6 *European Constitutional Law Review* 339.

horizon,⁶⁶ including a package of two proposals dealing with issues of private international law relating to matrimonial property and the property consequences of registered partnerships,⁶⁷ as well as possible future proposals dealing with the free movement and recognition of civil status records.⁶⁸

It is consistently stressed in these initiatives that the Union has no competence to act in substantive family law,⁶⁹ and there are specific provisions that make clear that substantive matters are excluded from the scope of the Union measure concerned.⁷⁰ Already in the Hague Programme, the European Council cautioned: ‘Such instruments should cover matters of private international law and should not be based on harmonised concepts of “family”, “marriage”, or other’.⁷¹ This dovetails with admonitions in certain provisions of the Treaties and other institutional documents on the AFSJ that the different legal systems and traditions of the member states should be respected.⁷² Indeed, it should be remembered that the EU’s activities in family law as part of the JCCM are not aimed at regulating family law for its own sake, but rather at achieving the Union’s objectives set out in the Treaties concerning the JCCM and the AFSJ. Following from these objectives, a common thread running through the various Union initiatives thus far is the Union’s aim to help resolve practical and legal difficulties encountered by its citizens by virtue of their mobility across borders and the resulting differences in

⁶⁶ For discussion of the content of these aforementioned measures, see Dieter Martiny, ‘The impact of the EU private international law instruments on European family law’, chapter 7 in this volume.

⁶⁷ See n 49.

⁶⁸ See Green Paper – Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM (2010) 747 final, 14.12.2010.

⁶⁹ See, eg, Communication – Bringing legal clarity to property rights for international couples (n 49), point 4, sixth para, second indent, 5 and point 7, third para, 9; Green Paper on civil status records (n 68), point 4.3, second para, 12.

⁷⁰ See, eg, recital 10 and article 1(2) of Regulation No 1259/2010 (n 63); recital 21 and article 22 of Regulation No 4/2009 (n 62); recitals 8 and 10 and article 1(3) of the Brussels II *bis* Regulation (n 52).

⁷¹ Hague Programme (n 56), point 3.4.2, fifth para.

⁷² TFEU, article 67(1); see also, eg, Stockholm Programme (n 57), point 3.1.2, second para.

treatment in the legal systems of the member states so as to establish an area of 'justice' that will help them in their everyday lives.⁷³

Nevertheless, the EU's activities concerning family law in the JCCM, even if only limited to private international law aspects of family law in cross-border situations, beg questions about the interplay with substantive family law and the extent of Union competence under article 81 of the TFEU.⁷⁴ In short, Union action in this context is apt to generate suspicion that it may potentially serve as a 'back door' into substantive family law, thereby encroaching on the competences of the member states. Moreover, with the recognition by some commentators that private international law may not be sufficient by itself to resolve certain problems in European family law, Union action in this context has become entangled with the broader discussion in the literature as to whether the unification or harmonisation of substantive family law is needed in the EU.⁷⁵

Noticeably, the Union measures and proposals concerning family law that have been taken so far in this context have largely been grounded in requests issued by the European Council in the Tampere, Hague and Stockholm Programmes,⁷⁶ and therefore, the future trajectory of Union

⁷³ For example, establishing a secure legal environment for children in maintaining relations with those who have parental responsibility over them as families break up and are recomposed in different Member States (Proposal (n 52), point 2, fourth para, 4); eliminating various obstacles preventing the recovery of maintenance claims throughout the EU (Proposal on maintenance obligations (n 49), point 1.2, first para, 3); enhancing legal certainty, predictability, and flexibility as regards the applicable law for divorce and separation proceedings where the spouses are of different nationalities or live in different Member States (Proposal related to Rome III Regulation (n 63), point 1, 3–4); 'bringing legal clarity to property rights for international couples' as regards the management and division of property following the dissolution of their relationships (Communication (n 49), point 4, 4–5); and promoting the free movement and mutual recognition of the effects of civil status records, such as birth, filiation, adoption, marriage, or name changes following marriage, divorce, registered partnership, or change of sex (Green paper (n 68), point 2, 3).

⁷⁴ See, eg, Boele-Woelki (n 7), particularly at 44 and citations therein. For detailed study of article 81 of the TFEU (including linkage to amendments to include substantive private law as part of European Convention leading to the draft Constitutional Treaty), see Gutman (n 9) ch 10. So far, no Union measure adopted under what is now art 81 TFEU has been challenged either directly (via an action for annulment) or indirectly (via a preliminary ruling on validity or an objection of illegality), and therefore, the case law elucidating the scope of Union competence under this provision is extremely limited.

⁷⁵ See, eg, Pintens (n 15); citations in n 22.

⁷⁶ See nn 55–57.

law-making activity beyond these confines remains to be seen. That being said, even if Union action in this context is in principle geared at the regulation of private international aspects of family law as part of the achievement of its objectives underpinning the AFSJ, as opposed to the development of family law per se, it currently stands out as an area in which the EU has had a tremendous practical impact through its regulation of various matters that determine the outcome of proceedings involving a host of familial (marital, non-marital and parent-child) relationships.

3.3 External Aspects of the Union's Competence in Family Law

3.3.1 Existence and nature of the Union's external competence in family law

The Union's approach to family law appears to be largely dominated by internal rather than external measures for the obvious reason that finding common ground on sensitive issues such as family law is even more difficult with third States than it is between the member states.⁷⁷ Nevertheless, the EU pursues external relations in family law through its participation in international agreements or international organisations. The EU's international action in family law occurs against the background of article 3(5) of the TEU,⁷⁸ which tasks the Union in its relations with the wider world to uphold and promote its values and interests and to contribute to, among other things, the protection of its citizens and human rights, and in particular the rights of the child.

A distinction should be drawn between the question whether the Union has external competence in family law, on the one hand, and if so, the question of the nature of that competence, on the other. The answer to these two questions is determined on the basis of articles 216(1) and 3(2) of the TFEU, respectively.⁷⁹ Article 216(1) of the TFEU explicitly confirms the general capacity of the Union to conclude international agreements: (1) where the Treaties so provide; or (2) where the conclusion of an agreement is 'necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to

⁷⁷ Aude Fiorini, *Which Legal Basis for Family Law? The Way Forward* (Note, European Parliament Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2012).

⁷⁸ See also article 21(2)(a)–(b) of the TEU.

⁷⁹ Cf the approach in Opinion 1/13 *Convention on the civil aspects of international child abduction*, EU:C:2014:2303, paras 67–74.

affect common rules or alter their scope'. The first part of this provision seems rather self-explanatory, whereas the second part is a codification of the ECJ's case law on implied external competences.⁸⁰

As there appear to be no explicit legal bases in the Treaties for external action in family law, the Union's external competences in question will of necessity be implied. The most likely candidates for such implied competences would seem to be article 79(2)(a) of the TFEU, which provides for Union competence with respect to measures concerning the conditions of entry and residence and standards on the issuance by member states of long-term visas and residence permits, including those for the purpose of family reunification, and article 81(3) of the TFEU which, as already mentioned, provides for Union competence to adopt 'measures concerning family law with cross-border implications'. It seems likely that the conclusion by the Union of international agreements with one or more third States or international organisations is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties or is likely to affect common rules or alter their scope within the meaning of article 216(1) of the TFEU.

With respect to the nature of these implied competences, a recent European Parliament report contends that in view of the extensive personal scope of EU family law rules in the areas covered (or likely to be covered) by internal rules, the Union has exclusive external competence to conclude agreements within the scope of which Union citizens living in third States would fall.⁸¹ Union external competence would also be exclusive where the conclusion of an international agreement, although it intervenes in an area where no internal rules exist or are planned, is necessary in order to achieve one of the Treaty objectives, and to enable the Union to exercise its internal competence.⁸² While that conclusion may be a bit hasty in its generality, it is nevertheless true that such exclusive competence is likely to arise with respect to Union measures concerning the private international law aspects of family law, such as the Brussels II *bis* Regulation,⁸³ Regulation 4/2009⁸⁴ and the

⁸⁰ See further Geert De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 20; and Geert De Baere, 'EU External Action', in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2014) 711–20.

⁸¹ Fiorini (n 77) 18.

⁸² *Ibid.*

⁸³ Regulation No 2201/2003 (n 52).

⁸⁴ Regulation No 4/2009 (n 62).

Rome III Regulation.⁸⁵ Indeed, the ECJ held in Opinion 1/13 that the exclusive competence of the Union encompasses the acceptance of the accession of a third State to the Convention on the civil aspects of international child abduction concluded in The Hague on 25 October 1980, because the overlap and the close connection between the provisions of the Brussels II *bis* Regulation and those of the Convention entails that the provisions of the latter may have an effect on the meaning, scope and effectiveness of the rules laid down in the former.⁸⁶ The Court held that conclusion not to be undermined by the fact that many provisions of the Brussels II *bis* Regulation may appear to be consonant with those of the Convention, thereby confirming its case law according to which EU rules may be affected by international commitments even if there is no possible contradiction between those commitments and the EU rules.⁸⁷

That exclusive competence is likely to arise regarding Union measures concerning the private international law aspects of family law already seemed to follow from Opinion 1/03 on the new Lugano Convention,⁸⁸ an instrument that aimed to extend the system of the Brussels I Regulation⁸⁹ to the EFTA countries. In that Opinion, the ECJ ruled that it had ‘found there to be exclusive [Union] competence in particular where the conclusion of an agreement by the member states is incompatible with the unity of the common market and the uniform application of [Union] law ... or where, given the nature of the existing [Union] provisions, such as legislative measures containing clauses relating to the treatment of nationals of non-member countries or to the complete harmonisation of a particular issue, any agreement in that area would necessarily affect the [Union] rules within the meaning of the *ERTA* judgment’.⁹⁰ However, a specific and careful case-by-case analysis is

⁸⁵ Regulation No 1259/2010 (n 63). See in that sense Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 161; Peers (n 54) 648–9.

⁸⁶ Opinion 1/13 (n 79), paras 84–90.

⁸⁷ *Ibid*, para 86.

⁸⁸ Opinion 1/03 *New Lugano Convention*, EU:C:2006:81.

⁸⁹ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, recast by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (‘Brussels I Regulation’).

⁹⁰ Opinion 1/03 (n 88), para 122. See the judgment in *Commission v Council* (‘*ERTA*’), 22/70, EU:C:1971:32. *ERTA* is authority for the existence of implied external competences on the basis of the existence of internal Union

necessary, given that the starting point must always be that unless there are clear indications to the contrary, Union competence should be presumed to be shared rather than exclusive.⁹¹

In Opinion 1/03, the ECJ also introduced the idea (especially relevant with respect to private international law) that there can be an *ERTA* effect where common rules constitute a system the integrity of which is liable to be compromised if member states exercise their competences autonomously with respect to the agreement in question. It considered that the Union rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, and that the new Lugano Convention would affect the uniform and consistent application of the Union rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules. It followed that the Union had exclusive competence to conclude the new Lugano Convention.⁹²

The member states were rather concerned by Opinion 1/03 to the extent that they made it clear that they would object to further EU legislation in the context of JCCM unless they were still left some scope for autonomous external action.⁹³ As a consequence, in certain regulations, the Union established a procedure for the negotiation and conclusion of agreements between member states and third States concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations.⁹⁴ These regulations are

rules and for the acquisition of exclusive external competences on the same basis. The former aspect is now codified in article 216(1) of the TFEU, pursuant to which the Union 'may conclude an agreement with one or more third countries or international organisations ... where the conclusion of an agreement ... is likely to affect common rules or alter their scope', while the latter aspect is codified in article 3(2) of the TFEU, which provides for the Union to have exclusive competence for the conclusion of an international agreement 'in so far as its conclusion may affect common rules or alter their scope'. See to that effect the judgment in *Commission v Council*, C-114/12, EU:C:2014: 2152, paras 66-67.

⁹¹ See, eg, the judgments in *Pringle*, C-370/12, EU:C:2012:756, paras 120–121; and *Commission v Council* (n 90), para 75.

⁹² Opinion 1/03 (n 88), paras 172–173.

⁹³ Peers (n 54) 651–2.

⁹⁴ Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member

examples of the possibility, pursuant to article 2(1) of the TFEU, for the Union to empower the member states to act in areas of exclusive Union competence.⁹⁵

The member states complicated matters somewhat by annexing Declaration No 36 to the Lisbon Treaty, which provides that ‘Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of Title V of Part Three⁹⁶ in so far as such agreements comply with Union law’.⁹⁷ That phrase has been interpreted as meaning that member states’ external competence exists where the EU has not yet acted.⁹⁸ In other words, the *ERTA* principle would still apply. A similar question arises regarding the Union’s external competence over external borders,⁹⁹ and it also arose pre-Lisbon as to whether the former article 133(5) of the EC Treaty (concerning what was then external Community competence as regards trade in services), as amended by the Nice Treaty, excluded the operation of the *ERTA* doctrine and effectively established a parallel competence for the then-Community and the member states.¹⁰⁰ However, the

States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations [2009] OJ L200/46. Compare Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations [2009] OJ L200/25.

⁹⁵ Eeckhout (n 85) 162, also noting that the complexity of the relationship between the pertinent EU law provisions and international agreements may give rise to so-called partially mixed agreements, of which not all Member States are parties. On the latter, see De Baere, *Constitutional Principles of EU External Relations* (n 80) 245–6.

⁹⁶ See n 53.

⁹⁷ Declaration No 36, annexed to the Lisbon Treaty, on Article 218 TFEU concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice [2012] OJ C326/351.

⁹⁸ Peers (n 54) 649.

⁹⁹ See Protocol No 23, annexed to the TEU and to the TFEU, on External Relations of the Member States with regard to the Crossing of External Borders [2012] OJ C326/304.

¹⁰⁰ See Geert De Baere, ‘The Basics of EU External Relations Law: An Overview of the Post-Lisbon Constitutional Framework for Developing the External Dimensions of EU Asylum and Migration Policy’ in Marleen Maes,

applicability of the *ERTA* doctrine cannot be deduced from the requirement that agreements concluded by the member states should comply with Union law. As recalled by the ECJ in Opinion 1/13, the *ERTA* doctrine applies regardless of whether the agreement in question complies with Union law.¹⁰¹ The implication of the member states retaining their external competence as long as the international agreements concluded by them comply with Union law is therefore that the *ERTA* doctrine as traditionally understood is not meant to apply. Be that as it may, contrary to the former article 133(5) of the EC Treaty and Protocol No 23, Declaration No 36 does not have the status of primary Union law, or indeed, of any sort of binding Union law. It is consequently safe to assume that it leaves the application of primary Union law intact, including the *ERTA* principle as codified in articles 3(2) and 216(1) of the TFEU.

3.3.2 International agreements in family law

As and when the relevant external competence is found to exist, the Union's participation in an international agreement concerning family law may be used as an alternative to the often difficult process of developing its own internal legal framework. That was the case, for example, with respect to the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations,¹⁰² which falls within the Union's exclusive competence.¹⁰³ On the same basis, the EU also became a party to the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.¹⁰⁴ Where negotiations for

Marie-Claire Foblets and Philippe de Bruycker (eds), *External Dimensions of European Migration and Asylum Law and Policy/Dimensions Externes du Droit et de la Politique d'Immigration et d'Asile de l'UE* (Bruylant 2011) 170–1.

¹⁰¹ Opinion 1/13 (n 79), para 86. See further De Baere, *Constitutional Principles of EU External Relations* (n 80) 43–51 and 71–2 and the references to case law therein.

¹⁰² Council Decision 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations [2009] OJ L331/17. See Fiorini (n 77) 8.

¹⁰³ See further Peers (n 54) 649–50.

¹⁰⁴ Council Decision 2011/432/EU of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance [2011] OJ L192/39. See also the Proposal for a Council Decision amending Annexes II and III of Council Decision of 9 June 2011 on the approval, on behalf of the European Union, of The Hague Convention of 23 November 2007, on the

international agreements were concluded or too far advanced when the Union acquired the necessary competence through the Amsterdam Treaty, the EU has on occasion authorised member states to sign or conclude the agreements in question as trustees of the Union.¹⁰⁵ For instance, the Union authorised certain member states to sign¹⁰⁶ and then to ratify, or accede to, in the interests of the Union, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, and likewise authorised certain member states to make a declaration on the application of the relevant internal rules of EU law.¹⁰⁷ This Convention complements the Brussels II *bis* Regulation.¹⁰⁸ The Union itself also acceded to the Hague Conference on Private International Law.¹⁰⁹

While the possibility for member states to conclude agreements on family law between themselves is limited by the principles in article 3(2) of the TFEU as discussed above,¹¹⁰ a separate but nevertheless related issue is how EU law deals with bilateral or multilateral conventions in international family law concluded by one or more of the member states prior to the establishment of the then-Community or to their accession to the Union. The basic rule is spelled out in article 351 of the TFEU, which provides that such pre-existing agreements are not to be affected by the provisions of the Treaties. However, to the extent that such agreements

International Recovery of Child Support and Other Forms of Family Maintenance, COM (2013) 35 final.

¹⁰⁵ Peers (n 54) 649.

¹⁰⁶ Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children [2003] OJ L48/1.

¹⁰⁷ Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law [2008] OJ L151/36.

¹⁰⁸ Regulation No 2201/2003 (n 52). See Fiorini (n 77) 9.

¹⁰⁹ Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law [2006] OJ L297/1.

¹¹⁰ See, to that effect, *Pringle* (n 91), para 101 and the contrary position of Advocate General Kokott in her View, EU:C:2012:675, point 98.

are not compatible with the Treaties, the member states concerned are to take 'all appropriate steps' to eliminate the incompatibilities established.

Acts of secondary Union law sometimes recall all or part of these obligations. For example, article 69(1) of Regulation 4/2009¹¹¹ provides that that Regulation is not to affect the application of bilateral or multilateral conventions and agreements to which one or more member states are party at the time of its adoption and which concern matters governed by it, without prejudice to the obligations of member states under article 351 of the TFEU. Moreover, the Brussels II *bis* Regulation contains quite an extensive set of conflict rules with respect to existing international agreements. The basic rule is set forth in article 59(1),¹¹² which provides for that Regulation to supersede conventions existing at the time of its entry into force that have been concluded between two or more member states and relate to matters governed by the Regulation.¹¹³ Article 60 stipulates that in relations between member states, the Regulation is to take precedence over a number of listed conventions insofar as they concern matters governed by the Regulation,¹¹⁴ and article 61 lays down specific rules regarding the relationship with the 1996 Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. Article 62 further specifies the scope of the effects of the international agreements in question, while article 63 contains specific rules as regards treaties with the Holy See.¹¹⁵

The ECJ has held that if a member state encounters difficulties that make adjustment of an international agreement impossible, an obligation

¹¹¹ Regulation No 4/2009 (n 62).

¹¹² See also recitals 17 and 18 in the preamble, as well as articles 11(1), (2), (4), (6) and (8) on return of the child, 12(4) on prorogation of jurisdiction, 18(3) on examination as to admissibility and 42(2)(c) on return of the child.

¹¹³ Article 59(2) further provides for specific rules with respect to Sweden and Finland.

¹¹⁴ The ECJ clarified in Opinion 1/13 (n 79), paras 87-88 that despite Article 60 providing for the precedence of the Brussels II *bis* Regulation over the 1980 Hague Convention on the civil aspects of international child abduction, the scope and effectiveness of the common rules laid down by the Brussels II *bis* Regulation were likely to be affected when the Member States would individually make separate declarations accepting third-State accessions to the 1980 Hague Convention.

¹¹⁵ See further Alegría Borrás, 'Institutional Framework: Adequate Instruments and the External Dimension', in Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen (eds), *International Family Law for the European Union* (Intersentia 2007) 141-2.

to denounce that agreement cannot be excluded. Nevertheless, it seems to accept that such an obligation does not extend to the duty for member states to denounce an international agreement that does not provide for such denunciation.¹¹⁶ While the Court has reaffirmed that the purpose of the first paragraph of article 351 of the TFEU is ‘to make clear, in accordance with the principles of international law, that application of the [Treaties] does not affect the commitment of the member state concerned to respect the rights of third countries under an agreement preceding its accession and to comply with its corresponding obligations’, it has also emphasised that when such an agreement allows, but does not require, a member state to adopt a measure which appears to be contrary to Union law, ‘the member state must refrain from adopting such a measure’.¹¹⁷ It has also clarified that the same principles must apply *mutatis mutandis* when, because of a development in EU law, a legislative measure adopted by a member state in accordance with the power offered by an earlier international agreement appears contrary to Union law. In such a situation, the member state concerned cannot rely on that agreement in order to exempt itself from the obligations that have arisen subsequently from Union law.¹¹⁸ The Court’s scrutiny therefore remains rather strict.

4. IMPACT OF THE ECJ ON EUROPEAN FAMILY LAW

4.1 Overview of the Union Courts’ Jurisdiction in Family Law

Generally speaking, although the Union has not yet been conferred explicit or implicit competence over substantive family law, family law matters may conceivably arise before each of the three Union courts¹¹⁹ pursuant to their respective bases of jurisdiction set forth in the Treaties.¹²⁰ This is illustrated by the Civil Service Tribunal’s jurisdiction over so-called ‘staff cases’ involving disputes between the Union and its servants (which used to fall within the jurisdiction of the former Court of

¹¹⁶ Judgment in *Commission v Slovakia*, C-264/09, EU:C:2011:580, paras 44–52.

¹¹⁷ See the judgments in *Evans Medical and Macfarlan Smith*, C-324/93, EU:C:1995:84, paras 27 and 32; and *Centro-Com*, C-124/95, EU:C:1997:8, paras 56 and 60.

¹¹⁸ Judgment in *Luksan*, C-277/10, EU:C:2012:65, para 63.

¹¹⁹ See n 3.

¹²⁰ See Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak (ed), OUP 2014) ch 2.

First Instance, now General Court),¹²¹ which has resulted in many judgments bearing on family law,¹²² especially as regards the right of persons in same-sex and opposite-sex relationships to receive, or not, certain benefits afforded to married couples under the Staff Regulations.

In fact, one of the most well-known cases to date on the Union concept of ‘marriage’ is *D and Sweden v Council*,¹²³ a staff case that came before the ECJ on appeal, in which the Court ruled that the Staff Regulations then in effect could not be interpreted to cover same-sex registered partnerships, and therefore, upheld the then Court of First Instance’s decision not to treat the applicant’s situation as that of a married official for the purpose of granting a household allowance.¹²⁴ After that judgment, the Staff Regulations were amended¹²⁵ to give a range of benefits to Union officials who are registered as a stable non-marital partner, provided that certain conditions laid down in a particular provision of the Staff Regulations are satisfied.¹²⁶ On this basis, the Civil Service Tribunal has ruled, for example, that an opposite-sex cohabitation agreement, although not a registered partnership, falls within the scope of that

¹²¹ See article 270 of the TFEU; Protocol No 3, annexed to the TEU, TFEU and the EAEC Treaty, on the Statute of the Court of Justice of the EU, Annex I The European Union Civil Service Tribunal [2012] OJ C326/210, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 [2012] OJ L228/1 (‘Statute’). For further discussion, see, eg, Lenaerts, Maselis and Gutman (n 120) ch 18.

¹²² See, eg, the judgment in *Mandt v European Parliament*, F-45/07, EU:F:2010:72, decided by the Full Court concerning the reduction of survivors’ pensions in circumstances involving two spouses.

¹²³ Judgment in *D and Sweden v Council*, C-122/99 P and C-125/99 P, EU:C:2001:304. See also the judgment in *Arauxo-Dumay v Commission*, T-65/92, EU:T:1993:47, another staff case concerning an opposite-sex cohabitation arrangement, which was cited by the then Court of First Instance in its judgment in *D v Council*, T-264/97, EU:T:1999:13, para 26.

¹²⁴ *D and Sweden v Council* (n 120), paras 33–40. As regards the Court’s formulation of the concept of ‘marriage’, see nn 201–203 and accompanying text.

¹²⁵ Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities [2004] OJ L124/1, particularly recitals 7–8. The Staff Regulations have been further amended, most recently by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 [2013] OJ L287/15: see the consolidated version of the Staff Regulations, available at http://ec.europa.eu/civil_service/index_en.htm (accessed 8 June 2015).

¹²⁶ Article 1(2)(c) of the Staff Regulations (n 125).

provision.¹²⁷ It has also held that the condition of no prior access to marriage for same-sex non-marital partners should be interpreted flexibly in a situation where the applicant, on account of his dual Belgian-Moroccan nationality, did not marry his same-sex partner in Belgium, even though he had the right to do so, because he would be subject to criminal prosecution if his same-sex marriage were to be notified to the Moroccan authorities.¹²⁸

Even so, attention typically centres on the role of the ECJ in European family law. This may be explained by the fact that the majority of cases that raise issues of family law have been brought before the ECJ pursuant to its exclusive jurisdiction (at least for the present time)¹²⁹ to deliver preliminary rulings on the interpretation and validity of Union law under article 267 of the TFEU. As discussed in the following sections, in the context of the preliminary ruling procedure, the ECJ has been confronted with issues of family law as part of answering questions submitted by the national courts in the areas of free movement, Union citizenship and discrimination, among others. It has also been in the context of this procedure that the Court has formulated judge-made rules of Union law in family law by virtue of what is called European ‘federal common law’.

Before proceeding further, however, there are two key institutional developments concerning the ECJ’s jurisdiction to deliver preliminary rulings in respect of the AFSJ that may enhance the ECJ’s role in deciding cases concerning family law matters. First, an urgent preliminary ruling procedure has been introduced in the Statute and the ECJ Rules of Procedure, which allows the ECJ to deliver preliminary rulings on a speedier basis concerning questions arising in areas falling within the AFSJ.¹³⁰ As illustrated by *Rinau*,¹³¹ the first reference to be dealt with under the urgent preliminary ruling procedure, a considerable proportion

¹²⁷ Judgment in *Roodhuijzen v Commission*, F-122/06, EU:F:2007:208, upheld on appeal in the judgment in *Commission v Roodhuijzen*, T-58/08 P, EU:T:2009:385.

¹²⁸ Judgment in *W v Commission*, F-86/09, EU:F:2010:125.

¹²⁹ Under the Treaties, the possibility of conferring preliminary ruling jurisdiction on the General Court in ‘specific areas as laid down by the Statute’ is envisaged under article 256(3) of the TFEU. To date, however, this has not come about. See Lenaerts, Maselis and Gutman (n 120) ch 2.

¹³⁰ Article 23a of the Statute (n 121); Rules of Procedure of the Court of Justice, accessed at <http://curia.europa.eu> (accessed 8 June 2015), arts 107–114. For detailed discussion, see eg Lenaerts, Maselis and Gutman (n 120) ch 22; Catherine Barnard, ‘The PPU: Is it Worth the Candle? An Early Assessment’ (2009) 34 ELR 281–97.

¹³¹ Judgment in *Rinau*, C-195/08 PPU, EU:C:2008:406.

of the rulings delivered thus far by the ECJ under this procedure relate to matters of child custody and parental responsibility covered by the Brussels II *bis* Regulation,¹³² thereby involving sensitive matters concerning the parent-child relationship.

Secondly, with the entry into force of the Lisbon Treaty, many of the former restrictions placed on the ECJ's jurisdiction in the AFSJ have been removed.¹³³ In particular, former article 68 of the EC Treaty, which had among other things restricted the ECJ's preliminary ruling jurisdiction in the area covered by former Title IV of the EC Treaty, including the field of JCCM, to references submitted by last instance courts,¹³⁴ has been repealed. References for a preliminary ruling on questions falling within this area are now governed by the mainstream procedure for preliminary rulings set down in article 267 of the TFEU. As a result, especially in light of the increasing number of Union measures dealing with family law matters in the JCCM, this may lead to a greater number of references from national courts and tribunals at all levels of the judicial hierarchy in the member states on questions relating to family law.

4.2 Judicial Interpretation: The ECJ as an 'Incidental' Family Court

Largely through its preliminary ruling jurisdiction, the ECJ has dealt with family law matters 'incidentally' in the process of interpreting a wide variety of Union measures. To some extent, this is not altogether surprising, since it follows from the law-making activities of the other Union institutions in family law. That is to say, for the various measures adopted by the Union legislature discussed above that touch on family law matters indirectly – for example, rules on family unification in the context of EU asylum and immigration policy¹³⁵ – the ECJ's interpretation of those measures can be expected to touch on family law matters

¹³² See, eg, the judgments in *Detiček*, C-403/09 PPU, EU:C:2009:810; *Povse*, C-211/10 PPU, EU:C:2010:400; *McB.*, C-400/10 PPU, EU:C:2010:582; *Aguirre Zarraga*, C-491/10 PPU, EU:C:2010:828; *Mercredi*, C-497/10 PPU, EU:C:2010:828; *Health Service Executive*, C-92/12 PPU, EU:C:2012:255. See also the order in *Mohammad Imran*, C-155/11 PPU, EU:C:2011:387, dealing with family reunification but subsequently withdrawn.

¹³³ See generally Lenaerts, Maselis and Gutman (n 120) ch 22.

¹³⁴ Former article 68(1) of the EC Treaty restricted the possibility to submit references for preliminary rulings to national courts or tribunals 'against whose decisions there is no judicial remedy under national law'.

¹³⁵ See, eg, the judgment in *Chakroun*, C-578/08, EU:C:2010:117, dealing with the very concept of 'family reunification'.

as well. Nevertheless, three key areas concerning free movement, Union citizenship and discrimination law stand out because they aptly illustrate the ECJ's impact on family law (and de facto compliance with EU law of the national laws at issue in the proceedings before the national courts that submitted the reference).

First, as already noted, one of the earliest areas to implicate issues of family law was free movement law, which involved the ECJ in a host of family arrangements in the process of determining the rights afforded to the applicant on the basis of the Union measure concerned. Indeed, the notion of 'family' itself has been important for EU law ever since article 10 of Regulation 1612/68¹³⁶ acknowledged that family members of migrant workers could benefit from the rules on free movement of persons.¹³⁷ For fear of interfering too much with national immigration law, the ECJ has outlined over the years certain limitations to the rights of free movement on which family members could rely. In *Akrich*,¹³⁸ the Court specified that in order to benefit from the rights provided for in article 10 of Regulation No 1612/68, a national of a non-member state who is the spouse of a citizen of the Union must be lawfully resident in a member state when he/she moves to another member state to which the citizen of the Union is migrating or has migrated.¹³⁹ Nevertheless, the Court added that where the marriage is genuine and where, on the return of the citizen of the Union to the member state of which he/she is a national, his/her spouse, who is a national of a non-member state and with whom he/she was living in the member state which he/she is leaving, is not lawfully resident on the territory of a member state, regard must be had to respect for family life under article 8 of the ECHR.¹⁴⁰

The Court's holding in *Akrich* was subsequently clarified in *Jia*¹⁴¹ and *Eind*.¹⁴² In addition, after the changes brought about by Directive 2004/38/EC,¹⁴³ consolidating the rights of movement and residence for Union citizens, the case law as it stood was in urgent need of clarification,¹⁴⁴

¹³⁶ n 30.

¹³⁷ See Cathryn Costello, 'Metock: Free Movement and "Normal Family Life" in the Union' (2009) 46 CMLRev 587.

¹³⁸ Judgment in *Akrich*, C-109/01, EU:C:2003:491.

¹³⁹ *Ibid*, para 50.

¹⁴⁰ *Ibid*, para 58.

¹⁴¹ Judgment in *Jia*, C-1/05, EU:C:2007:1.

¹⁴² Judgment in *Eind*, C-291/05, EU:C:2007:771.

¹⁴³ n 33.

¹⁴⁴ Costello (n 137) 595.

which the Court provided in *Metock*.¹⁴⁵ In one of the rare examples of an explicit overruling in the Court's history,¹⁴⁶ the ECJ acknowledged that while it had held in *Akrich* that in order to benefit from the rights provided for in article 10 of Regulation No 1612/68, a national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a member state when he/she moves to another member state to which the citizen of the Union is migrating or has migrated, that conclusion now needed to be reconsidered: 'The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another member state'.¹⁴⁷ Indeed, the Court pointed out that if Union citizens were not allowed to lead a normal family life in the host member state, the exercise of the freedoms they are guaranteed by the Treaties 'would be seriously obstructed'.¹⁴⁸ That reasoning establishes the right of third country nationals who are family members of EU citizens to enter and reside in the Union.¹⁴⁹ At any rate, the judgment in *Metock* indicates that a Union citizen who moves to another member state will be entitled to be joined or accompanied by the members of his family, without requiring either the family members to have lawfully resided in another member state before moving to the host member state, or that the family relationship was established before the Union citizen or his/her family members moved to the host member state.¹⁵⁰

Secondly, as part of the case law on Union citizenship, the ECJ has issued a growing body of judgments relating to names or civil status. As it declared in *Runevič-Vardyn and Wardyn*,¹⁵¹ as EU law presently stands, 'the rules governing the way in which a person's surname and forename are entered on certificates of civil status are matters coming within the competence of the Member States'. Still, the member states must comply with EU law when exercising that competence, 'and in particular with the Treaty provisions on the freedom of every citizen of the Union to move

¹⁴⁵ Judgment in *Metock and Others*, C-127/08, EU:C:2008:449.

¹⁴⁶ Other examples include the judgments in *Keck and Mithouard*, C-267/91 and C-268/91, EU:C:1993:905; and *CNL-SUCAL*, C-10/89, EU:C:1990:359.

¹⁴⁷ *Metock* (n 145) para 58.

¹⁴⁸ *Ibid*, para 62.

¹⁴⁹ *Costello* (n 137) 602–5.

¹⁵⁰ Nathan Cambien, *Citizenship of the Union as a Cornerstone of European Integration. A Study of its Impact on Policies and Competences of the Member States* (PhD thesis University of Leuven 2011) 232.

¹⁵¹ Judgment in *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, para 63.

and reside in the territory of the Member States'.¹⁵² That has been clear since *Konstantinidis*,¹⁵³ where the Court held that national legislation obliging a Greek national to use in the pursuit of his occupation a spelling of his name whereby its pronunciation was modified and created the risk that potential clients may confuse him with other persons was contrary to what is now article 49 of the TFEU.¹⁵⁴ Subsequently, in *Garcia Avello*,¹⁵⁵ the problem lay in the fact that the Belgian conflict of laws rule at issue led to an outcome that was in breach of what is now article 21 of the TFEU. The Belgian administrative authorities refused to treat applications for a change of surname made by Belgian nationals who also held the nationality of another member state as being based on 'serious grounds' solely on the ground that in Belgium children with Belgian nationality assume their father's surname in accordance with Belgian law.¹⁵⁶

Nevertheless, as the Court held in *Grunkin and Paul*¹⁵⁷ and *McCarthy*,¹⁵⁸ in circumstances such as those examined in *Garcia Avello*, what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that the discrepancy was liable to cause serious inconvenience for the Union citizens concerned, which constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued. In *Ruiz Zambrano*¹⁵⁹ and *Garcia Avello*, the national measure at issue had the effect of depriving Union citizens of 'the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the

¹⁵² Ibid. But see Koen Lenaerts, 'In the Name of EU Citizenship' in *Liber Amicorum Walter Pintens* (n 5) 831, suggesting that the EU could adopt a regulation determining the law applicable to a person's name, with article 81 of the TFEU as its legal basis.

¹⁵³ Judgment in *Konstantinidis*, C-168/91, EU:C:1993:115; on this see also *Pintens* (n 15) with further references.

¹⁵⁴ Ibid, para 17.

¹⁵⁵ Judgment in *Garcia Avello*, C-148/02, EU:C:2003:539.

¹⁵⁶ Ibid, para 38; see also the Opinion of Advocate General Jacobs in *Garcia Avello*, EU:C:2003:311, point 75.

¹⁵⁷ Judgment in *Grunkin and Paul*, C-353/06, EU:C:2008:559, paras 23, 24 and 29.

¹⁵⁸ Judgment in *McCarthy*, C-434/09, EU:C:2011:277, para 52.

¹⁵⁹ Judgment in *Ruiz Zambrano*, C-34/09, EU:C:2011:124.

territory of the Member States'.¹⁶⁰ The Court's approach requires the member states to put forward an interest that is vital to its identity and which complies with fundamental rights in order to prevent the Court from interpreting Union citizenship in such a way that it requires a person's name to remain the same throughout the EU.¹⁶¹ Such identity claims were accepted by the Court in *Sayn-Wittgenstein*¹⁶² and *Runevič-Vardyn and Wardyn*.¹⁶³ In the former judgment, the Court held that the national identity of Austria as a Republic was a concrete expression of public policy,¹⁶⁴ whereas in the latter judgment, Lithuania was allowed to protect its official language and traditions to safeguard its national identity.¹⁶⁵

The case law on names and civil status also shows that the fact that two people have a different nationality is not sufficient to conclude that they are in a different situation from the perspective of the EU principle of non-discrimination, and that classic conflict rules attaching personal status or other family law matters to nationality are therefore ipso facto lawful.¹⁶⁶ The Court's approach is essentially focused on private autonomy,¹⁶⁷ as illustrated by the judgments in *Garcia Avello*¹⁶⁸ and *Hadadi*.¹⁶⁹ In the former, the fact that persons with dual Belgian and Spanish nationality elected to rely on their Spanish nationality had a decisive impact on the determination of their family name. In the latter, the Court held that the system of jurisdiction established by the Brussels II *bis* Regulation¹⁷⁰ concerning the dissolution of matrimonial ties was not intended to preclude the courts of several States from having jurisdiction: 'Rather, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established

¹⁶⁰ *McCarthy* (n 158), paras 53–54. See also the judgment in *Dereci and Others*, Case C-256/11, EU:C:2011:734, para 74. See further the case note on *Ruiz Zambrano and McCarthy* by Janek Tomasz Nowak in (2011) 17 *Columbia Journal of European Law* 673–704.

¹⁶¹ *Lenaerts* (n 152) 831, 837 and 839.

¹⁶² Judgment in *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806.

¹⁶³ *Runevič-Vardyn and Wardyn* (n 151).

¹⁶⁴ *Sayn-Wittgenstein* (n 162), paras 81–95.

¹⁶⁵ *Runevič-Vardyn and Wardyn* (n 151), paras 83–94.

¹⁶⁶ Johan Meeusen, 'Le droit international privé et le principe de non-discrimination' (2011) 353 *Recueil des cours* 9, 87 and 125; *Lenaerts* (n 152) 831, 836–7.

¹⁶⁷ *Meeusen* (n 166) 9, 126–7; *Lenaerts* (n 152) 831, 837 and 839.

¹⁶⁸ n 155.

¹⁶⁹ Judgment in *Hadadi*, C-168/08, EU:C:2009:474.

¹⁷⁰ Regulation No 2201/2003 (n 52).

between them'.¹⁷¹ The Court readily acknowledged that the Brussels II *bis* Regulation might induce spouses to 'rush into seising one of the courts having jurisdiction in order to secure the advantages of the substantive divorce law applicable under the private international law rules used by the court seised'. However, such a fact could not, by itself, mean that the seising of a court having jurisdiction under article 3(1)(b) of the Brussels II *bis* Regulation may be regarded as an abuse. Indeed, 'seising the courts of a Member State of which both spouses hold the nationality, even in the absence of any other link with that Member State, is not contrary to the objectives pursued by that provision'.¹⁷² Such an approach follows logically from the fact that 'the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States',¹⁷³ and implies in certain circumstances the possibility for persons to choose the nationality on which they rely.¹⁷⁴

Finally, another area in which the ECJ exerts a substantial impact on family law matters is its interpretation of Union measures dealing with discrimination and equal treatment.¹⁷⁵ Early on, in *Grant*,¹⁷⁶ the ECJ ruled that what was then Community law 'as it [stood] at present' did not cover discrimination based on sexual orientation involving a person in a

¹⁷¹ *Hadadi* (n 169), para 49.

¹⁷² *Ibid*, para 57.

¹⁷³ See the judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, para 31; and most recently, *Dano*, EU:C:2014:2358, para 58.

¹⁷⁴ *Meeusen* (n 166) 9, 127.

¹⁷⁵ This is also an area inviting comparative inquiry. In particular, as regards the United States, the US Supreme Court has delivered two judgments that have potentially far-reaching effects with respect to combating discrimination against same-sex marriage. In *United States v Windsor*, 133 S. Ct. 2675 (2013), the Court, in a 5–4 decision authored by Justice Kennedy, held that the definition of marriage, as that between a man and a woman, in the federal Defense of Marriage Act ('DOMA') was unconstitutional as a deprivation of liberty of the person protected by the Fifth Amendment; and somewhat less dramatically in *Hollingsworth v Perry*, 133 S. Ct. 2652 (2013), in a 5–4 decision authored by Chief Justice Roberts, the Court ruled that the proponents did not have standing to challenge the lower court's order that Proposition 8 (a voter-enacted ballot initiative that amended the California Constitution to provide that only marriage between a man and a woman was valid and hence eliminated the right to same-sex couples to marry) was unconstitutional under the Fourteenth Amendment rights to due process and equal protection, with the result that the lower court's order was allowed to stand and thus that Proposition 8, like DOMA, is unconstitutional. For a broader outlook, see Gráinne de Burca, 'The Trajectories of European and American Antidiscrimination Law' (2012) 60 *AJCL* 1.

¹⁷⁶ Judgment in *Grant*, C-249/96, EU:C:1998:63.

stable relationship with a person of the same sex,¹⁷⁷ thereby distinguishing its case law involving discrimination on the basis of gender reassignment.¹⁷⁸ The Court also found that ‘in the present state of the law within the Community’, stable relationships between two persons of the same sex could not be regarded as equivalent to marriage or stable relationships between persons of the opposite sex, with the result that an employer was not required under Community law to treat the situation of a person in the first category as equivalent to that of a person in the latter category.¹⁷⁹ In the Court’s words, ‘it is for the legislature alone to adopt, if appropriate, measures which may affect that position’.¹⁸⁰

The Court’s statement in that case was particularly well-timed, given that the Amsterdam Treaty would enter into force the following year, introducing what is now article 19(1) of the TFEU, conferring competence on the Union legislature to adopt measures to combat various forms of discrimination, including that based on sexual orientation.¹⁸¹ As mentioned above, one of the Union measures adopted under this Treaty provision is Directive 2000/78,¹⁸² which establishes a general framework for equal treatment in employment and occupation. In essence, the Union legislature took the Court up on its offer in *Grant*, and the ECJ’s interpretation of this Directive has led to a recent stream of cases affording protection against discrimination for same-sex couples.

In *Maruko*,¹⁸³ the Court received a preliminary ruling request from a German court in a case involving a same-sex life partner whose request for survivor’s benefits had been rejected on the grounds that the national rules only extended such entitlements to surviving spouses.¹⁸⁴ In his Opinion, Advocate General Ruiz-Jarabo Colomer made clear from the outset that ‘it is not for the Court to define emotional relationships between persons of the same sex, a matter which is the subject of fierce debate, or to rule on the effects which the legislation of each Member

¹⁷⁷ Ibid, para 47.

¹⁷⁸ Judgment in *P. v S. and Cornwall County Council*, C-13/94, EU:C:1996:170. Compare the Opinion of Advocate General Elmer in *Grant* (n 176), EU:C:1997:449, which came to the opposite conclusion on the basis of the foregoing judgment. See further the judgments in *K.B.*, C-117/01, EU:C:2004:7; and *Richards*, C-423/04, EU:C:2006:256.

¹⁷⁹ *Grant* (n 176), para 35.

¹⁸⁰ Ibid, para 36.

¹⁸¹ The Nice Treaty added a second paragraph, which is now article 19(2) TFEU.

¹⁸² n 38.

¹⁸³ Judgment in *Maruko*, C-267/06, EU:C:2008:179.

¹⁸⁴ Ibid, para 22.

State attributes to the registration of such partners ... The main proceedings concern the inequality between married couples and people who form partnerships governed by different legal arrangements. Accordingly, the dispute does not turn on access to marriage but rather on the effects of the two types of union'.¹⁸⁵ The ECJ ruled that the Directive precludes national rules under which the surviving life partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit.¹⁸⁶ The Court was careful to frame its holding so as to leave it to the national court to determine whether a surviving life partner is in a comparable situation to that of a spouse who is entitled to the survivor's benefit, though it declared that if the referring court would find as such, the national rules at issue must be considered to constitute direct discrimination within the meaning of the Directive.¹⁸⁷

Thereafter, in *Römer*,¹⁸⁸ the Court received a similar reference from another German court, this time involving a situation in which the applicant was denied a greater supplementary retirement pension given to married persons on account of his registered life partnership status. The Court ruled that the Directive precludes national rules in which a pensioner in a registered life partnership receives a lower supplementary retirement pension than that granted to a married pensioner, provided that in the member state concerned marriage is reserved to persons of different gender and exists alongside a registered life partnership which is reserved to persons of the same gender. As a result, it found that there is a direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension, although it again left it to the national court to assess the comparability in light of the benefit in question.¹⁸⁹ The Opinion of Advocate General Jääskinen was

¹⁸⁵ Opinion of Advocate General Ruiz-Jarabo Colomer in *Maruko* (n 27), points 98–99.

¹⁸⁶ *Maruko* (n 183), paras 65–73.

¹⁸⁷ *Ibid*, para 72. Compare the Opinion of Advocate General Ruiz-Jarabo Colomer in *Maruko* (n 27), points 96–104, finding indirect, as opposed to direct, discrimination. For detailed discussion, see, eg, Helmut Graupner, 'Sexual Orientation Discrimination and the Court of Justice of the European Union', in *Legal Recognition of Same-Sex Relationships in Europe* (n 5) 271 (including mention of the reaction of certain German courts to this judgment).

¹⁸⁸ n 27.

¹⁸⁹ *Ibid*, paras 53–64.

bolder, advocating for the prohibition of discrimination on grounds of sexual orientation to be regarded as a general principle of Union law,¹⁹⁰ although this went unmentioned in the ECJ's judgment since it found it unnecessary to give an answer to that question.¹⁹¹

Recently, in *Dittrich and Others*,¹⁹² the Court received a question from a German court on the scope of application of the Directive to certain assistance for medical expenses incurred by the registered partners of the applicants. As highlighted in the Opinion of Advocate General Cruz Villalón, in contrast to the previous two judgments, the ECJ has not been asked in this case to determine whether the rights of the applicants in the main proceedings to be treated the same way as married couples have been infringed and thus to make a ruling on potential discrimination. Yet, if the ECJ determines that the Directive applies to the proceedings, the consequence would be that registered partners should be treated the same as spouses, with the result that the individuals involved in those proceedings would be entitled to the disputed public assistance.¹⁹³ The ECJ did in fact hold that the assistance such as that in the proceedings falls within the scope of the Directive, provided that it is the responsibility of the member state concerned to finance it, which was a matter for the national court to determine.¹⁹⁴

4.3 Judicial Law-making: European 'Federal Common Law' in Family Law

In addition to its traditional task of interpreting Union law, the ECJ has had a more subtle impact on family law through its formulation of judge-made rules of Union law, which may be referred to as European 'federal common law'. Since it is not possible here to delve into all aspects of the emergence and development of European 'federal common

¹⁹⁰ Opinion of Advocate General Jääskinen in *Römer* (n 27), points 125–131. See further, eg, Graupner (n 187) 279–82; Laurent Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*' (2012) 49 CMLRev 1841.

¹⁹¹ *Römer* (n 27), para 65.

¹⁹² Judgment in *Dittrich and Others*, C-124/11, C-125/11 and C-143/11, EU:C:2012:771.

¹⁹³ Opinion of Advocate General Cruz Villalón in *Dittrich* (n 192), EU:C:2012:398, points 19, 34–36.

¹⁹⁴ *Dittrich* (n 192), para 43.

law',¹⁹⁵ for the purposes of this contribution emphasis is placed on two main points that are highly relevant for surveying the Court's contribution to European family law: the definition of European 'federal common law' with particular regard to its so-called 'hard core', and some salient examples taken from the Court's jurisprudence in the field of family law.

European 'federal common law' is defined here as Union concepts, principles and rules formulated by the ECJ (and the other Union courts) that are not clearly suggested on the face of a provision of primary or secondary Union law.¹⁹⁶ In particular, this includes what may be considered the 'hard core' of European 'federal common law', which denotes judge-made rules fashioned by the ECJ for which the Union has not yet received legislative competence, either explicitly or implicitly, under the principle of conferral laid down in article 5(2) of the TEU. However, in order to make the objectives in the relevant provision of the Treaties or the duly-adopted Union measure work for the fields in which the Union legislature has been given competence to act, the Court is nonetheless faced with the prospect of formulating judge-made rules on the matter.¹⁹⁷

Many examples of the 'hard core' of European 'federal common law' may be found in the field of family law. In particular, there have been several prominent cases involving the ECJ's elaboration of Union concepts of 'spouse' and 'marriage'.¹⁹⁸ *Reed*¹⁹⁹ involved an action brought by Ms Reed against the Dutch authorities as a result of their rejection of her application for a residence permit. She was an unmarried British national who had applied for such a permit on the grounds that she was cohabiting with another British national for 'some five years standing'.²⁰⁰ Article 10(1)(a) of Regulation (EEC) No 1612/68²⁰¹ provided that certain members of the 'family' of a Union worker, including the 'spouse', 'have

¹⁹⁵ Koen Lenaerts and Kathleen Gutman, "Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54 *AJCL* 1.

¹⁹⁶ *Ibid*, 7.

¹⁹⁷ *Ibid*, 7–8.

¹⁹⁸ *Ibid*, 50–55. For further discussion of other Union concepts, see, eg, Laura Tomasi, Carola Ricci and Stefania Bariatti, 'Characterisation in Family Matters for Purposes of European Private International Law', in *International Family Law for the European Union* (n 5) 341.

¹⁹⁹ Judgment in *Reed*, 59/85, EU:C:1986:157.

²⁰⁰ *Ibid*, para 4.

²⁰¹ n 30. See already the judgment in *Diatta*, 267/83, EU:C:1985:67, para 18, in which the Court held that being married or being part of a family did not necessarily imply living under the same roof in its interpretation of this provision.

the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State'. Ms Reed wanted to fall within the definition of 'spouse' so as to be accorded the rights laid down by this provision. As the Regulation failed to define this term, the Court was confronted with the issue as to whether it included unmarried companions or cohabitantes. In agreeing in substance with an argument submitted by the Netherlands Government, the Court found that 'any interpretation of a legal term on the basis of social developments must take into account the situation in [what was then] the whole Community [now Union], not merely in one Member State'.²⁰² On that basis, the Court held that in the absence of 'any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the Regulation, it must be held that the term "spouse" in Article 10 of the Regulation refers to a marital relationship only'.²⁰³

Thereafter, the ECJ was faced with elaborating the concept of 'marriage' in *D & Sweden v Council*,²⁰⁴ which as mentioned above was a 'staff case' involving the Council's rejection of an official's request to treat his same-sex relationship as equivalent to marriage in order to obtain certain benefits provided under the Staff Regulations. Before the Court, D and Sweden were supported by Denmark and the Netherlands in arguing that 'civil status is a matter which comes within the exclusive competence of the Member States', and hence that 'where a Member State has legislated to give legal status to an arrangement such as registered partnership, which is to be treated in respect of the rights and duties it comprises as being equivalent to marriage, the same treatment should be accorded in the application of the Staff Regulations'.²⁰⁵ Nevertheless, the Court ruled that 'according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex'. It acknowledged that an increasing number of member states had 'introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such union certain effects which ... are the same as or comparable to marriage'. However, it considered that 'apart from their great diversity, such arrangements for registering relationships between

²⁰² *Reed* (n 199), para 13.

²⁰³ *Ibid*, para 15.

²⁰⁴ *D and Sweden v Council* (n 120). See nn 120–121 and accompanying text.

²⁰⁵ *Ibid*, para 29.

couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage'.²⁰⁶

These two judgments have been criticised in the scholarly literature on several grounds, such as privileging traditional marital relationships and discounting social developments taking place in the member states.²⁰⁷ Be that as it may, the Court's approach should arguably be situated within the particular context and time period in which each judgment was delivered. Noticeably, both judgments were delicately framed against the background of the common rules and principles shared by the member states, or at least a majority of them, at the time in which they were decided. Furthermore, the ECJ's cautious approach in elaborating controversial concepts of family law is symptomatic of, and thus helps to expose, the differences in the treatment of family law issues among the member states, which cannot be remedied by the ECJ alone. Certainly, in light of the increasing recognition of same-sex marriage and other types of non-marital relationships in various member states²⁰⁸ in the years since *Reed* and *D and Sweden* were handed down, it remains to be seen whether the ECJ will be inclined to revisit its position in future case law, as it has done with respect to matters relating to the discrimination on grounds of sexual orientation since *Grant*,²⁰⁹ or in relation to the treatment of transgender individuals in light of the common consensus of the member states.²¹⁰ Nevertheless, the fact that at the time of writing, several member states, as well as third States, are grappling with the recognition of same-sex marriage and whether marriage should be limited to a man and a woman helps to give credence to the ECJ's guarded approach in the elaboration of these concepts.

In the meantime, the ECJ may have to formulate other concepts and rules of family law. For instance, three recent judgments issued by the Court constitute striking examples of the extent to which it may have to

²⁰⁶ Ibid, paras 34–36. That said, the Court emphasised that the Union legislature could adopt measures to alter that situation, eg, by amending the provisions of the Staff Regulations: *ibid*, para 38. This was taken up: see n 125.

²⁰⁷ See, eg, Antokolskaia (n 1) 429–34; McGlynn (n 5) 219; Jule Mulder, 'Some More Equal Than Others? Matrimonial Benefits and the CJEU's Case Law on Discrimination on the Grounds of Sexual Orientation' (2012) 19 MJ 4.

²⁰⁸ On which see Ian Curry-Sumner 'Same-sex Relationships in a European Perspective' and Joanna Miles, 'Unmarried Cohabitation in a European Perspective', chapters 4 and 3 respectively in Jens M. Scherpe (ed), *European Family Law Vol. III: Family Law in a European Perspective*.

²⁰⁹ n 176.

²¹⁰ See n 178. But see Mark Bell, 'Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law' (2012) 60 AJCL 127.

decide sensitive matters of family law, such as the concept of pregnancy or birth, in the course of providing a useful answer to questions submitted by national courts in the preliminary ruling procedure. First, in *Mayr*,²¹¹ the Court was faced with elaborating the concept of ‘pregnancy’ for the purposes of determining whether the dismissal of a pregnant worker undergoing in vitro fertilization is in compliance with the Pregnancy Directive,²¹² which contains no provisions relating to this issue.²¹³ The Court held that this Directive did not extend to a female worker who was undergoing in vitro fertilization treatment and whose ova had been fertilized by her partner’s sperm cells on the date she was given notice of her dismissal, but not yet been transferred to her uterus.²¹⁴ Thereafter, in *Chatzi*,²¹⁵ the Court had to decide the meaning of ‘birth’ in order to determine the extent of parental leave involving twins for the purposes of interpreting the Framework Agreement on parental leave, concluding that the Agreement did not confer entitlement to a number of periods of parental leave equal to the number of children born.²¹⁶

Finally, in *Brüstle*,²¹⁷ the Court had to elaborate the definition of the human embryo for the purposes of determining the scope of the exclusion of certain matters from patentability under the Biotechnology Directive.²¹⁸ As underlined by Advocate General Bot in this case, the Court’s definition of this term must be limited to the framework of this technical directive on biotechnology inventions and could not be extrapolated to other areas of human life, such as the approach taken to abortion.²¹⁹ In its judgment, the Court ruled that any human ovum after fertilization, any non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilized

²¹¹ Judgment in *Mayr*, C-506/06, EU:C:2008:119.

²¹² Directive 92/85 (n 36).

²¹³ See the Opinion of Advocate General Ruiz-Jarabo Colomer in *Mayr* (n 211), EU:C:2007:715, point 28, framing ‘the heart of the issue, which revolves around ascertaining when a woman is pregnant and as such protected by Directive 92/85’.

²¹⁴ *Mayr* (n 211), para 53.

²¹⁵ Judgment in *Chatzi*, C-149/10, EU:C:2010:534.

²¹⁶ *Ibid*, para 75.

²¹⁷ Judgment in *Brüstle*, C-34/10, EU:C:2011:669.

²¹⁸ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L213/13 (‘Biotechnology Directive’).

²¹⁹ Opinion of Advocate General Bot in *Brüstle* (n 217), EU:C:2011:138, points 4, 49.

human ovum whose division and further development have been stimulated by parthenogenesis all constitute a ‘human embryo’ within the meaning of article 6(2)(c) of the Biotechnology Directive, leaving it to the referring court to ascertain, in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage constitutes a ‘human embryo’ within the meaning of that same provision.²²⁰

Certainly, at face value, these cases,²²¹ could be considered above in the context of the ECJ’s incidental role in interpreting Union law, which causes it to touch on family law issues indirectly as part of deciding the particular case before it. Nonetheless, they help to illuminate the ECJ’s impact on family law through its formulation of judge-made concepts in this field.

5. CONCLUSION

In light of the foregoing discussion, the impact of the EU on European family law may appear paradoxical. On the one hand, family law is largely considered to be a delicate, sensitive topic in which the member states, not the EU, have primary competence and which warrants special treatment in the EU decision-making process to ensure the member states have the ‘upper hand’. On the other hand, however, in view of the legislative developments taking place in the EU sphere, European family law is a burgeoning field in which the EU exerts a considerable influence on family law, which has blossomed from the adoption of Union measures that indirectly affect family law matters to achieve the Union’s objectives across a wide variety of policy fields to an increasing number of Union measures regulating the private international aspects of family

²²⁰ *Brüstle* (n 217), para 38. See further the judgment in *International Stem Cell Corporation*, C-364/13, EU:C:2014:2451, in which the Court held that Article 6(2)(c) of the Biotechnology Directive must be interpreted as meaning that an unfertilised human ovum whose division and further development have been stimulated by parthenogenesis does not constitute a ‘human embryo’, within the meaning of that provision, if, in the light of current scientific knowledge, it does not, in itself, have the inherent capacity of developing into a human being, this being a matter for the national court to determine.

²²¹ See also, eg, the judgments in *C.D.*, C-167/12, EU:C:2014:169; and *Z.*, C-363/12, EU:C:2014:159, on surrogacy, on which see Geert De Baere, ‘Shall I be Mother? The Prohibition on Sex Discrimination, the UN Disability Convention, and the Right to Surrogacy Leave under EU Law’ (2015) 74 *Cambridge Law Journal* 44-48.

law matters directly as part of carrying out the Union's objectives concerning JCCM and the AFSJ. Similarly, the impact of the ECJ on European family law is more substantial than may appear at first glance, taking account of the rising volume of case law implicating issues of family law by virtue of the Court's interpretation of Union law and its formulation of judge-made rules of Union law. In fact, this may be likely to increase in the coming years with the institutional developments brought by the entry into force of the Lisbon Treaty and the urgent preliminary ruling procedure.

Yet, on a closer look, this situation may not be so paradoxical after all. As illustrated by the EU's activities and the ECJ's case law discussed above, family law in the EU sphere holds out real and practical benefits for Union citizens and other persons residing in the EU. While it may be difficult to explain to the average citizen the subtleties of the case law on free movement or the division of competences between the Union and the member states, for instance, he or she is likely to care about whether there are rules adopted at the European level or case law of the Union courts on, among other things, discrimination against same-sex unions, recovery of maintenance obligations or the recognition of civil status records regarding, say, his or her marriage or the baptism of his or her child performed in another member state. As a result, even if the justification for certain Union measures in this context remains controversial, it is arguably not surprising that the EU has become increasingly involved in family law as part and parcel of the objectives and the competences that have been steadily conferred on it under the Treaties.

RECOMMENDATIONS FOR FURTHER READING

- Katharina Boelki-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003).
- Katharina Boelki-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe – National, Cross-Border and European Perspectives* (fully rev 2nd edn, Intersentia 2012).
- David Bradley, 'Family Law', in Jan M. Smits (ed), *Elgar Encyclopedia of Comparative Law*, 2nd edn (Edward Elgar 2012) 314.
- Cathryn Costello, 'Metock: Free Movement and "Normal Family Life" in the Union' (2009) 46 CMLRev 587–662.
- Aude Fiorini, *Which Legal Basis for Family Law? The Way Forward* (Note, European Parliament Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2012).
- Koen Lenaerts, 'In the Name of EU Citizenship', in Alain-Laurent Verbeke, Jens M. Scherpe, Charlotte Declerck, Tobias Helms, Patrick Senaeve (eds), *Confronting the*

- Frontiers of Family and Succession Law: Liber amicorum Walter Pintens* (Intersentia 2012) 831–46.
- Koen Lenaerts and Kathleen Gutman, “‘Federal Common Law’ in the European Union: A Comparative Perspective from the United States” (2006) 54 *AJCL* 1.
- Clare McGlynn, *Families and the European Union. Law, Politics and Pluralism* (Cambridge University Press 2006).
- Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen (eds), *International Family Law for the European Union* (Intersentia 2007).
- Walter LJ Pintens, *Naar een Ius Commune in het Europees Familie- en Erfrecht?/ Towards a Ius Commune in European Family and Succession Law?* (Intersentia 2012).