GEDIP – subgroup "General principles"
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Guidelines on the Recognition of a Foreign Legal Relationship

These guidelines constitute an attempt to formulate the method of recognition of foreign situations as established by legal doctrine. They are based on the model of an exceptional recognition of a legal relationship validly constituted abroad, in the light of the case law of the ECJ and the ECtHR on the one hand, and the objective of foreseeability of the applicable law on the other. They are different from a model based on a general rule of recognition in civil matters. In the proposed model, the decision on recognition depends on an assessment of all the circumstances, based on a list of indicators.

1. Without prejudice to special provisions[1], the application of a provision of the law designated by the choice-of-law rule which leads to the non-recognition of the validity or effects of a legal relationship validly formed abroad shall be disregarded where such application prejudices the exercise of a fundamental freedom or right enshrined in European Union law, the European Convention on Human Rights or international law, or where it undermines the achievement of the objective of legal certainty and predictability.

For the purpose of this paragraph, the validity of the legal relationship shall be determined in accordance with the rules of private international law of the State in which the legal relationship was formed[2].

2. The decision on recognition is based on an assessment of all the circumstances, in particular[3] :

- the existence of a sufficient connection, such as a party's habitual residence or nationality[4], with the State in which the legal relationship was formed; [5] ;
- the consolidation of the situation, in particular through the intervention of a public authority or the effective exercise of the rights deriving from the legal relationship;[6]
- a fair balance of the interests involved, private and public.[7]

3. In the event of non-recognition, a provision of the law designated by the choice-of-law rule of the forum may be applied and, if necessary, be adapted, with an effect that is equivalent to the provision that enabled the legal relationship to be formed abroad.[8]

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[1] As an example of a special regime for private divorce and parental responsibility, Articles 64 to 66 of Regulation 2019/1111 Brussels IIter provide for the recognition of an authentic instrument or agreement registered and certified in a Member State. The conditions include, in particular, an element of proximity in that the instrument must have been drawn up in a State whose courts would have had jurisdiction - in concrete terms, the State of nationality or residence of a spouse; the State of residence of the child - and an element of public policy. In addition, the certificate may be declared null and void by the originating authority if the instrument does not have "binding effect" in the State of origin, or if the instrument relating to parental responsibility is contrary to the child's interests. In comparison with the present guidelines, this regime includes the indicators of proximity, consolidation (with the requirement of crystallisation) and balance of interests. On the other hand, the

authorities of the requested State have no control over these conditions, apart from the grounds of public policy and the requirement that the child be given the opportunity to express his or her views. Furthermore, this system does not formally provide for a validity check in accordance with the private international law of the State of origin.

[2] Such a condition is present in most of the models proposed by the method based on the recognition of situations (see the discussion in the appendix *[French version only]*). European case law takes it into account as a necessary element of the configuration of the situation. See, for example Coman judgment (C-673/16, 5 June 2018), concerning a same-sex marriage celebrated in Belgium "in accordance with the law of that State": in this case, this celebration was based on Article 46(2) of the Code of Private International Law, according to which such a marriage (between an American and a Romanian residing in Belgium) is possible if it is valid according to the law of the nationality or residence of a party - as an exception to the rule designating the national law of each party, which would have required compliance with the prohibition of such a marriage under Romanian law. Similarly in relation to parentage, the Pancharevo judgment (C-490/20, 14 December 2021, citing the Coman judgment) refers to a "legally established" relationship, or a status "established in another Member State in accordance with the law of that State".

[3] The assessment indicators are intended to reflect the proportionality requirement that a decision to refuse recognition should meet, as well as the conditions of a legitimate expectation on the part of the parties. The list includes, but is not limited to, the main indicators.

The argument that the parties have a legitimate expectation echoes the consideration given to a number of concepts, such as the objective of legal certainty and foreseeability (see paragraph 1), the parties' confidence that their conduct will comply with the requirements of the law of the forum deduced from the practice of the authorities (an indication noted in the Wagner judgment, ECtHR, 28 June 2007, no. 76240/01), or the elements of proximity and consolidation of the situation that constitute indicia of assessment in this paragraph.

[4] The weighting of these indicators may vary depending on the subject matter. A priori, the weight of the nationality criterion may differ in matters of status and family relationships compared with other matters. In Freitag (C-541/15, 8 June 2017) concerning the recognition in the State of residence of a name acquired in the Member State of nationality of origin and birth, the Court accepted that the German authority of residence and co-nationality had to authorise a change of name under the law of the nationality of birth. By comparison, in the Coman case (C-673/16, 5 June 2018), the location of the European citizen's residence in Belgium, the country of celebration, was held to be decisive, as was, in the Grunkin & Paul case, the location of the German citizen's actual and continuous residence in his country of birth. The Pancharevo judgment identifies a link established in respect of a foreign child in the host State "of birth or residence".

[5] This indicator expresses a condition of proximity, present in most models concerning a system for recognising situations.
From the point of view of the general method of conflict of laws, this condition aims to prevent the risk of fraud. European case law accepts that the fraud argument can neutralise an artificial arrangement for obtaining the benefit of freedom of movement. According to the Bogendorff von Wolffersdorff judgment (2 June 2016, Case C-438/14, § 57), citing the Centros judgment (9 March 1999, Case C-212/97), the State may combat "circumvention of national law on the status of persons by the exercise for that purpose alone of freedom of movement and the rights resulting therefrom". This ground for refusal falls as much within the concept of abuse of Union law (on the constituent elements of this concept, see the Torresi judgment of 17 October 2014, C-58/13, §§ 45 and 46) as that of fraud against the law. However, it can only be applied following a concrete assessment of the circumstances, and not on the basis of an anti-fraud rule of general and abstract application (Centros judgment). See also, for the European Court of Human Rights: Orlandi v. Italy judgment of 14 December 2017, no. 26431/12 (same-sex marriage), and DB v. Switzerland judgment of 22 November 2022, no. 58817/15 (filiation by surrogate motherhood).

[6] The effective exercise of the rights deriving from the legal relationship validly established abroad echoes a condition for assessing the rights referred to in Article 8 ECHR. The intervention of a public authority - often required in the models as an element in the "crystallisation" of a situation - is not considered necessary but is merely an indication, in particular of a legitimate expectation on the part of the parties that the legal relationship will be held to be valid. Such an expectation may also arise, for example, from possession of status.

[7] This indicator expresses a balance of interests in the event of a conflict between several fundamental values, for instance when a refusal to recognise a legal relationship is justified by a legitimate objective of general public interest, set against a freedom or a fundamental right of the parties. In matters where the right in question is that of the child, his or her interests must be considered to be paramount.
The public policy argument as a ground for refusing recognition is generally accepted by the models relating to the method of recognising situations. However, its use in this context has particular significance. In most cases involving the recognition of a foreign situation, the obstacle to recognition arises from the application of the law of the forum after the public policy exception has been raised. As a result, this ground for refusing recognition is understood as part of a balance between the general interest invoked as justification for the measure in question and the interest of the individual, as practised in the context of the protection of fundamental rights or freedoms, where it is given a restricted meaning targeting a hard core of values of the legal order.
In European freedom of movement law, the public policy ground may relate to a manifest infringement of a fundamental principle, in particular of a constitutional nature, affecting a fundamental interest of society (for example, Omega judgment of 14 October 2004, C-36/02, for human dignity; Sayn-Wittgenstein judgment of 22 December 2010, C-208/09, for the republican conception of the State), or to the essential content of fundamental rights, in particular those enshrined in the Charter (for example, Swedish Match judgment of 22 November 2018, C-151/17). The same applies as a ground for refusing to recognise a foreign judgment (Renault judgment of 11 May 2000, C-38/98, § 29, citing the Krombach judgment and ALBER Opinion, § 67; Diageo Brands judgment of 16 July 2015, C-681/13, and Szpunar Opinion, § 44 with references; Meroni judgment of 25 May 2016, C-559/14).

The invocation of this argument must also take account of the degree of divergence between the conceptions prevailing in the legal systems in question, it being understood that the exception should not come into play where those conceptions are sufficiently similar (see, for example, the Opinion of Advocate General Alber preceding the Renault judgment, § 67). Account may thus be taken of the possible equivalence of the foreign institution in question with the corresponding institution known to the law designated by the conflict rule (in this sense, as an element left to the discretion of the court addressed, Bogendorff von Wolffersdorff judgment of 2 June 2016, C-438/14, referring to the possible absence of a shared conception of States in matters of name, concerning the recognition in Germany of a name associated with a predicate of nobility obtained in the United Kingdom).

[8] This paragraph illustrates the use of adaptation techniques, in the light of the Mennesson case (opinion of 10 April 2019, no. P16-2018-01) which, while admitting a refusal to recognise parenthood of intention without a genetic link, states that the best interests of the child require seeking, in the law of the requested State, a parent-child relationship equivalent to that established abroad, such as adoption, and adapting, if necessary, the conditions so as to ensure a simplified and accelerated procedure.