Chapter 13
Conclusions Case Study II

13.1. The internal picture – What do the various jurisdictions provide in respect of legal recognition of same-sex relationships?

13.1.1. Different paths, different paces, but similar direction

From the present case study a picture has emerged of different jurisdictions moving at different paces, a movement which nonetheless generally seems to be going in a similar direction. Whether the legislature or the judiciary is taking the lead, this direction consists of awarding increasingly more protection to same-sex couples and rainbow families. Nevertheless, the difference in pace of the three States studied in this research is striking. Moreover, not only are there differences in the speed of their movement, but the case studies have also shown that the States have followed different paths.[1] The paths chosen have been very determinative for the nature of the debates at the national level and for the ensuing (judicial) balancing exercises. For example, where a separate civil partnership was created for same-sex couples, as was the case in Germany and Ireland, the debates in essence related to a (presumed) tension between traditional notions of marriage and – initially – family on the one hand, and the principle of equal treatment on the other.[2] This also implied that for the assessment of whether there was discrimination on grounds of sexual orientation, civil partnership was compared with marriage. In the Netherlands, on the other hand, a registered partnership was introduced that was open to different-sex couples and same-sex couples, while marriage was soon thereafter opened up to same-sex couples as well. Consequently, civil status has played a less prominent role in debates on differences in treatment between same-sex and different-sex couples in the Netherlands.

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1 Curry-Sumner has divided formalised registration schemes for same-sex couples into five different models, namely: monistic, dualistic with weak registration; dualistic with strong registration; pluralistic with weak registration and pluralistic with strong registration. I. Curry Sumner, *All's well that ends registered?: the substantive and private international law aspects of non-marital registered relationships in Europe: a comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom* (Antwerp, Intersentia 2005).

2 Other considerations in debates on legal recognition of same-sex relationships have been legal certainty and coherence of legislation. For instance, one of the reasons in the Netherlands to consider the introduction of a registered partnership, was the fact that in the Netherlands over the years a complex web of laws regulating forms of *de facto* cohabitation had come into existence which lacked coherence. The ECtHR has also at times held that States must ensure that their legislative framework in the area is coherent. See ch. 12, section 12.3.2 and ch. 8, section 8.2.4.1.2.

As set out in the various subsections below, European law has so far had only minimal impact on national standard-setting in respect of legal recognition of same-sex relationships. This first section of this concluding Chapter will firstly address the balancing of equal treatment and traditional notions of marriage and the family in section 13.1.2. Subsequently, the question of when same-sex couples and different-sex couples are in a comparable situation and require equalisation of their position, is addressed (section 13.1.3). Section 13.1.4 discusses how the various jurisdictions studied for this research have dealt with parental rights for same-sex couples and how this developed over time. The diversity in legislative and judicial processes is set out in section 13.1.5. Section 13.2 addresses the cross-border picture and discusses the various legal responses to cross-border movement that can be identified in the present case study.

13.1.2. Equal treatment *vs*. traditional notions of marriage and the family

In all jurisdictions studied for this case study, equal treatment has been an important and often decisive argument in the debates on legal recognition of same-sex relationships. A desire to abolish discrimination on grounds of sexual orientation has been at the basis of a gradual but generally steady development towards increased protection of LGBT rights and, correspondingly, legal recognition of same-sex relationships in the three States studied. Still, other (general) interests have at times been considered weightier. Traditional notions of marriage and (marriage-based) family have been the most prominent and most often accepted counter-interests in this regard.

Because of its long history and tradition, marriage has a special place in the national legal orders of the three States studied for this case study. As elaborately set out in Chapters 10 and 11, this particularly holds for Germany and Ireland, whose Constitutions provide for special protection of marriage. Marriage is thereby understood as between man and woman only. Initially, the protection of traditional marriage and family was put forward in national legislative debates as an argument against any legal recognition of same-sex relationships. Later, in Germany and Ireland, the special protection of marriage was ground for creating a separate institution for same-sex relationships, while reserving marriage for different-sex couples only (see also 13.1.3 below). Both EU law and the ECtHR have respected such national choices. In the case law of the ECtHR, traditional marriage has generally enjoyed strong protection. As set out in Chapter 8, the ECtHR has held that marriage is 'singled out for special treatment' under Article 12 ECHR, and that it confers a special status on those who enter into it.[3] The ECtHR has repeatedly ruled that 'marriage' under Article 12 ECHR concerns traditional marriage between man and woman only and the Court has recognised a State interest in maintaining 'the traditional institution of marriage intact'.[4] States enjoy a wide margin of appreciation

[3] See Ch. 8, section 8.1.3.
[4] See Ch. 8, section 8.2.5.

when it comes to access to marriage and protection of traditional marriage has been accepted as justification ground for a distinction between (different-sex) spouses and (same-sex) stable partners, whether registered partners or unmarried partners (see also section 13.1.3 below).[5]

These debates have been, and are, however, in flux. Support for protection of traditional marriage has been or is eroding in all three States studied for this case study. The Dutch legislature deliberately gave precedence to the principle of equal treatment over tradition in 2001 when it opened up marriage to same-sex couples. In Ireland, the opening up of marriage to same-sex couples is presently being contemplated. In Germany this is not (yet) the case, but clear changes are also visible there. As observed in Chapter 10, the most recent line of case law of the German Constitutional Court in relation to same-sex relationships is no longer about the special protection of marriage, but about the protection of civil partnership against discrimination.[6] A similar development can be seen partly in the case law of the CJEU. The CJEU has also implicitly begun to tamper with the protection of traditional marriage by finding same-sex registered partners in a legal and factual situation comparable to that of spouses as regards certain employment benefit (see also 13.1.3 below).[7] The Luxembourg Court thereby gave a neutral reading of marriage as 'a form of civil union', without referring to any special status of marriage. Even the ECtHR has made the (though so far only symbolic) steps of finding that same-sex couples come within the scope of Article 12 (the right to marry).

In the same vein, views on traditional family have also developed over time. In particular, there is a trend emerging towards increased protection of the interests of the child in this context. This development has been visible both at the national level and in the case law of the Strasbourg Court, and it has had clear implications for the development of parental rights for same-sex couples, as is further discussed in section 13.1.4 below.

Moreover, outside the sphere of marriage, in fact, the protection of LGBT rights and same-sex relationships has grown increasingly stronger, including at the European level. Within the EU, equal treatment has been very strongly pursued in the field of employment, but even in areas of law where the EU has no competences, Member States must comply with the principle of non-discrimination as protected under EU law.[8] Under the ECHR, discrimination on grounds of sexual orientation requires particularly serious reasons by way of justification. In cases where no difference in civil status was concerned (see 13.1.3 below), this rule has resulted in stronger protection of same sex relationships. The ECtHR has furthermore held that same-sex

5 In cases where same-sex couples claimed that they were treated differently from different-sex couples, the special status of marriage has often been a ground for not even finding comparability of the situations of same-sex couples and those of different-sex couples, or in any case for justifying a difference in treatment between these groups.

6 See Ch. 10, section 10.5.

7 See Ch. 9, section 9.3.3.2.

8 See Ch. 9, section 9.3.

relationships enjoy the protection of both private and family life under Article 8 ECHR and has explicitly recognised that same-sex couples – just like different-sex couples – have a need for legal recognition and protection of their relationships. Although – as yet – no full consequences were given to these findings, there are, as observed in Chapter 8, hints that the Strasbourg Court may move in the direction of the definition of a positive obligation for the States to provide for some form of legal recognition of same-sex relationships.

The notion of protection of morals has not, as such, appeared explicitly in debates and decision-making on legal recognition of same-sex relationships. It was underlying the initial criminalisation of homosexual acts in all three States studied for this case study and was in that context in itself accepted as a legitimate state interest by the ECtHR.[9] The protection of morals has, however, scarcely been relied upon in respect of legal recognition of same-sex relationships, nor has the ECtHR accepted the protection of morals as a legitimate aim to justify reserving marriage for man and woman only.[10]

13.1.3. The comparability issue and the equalisation imperative

Courts and legislatures in the various jurisdictions studied in this research have dealt differently with discrimination complaints, in particular with the question of whether same-sex couples and different-sex couples were in a comparable situation if their civil status was different. This accordingly has had implications for the question of whether these groups should be treated equally.

As observed in Chapter 8, in the case law of the ECtHR, the special status of marriage has often been a ground for the ECtHR for not even finding comparability of the situations of unmarried same-sex couples and married different-sex couples, or in any case for justifying a difference in treatment between these groups. The fact that marriage was not open to same-sex couples under the law of the respective State had no bearing on these findings. In other words, the Court did not find indirect discrimination in these cases. The ECtHR has extended this formal equality based approach to cases involving other forms of a 'special legal status', such as registered partnerships.[11] The Strasbourg Court has thus only held couples with the same civil status to be in comparable situations; where different-sex couples had a 'special legal status', this status distinguished their situation from that of same-sex couples who did not have this status, irrespective of whether same-sex couples had access to that

9 See Ch. 8, section 8.1.1.

10 In *Schalk and Kopf* (2010), the wide margin was justified because general measures of economic or social strategy were concerned. Only in *Hämäläinen* (2013) – which case concerned the marriage of a post-operative transsexual – did the Court note that the case raised 'sensitive moral or ethical issues'. ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 98 and ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 75. See also Ch. 8, section 8.2.2.

11 As more elaborately discussed in Ch. 8, section 8.2.3.2, this has been defined in the Court's case law as 'a public undertaking, carrying with it a body of rights and obligations of a contractual nature'. ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom,* no. 13378/05, para. 65.

special legal status or not. This approach of the Strasbourg Court also implies that States are under no obligation to equalise alternative registration forms with marriage. In fact, the ECtHR has held that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition.[12]

The CJEU, on the other hand, has taken a different approach. In older case law the CJEU had been as evasive as the ECtHR by holding that a special legal status was decisive in cases where discrimination on grounds of sexual orientation was claimed.[13] However, more recently the CJEU has held in various cases that there is direct discrimination on grounds of sexual orientation where at the national level certain employment benefits are reserved to spouses, while marriage is reserved to different-sex couples only and under national law, same-sex registered partners are in a legal and factual situation comparable to that of spouses as regards that benefit. The Luxembourg Court has thus imposed on States the obligation to equalise alternative registration forms with marriage, where marriage is open to different-sex couples only. This obligation only applies, however, where that alternative registration form is comparable to marriage under the national law, and only in respect of certain employment related benefits. While initially the CJEU left it to the national courts to assess the issue of comparability of situations, more recently, the Court instead assessed this issue itself. It held that even the French PACS met the requirement of comparability, while that partnership form is not as close to marriage as, for example, the German civil partnership, which was central to earlier case law of the CJEU in the area.[14] The Luxembourg Court has thus over time become more instructive in this area and has correspondingly left less room for national courts to decide such cases.

Both Ireland and Germany have chosen a 'separate but equal' approach, by creating a separate institute for same-sex couples that nonetheless granted equivalent rights. In Germany this was first introduced in 2001 and over time the German civil partnership was increasingly more equalised with marriage on the basis of the principle of equal treatment. German courts thus did not hesitate to compare the position of (same-sex) civil partners with that of (different-sex) spouses and found indirect discrimination on grounds of sexual orientation where they were treated differently without sufficient justification. In Ireland, the comparison with marriage was generally avoided by the legislature when introducing civil partnerships, and the fact that the opening up of marriage was explored the very same year that civil partnerships were introduced, rendered such comparison and any equalisation of civil partnership increasingly more redundant. As noted above, in the Netherlands, differences in legal status have been even less relevant in debates over equal rights for same-sex couples. Instead, for instance in the context of parental rights, biological differences have been at times accepted as justification for a difference in treatment between same-sex couples and different-sex couples.

12 See Ch. 8, sections 8.2.2.2 and 8.2.6.

13 Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden* v. *Council* [2001] ECR I-4319, ECLI:EU:C:2001:304, as discussed in section 9.2 of Ch. 9.

14 See Ch. 9, section 9.3.3.

When it comes to the examination of discrimination cases, more precisely the question of whether situations are comparable, there are thus clear differences in approach between the various jurisdictions. This is a matter in respect of which not only do the national jurisdictions diverge, but also under the two European systems (EU law and the ECHR), different approaches to these questions have been taken.

13.1.4. Parental rights for same-sex couples: gradual shift to best interests of the child

Clear developments towards stronger protection of parental rights of lesbians and gays and of same-sex couples have been visible in all national jurisdictions studied for this case study, as well as under the ECHR. Where initially the interests of the child were perceived as an argument against the granting of parental rights to same-sex couples or single lesbians and gays, it is nowadays generally no longer accepted that to be born and/or raised in a same-sex relationship is not in the interests of the child.[15] On the contrary, it has been increasingly accepted by legislatures and courts that it is in the interests of these children that legal protection is given to the family they are born and/or raised in. Also, the view that equal treatment of same-sex parents is in fact in the interest of the child has received increasingly more support. There has thus been, as also noted in 13.1.2 above, a discernible shift from more traditional notions of the family to more child-centred approaches.

The ECtHR's contribution to these developments has consisted first of all of its insistence on the importance of granting legal recognition to *de facto* family life.[16] Further, this Court has ruled that sexual orientation may not be the decisive factor in decisions on parental rights for individuals.[17] Moreover, while the Strasbourg Court has accepted the protection of the interests of the child and protection of the traditional family as weighty and legitimate reasons which may justify a difference in treatment between same-sex and different-sex couples in relevantly similar situations, it has been increasingly stricter in its examination of the proportionality of limitations on parental rights for same-sex couples.[18] In its most recent case law in the area, the Strasbourg Court noted that it was in fact in the interest of the child that unmarried same-sex couples and unmarried different-sex couples were not treated differently in parental matters.

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15 For example, in *X. a.o.* v. *Austria* (2013), the ECtHR implicity found that generally no evidence existed '[…] to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs'. ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 142. See also Ch. 8, section 8.2.4.1.2.

16 Ch. 8.1.2. See also Ch. 2, section 2.1.1.

17 Ch. 8, section 8.2.4.

18 As concluded in Ch. 8, section 8.2.4.1.2, in choosing means to protect the family, States must take into account developments in society and changes in the perception of social and civil status and relational issues. Also, an examination of each individual case must be made possible, as that is most in keeping with the best interests of the child.

The German Constitutional Court recently adopted a similar line of reasoning in a case on successive adoption for same-sex couples of 2013 and took it further in two respects. Firstly, while the relevant ECtHR judgment concerned a case in which no 'special legal status' was involved (see 13.1.3 above), in the German case such a status was involved, but the German Court nonetheless found that (same-sex) civil partners were in a comparable situation to (different-sex) spouses.[19] Moreover, and more importantly, the German Constitutional Court found that the difference in treatment of (same-sex) civil partners and (different-sex) spouses, violated the right to equal treatment of the child. The child's rights were thus made central to the assessment of the parents' claim to be treated equally with different-sex partners.

Still, in Germany, and this also holds for Ireland, the protection of the parental rights of same-sex couples is lagging behind when compared to those of different-sex couples. Joint adoption and legal parenthood by operation of the law are prime examples of such differences.[20] In respect of Ireland it has in fact been observed that the rights, interests and needs of children living in rainbow families were 'largely ignored',[21] although some fundamental changes in this regard have been anticipated recently.

It seems that not all such differences in protection of parental rights for same-sex couples and different-sex couples are necessarily ruled out under the ECHR. The ECtHR has accepted differences in treatment if a difference in legal status is also concerned (see 13.1.3 above) and in recent case law the Court once again confirmed that alternative registration forms do not have to exhaustively regulate on parental matters.[22] The ECtHR has, moreover, accepted that biological differences between different-sex couples and same-sex couples, decisively distinguish these groups in respect of parental matters.[23] Such biological differences have also been a consideration in debates on parental rights for same-sex couples at the national level. In the Netherlands this debate has, over the years, moved from biological differences between same-sex couples when compared to different-sex couples to the biological differences between male and female same-sex couples. Under Dutch law, as it presently stands, the parental rights of couples consisting of two men stay behind when compared to two women and this has been justified on grounds of biological differences between these groups.[24]

Parental rights for same-sex couples have thus enjoyed increasingly more protection, both at the national level and under the ECHR, but parental rights of (male) same-sex couples generally still enjoy less protection when compared to different-sex couples.

19 See Ch. 10, section 10.3.5.3.
20 See Ch. 10, sections 10.3.5.4 and 10.3.5.5, and Ch. 11, section 11.3.5.
21 A. Daly, 'Ignoring Reality: Children and the Civil Partnership Act in Ireland', 14 *Irish Journal of Family Law* (2011) p. 82.
22 See Ch. 8, section 8.2.6.
23 See Ch. 8, section 8.2.4.2.
24 See Ch. 12, sections 12.3.6.4 and 12.5.

13.1.5. How was change brought about? Typification of (legislative and judicial) processes

As noted above in 13.1.1, the legislative and judicial processes in the various national jurisdictions studied for the present case study have differed. Amongst them, the Netherlands have proven the most progressive and most proactive. In a way the Netherlands can be said to belong to those States who have set the tone within the European Union – or even the world – in respect of legal recognition of same-sex relationships. Being a pioneer in this area, the Netherlands set and followed its own pace. After the initial impetus came from the judiciary, the legislature took the lead by introducing a few fundamental changes in a relatively short period of time. Subsequently, as observed in Chapter 12, a legislative process commenced that has been described as 'the law of the small change'.[25]

In Germany a step-by-step approach has been taken as well, although the German point of departure has been different and the Courts have played a much more prominent role in the process. Here, the initial impetus came from the legislature who introduced a civil partnership for same-sex couples in 2001. It has been mainly court decisions that have subsequently prompted the legislature to remove differences between (same-sex) registered partners and (different-sex) spouses, in respect of all sorts of matters, ranging from taxes, to pensions, to parental rights (see 13.1.3 above).[26] The German process can thus well be described as an incremental one.[27] Perhaps, it may even be qualified as 'disjointed incrementalism', because this kind of decision-making could be held to have led 'to a less desirable outcome than radical action at the outset would have achieved.'[28]

In Ireland, the process had different phases, each with a different pace. Overall, however, it is striking that fundamental change was introduced in a relatively short period of time. Ireland was comparatively late with the abolition of the criminalisation of homosexual conduct, and the build-up to the introduction of a civil partnership for same-sex couples took some time, namely from 2004 to 2011. The impetus for the introduction of this civil partnership came from the judiciary and was reinforced by the introduction of a civil union for same-sex couples in the UK in 2004.[29] The Civil Partnership Act was in the end adopted following a remarkably smooth legislative process, however, and without any review of constitutionality by the Irish Supreme

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25 See Ch. 12, section 12.5.

26 See ch. 10, section 10.5.

27 Incrementalism has been defined as '[t]he political or administrative practice of making small changes to existing policy rather than undertaking radical or ambitious plans'. C. Calhoun (ed.), *Dictionary of the Social Sciences* (Oxford, Oxford University Press, published online: 2002, eISBN: 9780199891184). In some definitions of incrementalism, the decision-making process is started 'not with some ideal goal in mind but from current policies.' I. McLean and A. McMillan, *The Concise Oxford Dictionary of Politics*, 3rd edn. (Oxford, Oxford University Press, Published online: 2009, eISBN: 9780191727191).

28 Calhoun 2002, *supra* n. 28.

29 As explained in Ch. 11, section 11.3.1, the Republic of Ireland was under an obligation to provide for an 'at least an equivalent level of human rights protection' as prevalent in Northern-Ireland, under the so-called Good Friday agreement.

Court. It was, moreover, followed by rapid developments as a result of which a strong increase in parental rights for same-sex couples and the opening up of marriage to same-sex couples were being contemplated in Ireland at the time this research was concluded.[30]

Compared to the action taken at national level, the European jurisdictions generally have taken a rather reactive, pragmatic and incremental approach.[31] The EU legislature as well as the CJEU and the ECtHR generally follow the pace set by national legislatures and courts and (the absence of) European consensus in the area has played a primordial role in the case law of both European Courts.[32] While the decriminalisation of homosexual conduct was expressly demanded by the ECtHR, fundamental choices in respect of legal recognition of same-sex relationships have been left to the States. They enjoy a margin of appreciation in the timing of the introduction of legislative changes and the Strasbourg Court has never 'reproached' a State for not introducing legislative change in respect of legal recognition of same-sex relationships any sooner than it did. In a way, the ECtHR could therefore be said to have provided States with an 'excuse' to delay or postpone the introduction of (fundamental) change in the area. Its case law has in any case enabled, or perhaps even stimulated, States to take an incremental approach in these matters.

While the ECtHR has thus been primarily reactive in the area, case law has at the same time been continually developing. Slowly and carefully, the Strasbourg Court has increasingly defined its position in respect of legal recognition of same-sex relationships. As noted above and as elaborately discussed in Chapter 8, there are hints in the case law of the ECtHR that this Court may be taking more firm stances in future case law, for example by defining a positive obligation for States to provide for an alternative registration form. At the same time it must be noted that the ECtHR has made clear that isolated positions in this area are not necessarily incompatible with the Convention.[33]

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30 That is 31 July 2014.

31 Incrementalism has been explicitly advocated by the EU Justice Commissioner, who has held the following during a meeting of the European Parliament in 2010: 'I am sure you understand that this is, for some Member States, a very delicate political and social question, because the way of looking at things is not the same all across Europe. […] We have to advance step by step. We must, most of all on the basis of our guidelines, bring the Member States to accept these rules. For many, this is very new and very unusual. For some, it is very shocking. We have to advance cautiously, because what we do not want […] is […] to be too harsh. In saying this, I am not speaking about the basic values, which are not in question, but we have to bring resisting Member States, step by step, to accept the general rules. What we do not want is to have people starting to oppose same-sex marriages, the recognition of rights and non-discrimination. […]. I do not want there to be any doubts about the fundamentals, about the rights of free movement, irrespective of sexual orientation or ethnicity. These we are going to apply step by step.' Tuesday, 7 September 2010 – Strasbourg, PV 07/09/2010 – 17 CRE 07/09/2010 – 17, online available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20100907+ITEM-017+DOC+XML+V0//EN&language=EN, visited 24 June 2014.

32 See Ch. 8 and Ch. 9, in particular section 9.2.

33 In *Vallianatos* (2013), the ECtHR held: 'The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field – matrimony – which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.'

13.1.6. Resumé and outlook

The present case study has made clear that when it comes to legal recognition of same-sex relationships across the European Union, States have taken the lead, rather than the European institutions. National legislatures, courts and administrative bodies set the tone and pace and the European level generally only follows. The European Courts have at times given some subtle nudges to the national legislature or judiciary, but this has generally only been in situations where first (principled) steps towards legal recognition had yet been taken at the national level. In the case law of the ECtHR, civil status has often functioned as a vehicle for unequal treatment of same-sex couples and different-sex couples. Only in cases where no 'special legal status' was involved, the ECtHR has applied a strict scrutiny test.

Traditional notions of marriage and the family have toned down in all three States studied in this research, although they have not been completely abandoned in all States. Also, under the ECHR marriage still enjoys strong protection. Moreover, the increased acknowledgement and legal protection of *de facto* family life has been paired with the acceptance of biological differences between different-sex couples and same-sex couples, and between lesbian couples and gay couples, as justification for certain differences in treatment between these groups in respect of parental matters. Unequal treatment of same-sex couples does thus still exist, but there has been a shift in the justification grounds from more morally charged grounds to more value-neutral grounds.

Generally a steady development towards increased protection of LGBT rights, and correspondingly, legal recognition of same-sex relationships has been discernible. Such change has been in most cases brought about gradually and at a slow pace, with some exceptions of much quicker developments. These developments are likely to continue in the future. Possibly the European level will take a more proactive stance in some respects. In any case it is likely that the European Courts will continue to nudge national legislatures and courts in this process of increased equalisation of the legal position of same-sex couples with that of different-sex couples.

13.2. The cross-border picture – Legal responses to cross-border movement

As set out in the various Chapters of this case study, cross-border movement within the context of the present case study is taking place in the sense that, naturally, same-sex couples and rainbow families have been, and are, moving around the EU.[34] From a legal perspective a distinction can be made between two types of cross-border movement. The first concerns situations where same-sex couples move to another State with the express purpose of having their relationship legally recognised under

ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09, para. 92. See Ch. 8, section 8.2.6.

34 See Ch. 9, section 9.5, Ch. 10, section 10.4.1, Ch. 11, section 11.4.1 and Ch. 12, section 12.4.1.

the more permissive regime of that other State. This type of cross-border movement has been referred to as 'registration tourism' and 'marriage tourism'. Secondly, there are cross-border situations where same-sex couples or rainbow families move to other States, or desire to do so, for other purposes, such as work.

Following the approach taken in Chapter 7, this section identifies categories of legal responses of States to these two types of cross-border movement by same-sex couples and rainbow families. Based on the findings of this case study two such categories can be distinguished. The first consists of warding off (the effects of) cross-border movement. As further explained in section 13.2.1, States may (try to) deter same-sex couples and rainbow families from going to other States or from moving to their State. Secondly, as a mirror of the 'warding off' approach, States may choose to accommodate (the effects of) cross-border movement of same-sex couples and rainbow families, as is discussed in section 13.2.2 below. For both these categories it is assessed in this section what interests, considerations, perspectives or values have inspired or dictated these legal responses.[35] Also, this section discusses the extent to which European law (both EU law and the ECHR) leaves room for the respective legal responses at national level or in fact even encourages or dictates them. Lastly, it is examined what the implications of these legal responses are or may be for the States concerned, as well as for the same-sex couples and rainbow families involved in the cross-border movement.

Section 13.2.3 explains that two categories of legal responses that were identified in Case Study I on reproductive matters have not been very visible in the present case study. These are outsourcing, whereby foreign options (partly) justify a restrictive regime at domestic level, and adaptation, entailing the adjustment of national standard-setting in the area to that of another State or other States to which cross-border movement takes place. Instead, as further explained in section 13.2.3, the present case study has shown that the troubles that same-sex couples and rainbow families may encounter when moving abroad may be a reason for States to 'back out' from introducing legal recognition of same-sex relationships at national level.

The final section, section 2.4, assesses how the various legal responses to cross-border movement as identified in the present case study relate to one another.

13.2.1. Warding off

Two types of warding off can be discerned in the present case study, which correspond with the two types of cross-border situations set out above. States may firstly desire to prevent cross-border movement for registration or marriage purposes (section 13.2.1.1). Also, they may obstruct cross-border movement by same-sex couples and rainbow families for other purposes than registration or

[35] As also noted in Ch. 7, one of course needs to take care not to ascribe more intentions or underlying motives to the various State measures discussed than can be derived from the type of legal research conducted in this case study.

marriage (section 13.2.1.2). In the latter situation, the warding off by States is not necessarily directed against the cross-border movement of the same-sex couples and rainbow families concerned as such, but rather against certain legal effects of their relationship, such as their civil status or their parental links.

13.2.1.1. Restrictions on access to marriage and civil partnership

The present case study has made clear that some States with relatively permissive regimes in respect of legal recognition of same-sex relationships have warded off cross-border movement by same-sex couples towards their countries for the purpose of concluding a marriage or a civil partnership. For example, when the Netherlands introduced registered partnership and later opened up marriage to same-sex couples, it wished to prevent so-called marriage and registration 'tourism' towards the Netherlands. Presumably, the Netherlands did not wish to upset its diplomatic relations with States which did not (yet) provide for legal recognition of same-sex relationships. There was also a fear of sham registrations. As discussed in Chapter 12, this initially resulted in setting particularly strict conditions for access to registered partnerships.[36] While these requirements have been relaxed over time, at least one of the future spouses or future partners still must be legally resident in the Netherlands or have Dutch nationality in order to register a partnership or enter into a marriage under Dutch law.[37] This thus renders it impossible for foreign couples to go to the Netherlands with the mere purpose of having their relationship legally recognised under Dutch law. Whether such limitations are acceptable under EU (free movement) law, is a matter that has not been discussed extensively in Chapter 9, although it was noted that they are probably not problematic.[38]

States that function as home States in this type of cross-border situations, may for their part try to restrict travel by same-sex couples to other States for registration and marriage purposes. They may do so in order to uphold certain national standards, such as the special protection of traditional marriage. While none of the three States studied in this research appears to have taken such warding off measures, they have nonetheless been identified in this case study. As noted in Chapter 9, reports have been made to the European Commission about refusals by national authorities to issue civil status records to same-sex couples who requested such documents for the purpose of marrying or registering their partnerships in another Member State.[39] The intervention by the European Commission in these cases showed that such warding off measures may be problematic under EU law. The Commission held the national practices incompatible with the right to respect for private and family life (Article 7 CFR), the prohibition of non-discrimination on the basis of sexual orientation (Article 21 CFR) and EU rules guaranteeing free movement and residence.

36 See Ch. 12, section 12.4.3.
37 *Idem*.
38 See Ch. 9, section 9.6, footnote 205.
39 See Ch. 9, section 9.6.3.

13.2.1.2. Non-recognition or downgrading of foreign civil status and parental links

States that function as host States in cross-border situations – or States to which couples return (see above) – may take a warding off approach by refusing to recognise the civil status of a same-sex couple whose relationship was legally recognised in another State by means of registered partnership or marriage. Warding off by the host State may also consist of downgrading such a civil status or by non-recognition of parental links of rainbow families established abroad.

This type of warding off may first of all have implications for decisions on entry and residence of same-sex couples. As explained in Chapter 9, here a distinction can be made between migrating EU citizens and third-country nationals (TCNs) with same-sex partners. Warding off in this context may consist of refusals to authorise entry and residence of same-sex partners of EU citizens or of family reunification applications of same-sex partners of TCNs. It may also consist of the subjecting of such authorisation to stricter conditions, when compared to different-sex partners.

For example, as explained in Chapter 10, in Germany until 2005, same-sex spouses and registered partners of workers (EU citizens) were not recognised as qualifying family members under the Residence Act and could thus be refused entry and residence. Between 2005 and 2013 residency permits for same-sex spouses and same-sex civil partners of migrating EU citizens could be of shorter duration when compared to those of different-sex spouses.[40] Also, until 2005 same-sex spouses and same-sex registered partners of third-country nationals could not qualify for family reunification on an equal footing with different-sex spouses.[41] In Ireland it was only in 2011, when civil partnership was introduced in Ireland, that same-sex spouses and same-sex registered partners of EU citizens were granted entry and residence as 'qualifying family members'. Until that time, their formal relationship status could positively impact the authorities' assessment of whether they were 'permitted family members'. Also for family reunification purposes was a marriage or civil partnership status of a same-sex couple until 2011 only an element in the authorities' assessment, but not a qualifying status per se.

As elaborately discussed in Chapter 9, there are as yet various open questions as to whether this kind of warding off is compatible with EU free movement law. It has been shown that it cannot be ruled out that same-sex spouses of EU citizens may be refused recognition as spouses and thus as family members within the meaning of the Free Movement Directive, and the same holds for registered partners of EU citizens where the host State does not provide for a partnership status under the national law. In those cases there is nonetheless a duty to facilitate entry and residence of these same-sex stable partners of EU citizens.[42] Such a fallback option does not exist under

40 In 2013 these differences were abolished. See Ch. 10, section 10.4.4 and see section 13.2.2.2 below.

41 Since 2005 both same-sex spouses and same-sex registered partners of third-country nationals may qualify for family reunification on an equal footing with different-sex spouses. See Ch. 10, section 10.4.4 and see section 13.2.2.2 below.

42 See Ch. 9, section 9.6.2.3.

the Family Reunification Directive, however, and Member States have discretion in respect of reunification applications by registered and unmarried partners of TCNs, although States may thereby not discriminate on grounds of sexual orientation.[43] There is thus particular room for warding off in the context of family reunification by same-sex partners of TCNs.

Further, even if entry and residence have been granted to the same-sex partner of a migrating EU citizen or a third-country national, there are other realms of the law in which warding off may take shape. Same-sex couples may encounter difficulties in their daily lives if their civil status is not recognised or is downgraded in the host Member State.

Before Germany and Ireland introduced civil partnerships for same-sex couples in 2001 and 2010 respectively, foreign same-sex marriages were not recognised at all in these States. Since that time marriages between same-sex couples that were celebrated abroad have been recognised as civil partnerships and thus downgraded. As explained in Chapter 10, the so-called '*Kappungsgrenze*' has been held to have been inspired by the German legislature's wish to give material protection to the institution of marriage. Out of the three States studied in this research, only in the Netherlands are foreign same-sex marriages recognised as marriage, and this has been so from the outset since this country was the first to open up marriage to same-sex couples. Chapter 12 has shown that there are also EU Member States where same-sex marriages are not at all recognised under the law.[44]

When it comes to registered partnerships of same-sex couples that were entered into abroad, the situation is somewhat different. In Ireland and Germany, these are recognised, but only those that resemble the national registered partnerships. Also in the Netherlands foreign registered partnerships must meet certain requirements in order to be recognised as registered partnerships. The setting of such requirements may result in downgrading or even the non-recognition of the foreign registered partnership. For instance in Ireland, foreign same-sex civil partnerships that can be dissolved outside the courts – such as the Dutch registered partnership – are not recognised.

Lastly, while not numerous, there have been cases where one of the three States studied in this research has not recognised parental links of same-sex couples that had been established under the law of another State. For example, in a Dutch case of 2003 – before joint interstate adoption was introduced for same-sex couples in the Netherlands – a District Court refused to recognise a joint adoption by a same-sex couple under American law.[45] In Germany in 2011 a so-called 'co-mother', who had been recognised as such under Spanish law, could not be registered in the German

43 It has also been shown that if a long-term resident has entered into a (same-sex) registered partnership in one of the Member States and wishes to move to another Member State, it is at the discretion of the second Member State whether he or she is allowed to bring his or her registered partner.

44 See Ch. 12, section 12.4.7.

45 See Ch. 12, section 12.4.6.

birth register as (co-)mother of the child of her and her female partner, because German filiation law did not allow for the granting of paternity to two same-sex partners, except for in adoption situations.[46] As discussed in Chapter 9, it has been reported more broadly in respect of the situation within the EU that parental links may be stripped away from children in rainbow families upon movement to another Member State.[47]

As explained in depth in Chapter 9, there remain many open questions as to whether EU law allows for warding off by means of non-recognition or downgrading of civil status and/or parental rights of migrating same-sex couples. German Courts have held the downgrading of a marriage of a same-sex couple involving an EU citizen into a civil partnership unproblematic under EU free movement rules,[48] but as the CJEU has never ruled on the question, it is not certain whether it would follow this reasoning. As also discussed in Chapter 9, it may in fact be problematic under primary EU law, as it may hinder the free movement of the EU citizen concerned.[49] The ECtHR has so far not given guidance in this area, except for its rulings in international adoption and surrogacy cases, which provide clear clues that warding off by means of non-recognition of parental links legally established in another State may be incompatible with the best interests of the child (see also 13.2.2.2 below).[50]

13.2.1.3. Observations

Warding off measures may be perceived by States with less permissive regimes as enabling them to prevent the 'import' of undesired partnership or marriage forms. By subjecting couples with a foreign civil status to their national standards, States can uphold these standards, such as the special protection of marriage. Also, by doing so, States can prevent that migrating same-sex couples are treated more favourably than same-sex couples within their own jurisdiction. Such reverse discrimination might, after all, put pressure on States to treat the latter group as favourably as the former. States with more permissive regimes may, for their part, ensure, with warding off measures such as those described under section 13.2.1.1, that they cannot be reproached for 'exporting' their regimes and thus for imposing their standards on other States. Warding off, in other words prevents any 'spill-over effects' and confirms jurisdictions along State borders.

Clearly, same-sex couples and individuals carry the burden of warding off measures as they restrict their cross-border movement. This is particularly so where the entry and residence of a same-sex partner is refused and couples can thus not move as couple to another State. While entry and residence of a same-sex stable partner of an

46 See Ch. 10, section 10.4.8.

47 See ILGA Europe, *ILGA Europe's contribution to the Green Paper* (ILGA-Europe 2011) p. 20, online available at www.ilga-europe.org/home/publications/policy_papers/green_paper_april_2011, visited June 2014. See also Ch. 9, section 9.7.3.

48 See Ch. 10, section 10.4.7.

49 Ch. 9, section 9.6.3.

50 Ch. 8, section 8.3.3. See also Ch. 7, section 7.2.2.1.

EU citizen will in principle be facilitated under EU law, this is different for same-sex partners of third-country nationals, regardless of whether or not they are registered partners, and possibly even regardless of whether they are spouses.[51] Moreover, as noted above, same-sex couples may meet obstacles in their daily lives as a result of warding off measures. Both non-recognition and downgrading of their civil status by a host State may imply for same-sex couples that upon moving to another State certain or all legal effects of their relationship status are no longer recognised. Hence, they carry the risk of so-called 'limping relationships', which, for example, may have implications for their property or their pensions. Also, the rights and entitlements that the couples concerned enjoy in the host State, for example in respect of tax benefits or parental rights, depend on the regime of the host State. In cases where families no longer enjoy legal recognition upon crossing a border, because parental links are not recognised, this inevitably also has (serious) implications for children involved.

13.2.2. Accommodation

Instead of warding them off, States may also opt for an entirely different approach towards (the effects of) cross-border movement, which is to accommodate them. Again, a distinction can be made between two types of accommodating responses, which correspond to the two kinds of cross-border movement that were described above.

13.2.2.1. Providing access to marriage and registered partnership

Both the German and the Irish legislature have deliberately enabled foreign same-sex couples to enter into registered civil partnerships under their domestic regimes. No nationality or domicile (or habitual residence) requirements are set for having access to civil partnerships in these States.[52] German law also gives couples who entered into civil partnerships abroad the option to re-register their partnerships under the German civil partnership regime.[53] A need to prevent 'registration tourism' (see 13.2.1.1 above) was thus apparently not felt in Ireland and Germany. Indeed, as explained in Chapter 10, the German Civil Partnership is so open to foreign same-sex couples because the German legislature wished to extend its aspirations to abolish discrimination on grounds of sexual orientation outside Germany. The Netherlands, even though it had a clear wish to be a pioneer in Europe, or even in the world, in respect of the legal recognition of same-sex relationships, has – as discussed above – not made marriage and registered partnerships so easily accessible to foreign couples. As discussed in Chapter 12, only in 2012, and only for a period of little over a year, did the Netherlands actively accommodate cross-border movement

51 See Ch. 9, section 9.6.4.
52 Ch. 10, section 10.4.3 and Ch. 11, section 11.4.2.
53 Ch. 10, section 10.4.3.

towards it for registration purposes, by enabling same-sex couples from abroad to apply for a 'marriage visa'.[54]

13.2.2.2. Recognition of foreign civil status and parental links

As briefly noted in section 13.2.1.2, and as extensively discussed in Chapter 9, as matters stand today there are still a few open questions regarding the application of EU (free movement) law to cross-border movement by same-sex couples. Some accommodation obligations can nonetheless be identified. A clear accommodation obligation exists in respect of the entry and residence of registered partners of migrating EU citizens under the Free Movement Directive. This is only a conditional accommodation obligation, however, as States are only obliged to grant registered partners entry and residence as family members within the meaning of the Directive, if their legislation treats registered partnerships as equivalent to marriage. In that regard, as noted in Chapter 9, it is unclear what 'equivalent to marriage' means exactly. In any case, Article 3(2) Free Movement Directive sets a clear minimum accommodation obligation, as States must facilitate the entry and residence of same-sex stable partners of EU citizens. As noted above, States have more discretion when it comes to family members of third-country nationals. The only firm accommodation obligation in respect of TCNs concerns their spouses, but it is as yet not sufficiently clear whether this includes same-sex spouses.[55]

The EU Commission, for its part, has strongly advocated an accommodating approach, as voiced by former Commissioner Reding, who has held that EU Member States must recognise any marriage or registered partnership legally concluded in another State.[56] The Commission has, moreover, explored the options for, or initiated, legislation that imposes certain accommodation obligations on States or could potentially do so, in respect of matters that concern the daily life of migrating same-sex couples, such as their property regimes.[57]

There may furthermore be a positive accommodation obligation by means of recognition under ECHR. The Strasbourg case law gives the strongest indication that this may be so in respect of parental links. As discussed in Chapters 2 and 7, the Court's case law in international adoption and surrogacy cases is a strong indication that the best interests of the child, in particular its right to personal identity, indeed require an accommodating approach in cross-border cases concerning rainbow families.[58]

54 As explained in Ch. 12, section 12.4.4, this measure was introduced to alleviate the effects of a newly introduced rule that unmarried stable partners no longer qualified for family reunification. When the latter rule was lifted, so was the marriage visa measure.

55 See Ch. 9, section 9.6.4.

56 See Ch. 9, section 9.6.2.1.

57 See Ch. 9, section 9.7.2.

58 See also Ch. 7, section 7.2.2.1.

Turning to the national level, in the Netherlands, the granting of entry and residence to same-sex partners of EU citizens, or the approving of family reunification applications by same-sex partners of third-country nationals, has never been an issue. In Ireland explicit accommodation of the cross-border movement of same-sex couples (whether or not it involved EU citizens) was introduced in 2011, albeit that these changes were only laid down in policy, not in law.[59] In Germany, same-sex partners of EU citizens have only been recognised on a fully equal basis with different-sex partners of EU citizens since 2013, while same-sex spouses and same-sex registered partners of third-country nationals have qualified for family reunification on an equal footing with different-sex spouses since 2005.

The picture in respect of the legal position of same-sex couples after entry and residence, is equally diverse. In the Netherlands, foreign same-sex registered partnerships and marriages have been recognised as such and it is therefore unlikely that foreign same-sex couples will lose certain rights upon moving to the Netherlands. In Ireland and Germany same-sex marriages are downgraded, while foreign same-sex registered partnerships are recognised only if they meet certain standards (see 13.2.1.2 above). This could be perceived as partial, conditional accommodation. Same-sex couples that migrate to Germany or Ireland (may) thus enjoy protection under the law of these States, but the level of protection may be lower when compared to the home State. Boosting or upgrading of the same-sex couple's civil status has been explicitly ruled out in Germany.[60]

When it comes to parental links, there have been clear examples of an accommodating approach being taken by national courts. For instance, various German courts have, in more recent years, recognised parental links that same-sex couples had established abroad, including – with some exceptions[61] – in cases where such links could not have been established under German law. The best interests of the child as well as developments in German law towards the greater equalisation of civil partnership with marriage in respect of parental matters, have been express grounds for such accommodation. In that regard it has been expressly held by some courts that children were not to be the victim of their parents' cross-border movement; the obligation to observe German law could not be pursued by trampling upon the children concerned.[62] In Ireland a similar approach has been adopted in the 2014 Family Relationships Bill.[63] In the Netherlands, apart from a few early exceptions,[64] generally an accommodating approach has been taken in respect of cross-border cases involving parental matters. This is unsurprising, since the Netherlands has also been in the vanguard when it comes to granting parental rights to same-sex couples.

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59 Ch. 11, section 11.4.3.
60 Ch. 10, section 10.4.5.
61 See the situation involving a so-called co-mother, as discussed in section 13.2.1.2 above.
62 See Ch. 10, section 10.4.8.
63 See Ch. 11, section 11.4.5.
64 See the example referred to in section 13.2.1.2 above.

13.2.2.3. Observations

Accommodation in the context of the present case study, may take either more (pro-) active or more passive forms, which may each have different implications for the States concerned. Firstly, the kind of measures as discussed in section 13.2.2.1 above, may be perceived as active promotion of national standards at the international level, possibly even as 'exportation' of national standards to other States. This may have implications for the diplomatic relations of the State concerned.[65]

Accommodation by means of recognition of civil status or parental links established abroad generally takes a more passive form, as in most cases States only recognise these to the level they provide for them at national level, and do not actively have to provide for anything under their national law in this regard. This clearly holds for the forms of partial and conditional accommodation that Ireland and Germany employ in respect of foreign same-sex marriages and partnerships (see above). The recognition of foreign same-sex marriages and partnerships, as well as parental links, by the Netherlands is also mainly passive, as it comes down to recognising something foreign that meets the national standard.

Accommodation by means of recognition takes a more active form where a civil status is recognised that is not at all provided for at national level, or where parental links are recognised that could not have been established under the national law of the host state in the first place. Recognition in such circumstances may imply reverse discrimination and this may put pressure, perhaps even 'serious pressure',[66] on host States to amend their national family laws and to adapt them to the standard of the State of origin.

For individuals, accommodation is evidently much more beneficial than warding off, as it optimises their free movement. Accommodation enables same-sex couples to move to (other) EU Member States and to continue to enjoy their family lives there. Moreover, it reduces or takes away the risk of limping relationships and of parental links not being recognised in the daily lives of the rainbow families in the host States. Same-sex couples may also profit from access to registration forms abroad, although the positive effect may be diminished if this status is not recognised upon return to the home State or upon movement to another State with a less permissive regimes.

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65 As noted above, the Dutch legislature feared being accused of imposing their national standards upon other States through the claiming of recognition of a civil status acquired under their national law. Within the confines of the present legal research no backlash implications have, however, been identified.

66 M. Melcher, 'Private international law and registered relationships: an EU perspective', 20 *European Review of Private Law* (2012) p. 1075 at p. 1085.

13.2.3. Outsourcing, adaptation and backing out

Different from in Case Study I on reproductive rights, in the present case study on legal recognition of same-sex relationships, an outsourcing approach has not been seen to have been employed by the ECtHR. In other words, this Court has not accepted foreign registration options as (part of a) justification of restrictive national regimes in respect of legal recognition of same-sex couples. States have also not claimed an interest in such an outsourcing option. This may be explained by the fact that in many cases, there is no true 'safety valve' or 'outsourcing option' for States in the context of the present case study, as various States subject access to marriage or partnership registration to conditions relating to residency and/or nationality (see 13.2.1.1 above).[67] Also, the possible existence of an 'outsourcing' option does not exclude that, upon return to their States of origin, the couples concerned may claim recognition of their newly acquired civil status. The pressure on the national law that ensues from such claims, may considerably diminish the desired effects of the 'outsourcing' option.

It is very likely that States may also respond to cross-border movement in the context of the present case study by adjusting their national standard-setting in the area to that of another State or other States to which cross-border movement takes place. In the present case study no such express adaptation measures can be identified, however. The fact that cross-border movement is taking place, has not, as such, been put forward as a reason for introducing forms of legal recognition of same-sex relationships at the national level. What has been visible, however, is that developments in other European countries and at the European and international levels have had some impact at the national level in all three national jurisdictions studied in this case study. Some States did not want to lag behind other (European) States or in European integration in a broader sense. For instance, the German Civil Partnership Act aimed to adopt and transpose two European calls for the creation of legal options for the registration of same-sex unions.[68]

The present case study has also revealed another response to cross-border movement by same-sex couples which is perhaps best described as 'backing out'. As discussed in Chapter 12, in the Netherlands fear that other countries would not accept or recognise the Dutch legislative choices, was presented as an argument against the granting of certain rights to same-sex couples. It was the main reason why the Dutch government initially did not want to risk opening up marriage or to introduce joint international adoption for same-sex couples. Hence, although in the end the fears did not materialise in the Netherlands, cross-border movement potentially has a chilling effect on the development of national standard-setting in respect of legal recognition of same-sex relationships. This is of course most likely to occur where States are in the vanguard and this chilling effect may diminish the more other States grant legal recognition to same-sex relationships.

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67 See Ch. 12, section 12.4.3.

68 See Ch. 10, section 10.3.2.

13.2.4. Resumé and outlook

In the present case study in essence two categories of legal responses to cross-border movement have been identified: warding off and accommodation. In their most extreme form these are, in the context of the present case study, mutually exclusive. However, it has turned out that different degrees of warding off and of accommodation are possible. For example, in some cases States, like Ireland and Germany have resorted to partial or conditional accommodation in their dealing with cross-border movement in the context of the present case study (see 13.2.2.3 above). It has furthermore been shown that States have generally maintained their national standards in cross-border cases, which implies that they have either warded off or resorted to passive forms of accommodation only. Generally only if, or to the extent that, a certain level of legal recognition of same-sex relationships and rainbow families was provided for at national level, have States recognised foreign civil status and parental links. In other words, these legal responses have been in most cases a perfect reflection of what has been provided for at domestic level and have developed as progressively as national standards. This has only differed exceptionally, with cross-border cases involving parental matters being the clearest example. Here, sometimes – and increasingly – the best interests of the child have been considered to require such recognition. However, in these cases generally reference has also been made to the family law standards of the host State and at times this has implied that recognition is not provided for.[69]

Because all three States studied in this research have introduced some form of legal recognition of same-sex relationships and have granted some parental rights to these couples, the implications for individual couples and families moving to these States may be not so severe when compared to States that do not provide for any form of legal recognition under their national law. Still, the effects on individuals of for example downgrading should not be underestimated (see 13.2.1.3 above).

Standard-setting at the European level for cross-border cases in the context of the present case study has so far been fairly minimal. Some minimum accommodation obligations in respect of the entry and residence of same-sex partners of EU citizens follow from the relevant Free Movement Directive, but particularly as regards the legal position of these couples once entry and residence have been granted, there remain various open questions. Here, case law of the CJEU or further guidance of the EU legislature on the discretion that States either have or do not have in these matters, is much desired. The ECtHR has given the clearest guidance in this regard in respect of cases concerning parental matters, but under the ECHR also, not all issues arising in cross-border cases have crystallised. This also implies that, as goes for Case Study I,[70] there is room and potential for (further) bilateral or coordinated legal responses to develop, for example, by means of the harmonisation of Private International Law.

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69 See the German case concerning a co-mother as discussed in section 13.2.1.2 above.

70 See Ch. 7, section 7.2.5.

Other categories of – and in fact also different types of – legal responses to cross-border movement in the context of the present case study that have been visible, albeit to a limited extent only, are adaptation and 'backing out'. These concern not so much the responses of States to individual cross-border cases, but their reaction to (potential) incidences of such movement at a more abstract level. They are in fact opposites, or in any case communicating vessels, as the greater the number of States that provide for legal recognition of same-sex relationships, the more likely it is that adaptation instead of 'backing out' takes place.