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Foreword

Maria Caterina Baruffi* and Laura Calafà**

This special issue of the journal *Papers di diritto europeo* collects the proceedings of the conference organized within the project «Identities on the move. Documents cross borders - DxB» (selected under the call for proposals «Action grants to support judicial cooperation in civil and criminal matters» – JUST-JCOO-AG-2020, co-funded by the European Union within the Justice Programme 2014-2020). The project is coordinated by the University of Verona and the Consortium is composed of the University of Graz, the Aristotle University of Thessaloniki, the European Association of Registrars (EVS) and the Italian Association of Civil Status Officers and Registrars (ANUSCA), at whose premises the final conference took place on 23 and 24 June 2022.

The final event has provided the opportunity to deepen the analysis of Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union, which was at the core of the research and scientific activities of the DxB project. The idea of focusing on this Regulation comes from the limited knowledge that both practitioners and citizens still have of it, despite its being a valuable instrument to bring people closer and make the European Union more integrated thanks to the simplification of administrative formalities. The issues related to the mutual recognition of public documents and their circulation across Member States are among the most important and urgent challenges in a globalized society. The aim of the project, then, is to raise awareness among registrars and legal practitioners and gain a more extensive expertise on how and to what extent the Regulation is actually applied in national practices, ultimately ensuring a better understanding of this tool.

Against this background, the conference's speakers contributed to give an extensive overview of this EU act in the context of national civil status systems, the free movement of persons and the Charter of fundamental rights of the European Union. Presentations also provided specific information regarding how the Regulation addresses the problematic aspects and deficiencies of the current legal framework, under both interpretative and operational perspectives.

The conference has been a truly international event that effectively encouraged the development of a concrete cooperation among the participants, i.e. scholars, registrars,

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public administrators, and practitioners from all over Europe. To all of them goes our gratitude for accepting to taking part in the DxB project as well as to the authors of this special issue. We are also thankful to Alexander Schuster for his input in managing the project and organizing the conference. Thus, the proceedings collected in the following pages represent both a final output and a starting point to further debates and exchange of views on the application of the Public Documents Regulation.

Lastly, the contents of all the papers, which are published in alphabetical order, are the sole responsibility of the respective authors and do not reflect the views of the European Commission.

«Recognition» of civil status records in the aftermath of Regulation (EU) 2016/1191 on public documents: a new functional identity for EU citizens

Cristina Campiglio*

CONTENTS: 1. Less bureaucracy for citizens: promoting free movement. – 2. Regulation (EU) 2016/1191 on circulation of public documents. – 3. The unsolved problem of recognition of the civil effects connected with the situation recorded in a civil status document. – 4. The mutual recognition of situations in the case law of the Court of Justice. – 5. A new EU functional personal identity. – 6. Possible future developments.

1. Less bureaucracy for citizens: promoting free movement.

«Every person holding the nationality of a EU Member State is now also automatically a citizen of the European Union. EU citizenship does not replace national citizenship. Instead, it confers upon all EU citizens an additional set of rights, guaranteed by the EU Treaties, which lie at the heart of their everyday lives (…) EU citizenship rights are firmly anchored in primary EU law and substantially developed in secondary law. Those who are taking advantage of the European project by extending aspects of their life beyond national borders, through travel, study, work, marriage, retirement, buying or inheriting property, voting, or just shopping online from companies established in other Member States, should fully enjoy their rights under the Treaties. However, a gap still remains between the applicable legal rules and the reality confronting citizens in their daily lives, particularly in cross-border situations (...). It is paramount for citizens who move to other Member States to have recognition of civil status documents concerning their «life events» (e.g., birth, marriage, registered partnership, divorce, adoption or name). Member States' registries and administrative systems vary across the EU, causing problems for such cross-border recognition. Moreover, these life events might not be recognised by all Member States. Citizens are thus obliged to go through cumbersome and costly formalities (translation, additional proof of authenticity of documents) which might even make it impossible for them to enjoy their rights».

These were the terms used by the European Commission in its «EU Citizenship Report 2010 – Dismantling the obstacles to EU citizens' rights»[1], in response to requests

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[1] EU Citizenship Report 2010 – Dismantling the obstacles to EU citizens' rights, COM(2010) 603 final of 27 October 2010, p. 3 ff.

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from the European Council. Within the framework of the Stockholm Programme, published in May 2010[2], the European Council actually invited the Commission to «submit appropriate proposals taking into account the different legal systems and legal traditions in the Member States. In the short term a system allowing citizens to obtain their own civil status documents easily could be envisaged. In the long term, it might be considered whether mutual recognition of the effects of civil status documents could be appropriate, at least in certain areas. Work developed by the International Commission on Civil Status should be taken into account in this particular field»[3]. Reference is made here to the conventions promoted by the International Commission on Civil Status (ICCS), aimed at abolishing legalisation[4]. Strangely enough, the Commission makes no mention of another international organisation, the Hague Conference on Private International Law, to which we owe the important Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents, replacing the often long and costly legalisation process with the issuance of a single apostille certificate by a competent authority[5]. The fact that the 1961 Hague Convention has been ratified by all EU Member States, that not all EU Member States have ratified the ICCS Conventions, and that some have also ratified the Brussels Convention of 25 May 1987 abolishing the legalisation of documents in the Member States of the European Communities[6], results in different solutions depending on the State that issued the public document and on the State in which it is to be presented[7]. This is undoubtedly a huge complication for legal practitioners.

[2] The Stockolm Programme – an open and secure Europe serving and protecting citizens of 4 May 2010, para. 3.1.2.

[3] Many conventions have been adopted within the ICCS framework, although they have not been very successful. In its response to the 2010 Green Paper, the ICCS noted that the solutions put forward therein were largely inspired by the ICCS Conventions. Therefore, it would have been better to impose their compliance by the EU Member States than having the EU, which has no specific technical competence in this area, issue its own provisions. See fn. 20 below.

[4] Convention (No 2) on the issue free of charge and the exemption from legalisation of copies of civil status records (Luxembourg, 26 September 1957); Convention (No 16) on the issue of multilingual extracts from civil status records (Vienna, 8 September 1976); Convention (No 17) on the exemption from legalisation of certain records and documents (Paris, 15 September 1977); Convention (No 34) on the issue of multilingual and coded extracts from civil-status records and multilingual and coded civil-status certificates (Strasbourg, 14 March 2014).

[5] In 2006 the electronic Apostille Programme (e-APP) was launched to support the electronic issuance and verification of apostilles around the world.

[6] Mention should also be made of the European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers (London, 7 June 1968).

[7] In principle, in Italy civil status documents drawn up abroad must be legalised and translated in order to be transcribed (Arts. 21(3) and 22 of Presidential Decree of 3 November 2000, No. 396). Legalisation, as is well known, is the certification of the legal status of the person who signed the original document drawn up in a foreign language (Art. 1(1)(l) Presidential Decree of 28 December 2000, No. 445), which is the responsibility of the Italian diplomatic or consular authority abroad (Art. (33)(2) of Presidential Decree No. 445/2000, cit.). The translation must be accompanied by a certification of conformity with the foreign text signed by the diplomatic or consular authority or by an official translator. The issue of the circulation of civil status documents in Italy has long been ignored by legal authors. Early writings include G. CANSACCHI, *L'efficacia probatoria dei certificati amministrativi stranieri,* in *Giurisprudenza*

Therefore, the European Commission presented the Green Paper, «Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records»[8], in which it underlined that «[t]he mobility of European citizens is a practical reality, evidenced in particular by the fact that some 12 million people study, work or live in a Member State of which they are not nationals. This mobility is facilitated by the rights attached to citizenship of the European Union: in particular the right to freedom of movement and, more generally, the right to be treated like a national in the Member State of residence. These rights are enshrined in primary EU law and implemented by means of secondary legislation. However, (…) European citizens are still confronted each day with many obstacles to the exercise of these rights»[9]. To overcome these obstacles, the Commission envisaged, on the one hand, the abolition of administrative formalities for the authentication of public documents, the cooperation between the competent national authorities and limiting translations of public documents; on the other, the introduction of a European civil status certificate, along the lines of European driving licences and passports[10]. In this regard, it should not be forgotten that, shortly before, the Commission had already proposed the creation of a European certificate in the private law sector: the European certificate of succession[11]. In other

comparata di diritto internazionale privato, 1938, III, pp. 266-297; P. FEDOZZI, *De l'efficacité extraterritoriale des lois et des actes de droit public*, in *Recueil des Cours de l'Académie de Droit International*, 1929, pp. 141-242, and *Il diritto amministrativo internazionale*, in *Annali dell'Università di Perugia*, 1901; and especially G. BISCOTTINI's works concerning international administrative law, in particular *La rilevanza internazionale degli atti di stato civile*, in *Rivista del notariato*, 1968, pp. 1-17; *Diritto amministrativo internazionale*, t. I, *La rilevanza degli atti amministrativi stranieri*, Padova, 1964, p. 24; *L'efficacité des actes administratives étrangers*, in *Recueil des Cours de l'Académie de Droit International*, 1961, pp. 635-723 (where he distinguishes between the value to be attributed to foreign certificates and the value to be attributed to the legal situations created by foreign public documents); *I procedimenti per l'attribuzione di efficacia degli atti amministrativi stranieri*, in *Diritto internazionale*, 1959, pp. 36-46; *Sulla rilevanza degli atti amministrativi stranieri*, in *Pubblicazioni dell'Università di Pavia*, 1951. On this subject, see R. CALVIGIONI, *Il diritto internazionale privato applicato allo stato civile*, Santarcangelo di Romagna, 2019, which has a practical approach, and R. CAFARI PANICO, *Lo stato civile ed il diritto internazionale privato*, Padova, 1992.

[8] COM(2010) 747 final of 14 December 2010. See C. KOHLER, *Towards the Recognition of Civil Status in the European Union*, in *Yearbook of Private International Law*, 2013/2014, pp. 13-29.

[9] Green Paper, cit., para. 3.3.

[10] Until then, standard forms, sometimes annexed to the Regulation, were used to facilitate the recognition and enforcement of public documents. (see for example Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, which contains eight relevant annexes).

[11] Proposal for a Regulation 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 of 14 October 2009. As is well known, with Regulation (EU) 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, instead of relying on the mutual recognition of national certificates of inheritance, the EU decided to create a completely new instrument by directly regulating its content and effects in all Member States, without the need for any recognition and acceptance procedure, without any grounds for refusal (including for public policy) and without the need for legalisation or an apostille (Art. 74). The introduction of uniform rules for identifying the authority competent to issue the certificate and the preparation of a standard form justify the legitimate expectations

words, the purpose was to offer EU citizens the possibility of requesting the issue of a European civil status certificate – with a public law value – which would not replace their national certificates (which differ in both form and substance).

However, and this is undoubtedly the most innovative part, the Commission pointed out the need «to guarantee the continuity and permanence of a civil status situation to all European citizens exercising their right of freedom of movement» and proposed, in the name of legal certainty, «to remove the obstacles which they face when asking for a legal situation created in one Member State to be recognised in another (…) in order to benefit from the civil rights connected with the situation in the Member State of residence». Moreover, a precedent already existed: Regulation (EC) 2201/2003[12] (Regulation Brussels II) provides for the automatic updating of «the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State» (Art. 21(2)). As to the methods to ensure the recognition of effects, excluding, due to lack of jurisdiction, the adoption of uniform substantive rules on the matter, the Commission proposed three different solutions: a) assisting national authorities in the quest for practical solutions; b) automatic recognition in a Member State, of civil status situations established in other Member States (leaving

towards the certificate itself. The effects of the certificate are of an evidentiary nature: the certificate does not constitute a title for the acquisition of succession rights, but only highly reliable evidence of the status of heir, legatee, executor of the will or administrator of the estate. The certificate «shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements» (Art. 69(2) and «shall constitute a valid document for the recording of succession property in the relevant register of a Member State» (Art. 69(5). The authorities of the receiving State will not be able to challenge either the prerequisites, the content, or the effects of the certificate: any challenge can only be raised before the judicial authorities of the Member State of the issuing authority under the law of that State (Art. 72). Regulation (EU) 650/2012 was implemented with Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, which contains, in annex V, the European certificate of succession form (see S. MARINO, *Use of standard forms in EU civil judicial cooperation: the case of the European Certificate of Succession*, in *Cuadernos de Derecho Transnacional*, 2020, n. 1, pp. 627-634, available *online*). As already noted, the harmonisation of conflict-of-law rules will significantly reduce (if not eliminate) the «structural fragility» that previously characterised national certificates: see A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014, p. 234, which refers to P. LAGARDE, *Présentation du règlement sur les successions*, in G. KHAIRALLAH, M. REVILLARD (edited by), *Droit européen des successions internationales (Le Règlement du 4 juillet 2012)*, Paris, 2013, pp. 5-21, at p. 15, according to which the «fragilité structurelle» should even disappear. The Certificate, which does not appear to be a subcategory of authentic instruments, is intended to facilitate the exercise of individual rights or the protection of individual interest and therefore «shall not be mandatory» and «shall not take the place of internal documents used for similar purposes in the Member States» (Art. 62). Lastly, also for bibliographical reference, see F. MAOLI, *Il certificato successorio europeo tra regolamento (EU) No 650/2012 e diritto interno*, Napoli, 2021, pp. 191 and 235, who analyses the effects of the certificate under Art. 69, which are less pronounced than those set out in the 2009 proposal for a regulation.

[12] Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000.

Member States' legal systems unchanged)[13]; c) harmonisation of conflict-of-law rules (enshrining the rules which would be applicable to a crossborder situation when a civil status event takes place, rules thus foreseeable and known in advance). The road to harmonisation should have «be accompanied by a series of compensatory measures to prevent potential fraud and abuse and take due account of the public order rules of the Member States», which can be found, for example, in matrimonial matters.

Following the public consultation «in terms of the movement of public documents and the application of the principle of mutual recognition in relation to civil status matters», the Commission decided to reduce the scope of the planned regulation and presented in 2013 a proposal «on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union»[14]: thus, a proposal which «does not address the issue of recognition of effects of public documents between the Member States nor does it introduce full harmonisation of all public documents existing in the Member States or situations in which they are needed in cross-border scenarios by EU citizens and businesses». Consistently, the basis of the regulation was identified in Art. 21(2) TFEU – and not in Art. 81(2) TFEU on judicial cooperation in civil matters – in that «[a]dministrative obstacles to the cross-border use and acceptance of public documents have a direct impact on the free movement of citizens (…) removing these obstacles would facilitate the exercise of the free movement of citizens as foreseen in Art. 21(2) TFEU».

Along the lines of several regulations adopted in the field of judicial cooperation[15], the proposal merely provides (in Arts. 1 and 4) for a dispensation from legalisation (conceived, under Art. 3(3)) as «the formal procedure for certifying the authenticity of a public office holder's signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears») or

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[13] H.-P. MANSEL, *Methoden des internationalen Privatrechts – Personalstatut: Verweisung und Anerkennung*, in M. GEBAUER, H.-P. MANSEL, G. SCHULZE (eds), *Die Person im Internationalen Privatrecht. Liber Amicorum Erik Jayme*, Tübingen, 2019, pp. 27-46, pp. 36-37 challenges this statement.

[14] Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012, COM(2013) 228 final of 24 April 2013. See P. LAGARDE, *The Movement of Civil-Status Records in Europe, and the European Commission's Proposal of 24 April 2013*, in *Yearbook of Private International Law*, 2013/2014, pp. 1-12.

[15] For example, Regulation (EC) 2201/2003, cit. (Art. 52); Regulation (EC) 4/2009, cit. (Art. 65); Regulation (EU) 650/2012, cit. (Art. 74); Regulation (EU) 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, recast (Art. 61) exempt from legalisation. In general, see J. FITCHEN, *The Private International Law of Authentic Instruments*, London, 2020. On the circulation of authentic instruments in succession matters, see D. DAMASCELLI, *La «circulation» au sein de l'espace judiciaire européen des actes authentiques en matière successorale*, in *Revue critique de droit international privé*, 2013, pp. 425-432; J. FITCHEN, «*Recognition*», *acceptance and enforcement of authentic instruments in the Succession Regulation*, in *Journal of Private International Law*, 2012, pp. 323-357; M. KOHLER, M. BUSCHBAUM, *La «reconnaissance» des actes authentiques prévue pour les successions transfrontalières*, in *Revue critique de droit international privé*, 2010, pp. 629-651.

similar formality (which means, under Art. 3(4) «the addition of the certificate foreseen by the Hague Convention of 1961 abolishing the requirement of legalisation for foreign public documents») and «a simplification of other formalities related to the acceptance of certain public documents issued by authorities of the Member States» (reference is made here to «the issuance of certified copies and certified translations of public documents»: Art. 3(5)). «Union multilingual standard forms concerning birth, death, marriage, registered partnership and legal status and representation of a company or other undertaking» are also established (Arts. 1 and 11) and attached to the proposal: standard forms relating to names, filiation and adoption are postponed to a later stage, as the norm on these matters varies greatly from one State to another. The text, as mentioned above, «does not apply to the recognition of the content of public documents issued by the authorities of other Member States» (Art. 2(4)). As a result, Union multilingual standard forms provided for by the proposal will have «the same formal evidentiary value as their national equivalents as regards their authenticity»: their primary purpose will be the reduction of the remaining translation requirements for Union citizens and businesses[16]. Under Arts. 7 ff., in case of «reasonable doubt as to (…) authenticity» of a foreign public document or its certified copy, national authorities may submit a request for information to the relevant authorities of the Member State where these documents were issued, either by using the Internal Market Information System (IMI) established by Regulation (EU) 1024/2012[17] or by contacting the central authority of their Member State.

2. Regulation (EU) 2016/1191 on circulation of public documents.

Regulation (EU) 2016/1191[18] on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union is dated 6 July 2016 and took effect on 16 February 2019. Initial expectations were disappointed by the very title of the Regulation: the European Commission moved from the «*recognition* of the effects of civil status records» provided for in the 2010 Green

[16] COM(2013) 228 final, cit., para. 1.3.2.

[17] Regulation (EU) 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

[18] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012. For a comment see, among others, A. ZANOBETTI, *La circolazione degli atti pubblici nello spazio di libertà, sicurezza e giustizia*, in *Freedom, Security & Justice: European Legal Studies*, 2019, pp. 20-35, available *online*; G. CASONI, *Il 16 febbraio entra in vigore il regolamento europeo n. 1191/2016 sull'esenzione dalla legalizzazione e sull'utilizzo di modelli plurilingue*, in *Lo stato civile italiano*, 2018, n. 12, pp. 4-12; M. FONT I MAS, *La libera circolazione degli atti pubblici in materia civile: un passo avanti nello spazio giudiziario europeo*, in *Freedom, Security & Justice: European Legal Studies*, 2017, pp. 104-125, available *online*; A. VETTOREL, *La circolazione dei documenti pubblici stranieri dopo il regolamento (UE) n. 2016/1191*, in *Rivista di diritto internazionale privato e processuale*, 2016, pp. 1060-1075.

Paper to the 2013 proposal aiming at the «simplification of the *acceptance* of certain public documents» to end up with the mere «simplification of the requirements for *presenting* certain public documents»[19].

The Regulation clarifies from the onset that it «does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State» (Art. 2(4)) and that it «should not oblige Member States to issue public documents that do not exist under their national law» (Recital 7). Its aim «is not to change the substantive law of the Member States relating to birth, a person being alive, death, name, marriage (including capacity to marry and marital status), divorce, legal separation or marriage annulment, registered partnership (including capacity to enter into a registered partnership and registered partnership status), dissolution of a registered partnership, legal separation or annulment of a registered partnership, parenthood, adoption» (Recital 18), where parenthood means «the legal relationship between a child and the child's parents» (Recital 14: however, defining the notion of «parent» remains an unresolved issue). In short, Brussels' institutions exclude any forms of indirect harmonisation.

Regulation (EU) 2016/1191 mainly concerns civil status documents but also public (administrative and notarial) documents relating to domicile and/or residence, nationality, and absence of a criminal record (Arts. 2-3). As already set out in the proposal, the simplification consists firstly in the exemption of public documents and their certified copies from legalisation and similar formality (Arts. 4-5). It is usually sufficient to provide the original of the document, with no need for a certified copy (Art. 5(1)): where a Member State does not require the original but only the presentation of a certified copy of a public document, the authorities of that Member State shall accept a certified copy made in another Member State without legalisation (Art. 5(2)).

With a view to overcoming language barriers, the Regulation also simplifies other formalities relating to the translation of public documents which, at the request of the interested party, are accompanied by standard multilingual forms in each of the official languages of the EU (Arts. 6-12). These forms are only intended to facilitate the understanding of the document to which they are attached (Recital 22): the forms, in other words, «have no autonomous legal value» (Art. 8(1))[20].

[19] Emphasis added. Unlike the proposal, the final text also does not provide for the free movement of businesses and public documents that concern them.

[20] The proposal, which was largely inspired by ICCS Conventions No 16 and No 34 (see fn. 3 above) gave the form «the same formal evidentiary value as the equivalent public documents drawn up by the authorities of the issuing Member State» (Recital 17). It is worth noting that the envisaged multilingual standard forms only covered birth, death, marriage, registered partnerships, legal status and representation of companies. Only at a later stage would forms relating to name, filiation, adoption and other matters be introduced (proposal, para. 3.1).

Electronic versions of multilingual standard forms can be found on the European e-Justice Portal[21] although «[i]t should be possible to integrate the electronic version of a multilingual standard form from the European e-Justice Portal into a different location accessible at national level, and to issue it from there» and «[t]he Member States should have the possibility of creating electronic versions of multilingual standard forms using a technology other than that used by the European e-Justice Portal, provided that the multilingual standard forms issued by the Member States using that other technology contain the information required by this Regulation» (Art. 12 and Recitals 28-29).

As mentioned above, the Regulation (Arts. 13 ff.) introduces a mechanism for administrative cooperation between the authorities designated by the Member States based on the Internal Market Information System ('IMI'), established by Regulation (EU) 1024/2012 (in the Annex to which reference to Regulation (EU) 2016/1191 is therefore added)[22]. If national authorities have a reasonable doubt as to the authenticity of a public document or its certified copy, they can «check the available models of documents in the repository of IMI» and also submit a request for information through IMI to the authority that issued the document or certified copy or to the relevant central authority designated pursuant to Art. 15 (Art. 14). This is a new mechanism, which does not appear in the regulations on judicial cooperation: neither in those exempting judgments and authentic instruments from legalisation[23] nor in the one dealing with registers, in which information concerning insolvency proceedings is published (insolvency registers).

As a matter of fact, Regulation (EU) 2015/848 on insolvency proceedings[24] provides «for the interconnection of (…) insolvency registers via the European e-Justice Portal» (Recital 76), «which shall serve as a central public electronic access point to information in the system» (Art. 25). The interconnection of registers was already set forth in Directive 2012/17/EU[25]. Mention should also be made of the project started by the European Network of Registers of Wills Association and funded by the European Union, intended to create an interconnection of the European registers of wills[26]: after the entry into force of Regulation (EU) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments

[21] Available at https://e-justice.europa.eu.

[22] In this respect, each Member State must designate «at least one central authority» to provide information (Art. 15) In Italy, this authority is the European Policies Department, Internal Market and Competition Office. Lists of country-specific entry headings received from the Member States of the European Union pursuant to Art. 24(2) are published in *OJEU* C 339 of 23 August 2021, p. 1.

[23] See fn. 15.

[24] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

[25] Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies' registers.

[26] It is worth mentioning the Convention on the Establishment of a Scheme of Registration of Wills of 16 May 1972, which, however, was not very successful: apart from Italy, only twelve other States, some of which non-EU, have ratified it.

in matters of succession and on the creation of a European certificate of succession, the interconnection of registers facilitates the search for the European certificates of succession issued in any Member State.

The creation of an interconnected network of civil status records could indeed be envisaged. However, this would imply the digitisation of these records by each Member State and the storage of the civil-status data of each person in a centralised database. Actually, a platform for the international communication of civil-status data already exists and is co-financed by the EU: it is the platform set up by the Convention on the use of the International Commission on Civil Status Platform for the international communication of civil-status data by electronic means (signed in Rome on 19 September 2012, Convention No 33). The idea of using the ICCS Platform was probably discarded by Regulation 2016/1191 because multilingual standard forms under the Regulation do not have legal value and do not overlap with the multilingual standard forms provided for in ICCS Conventions (No 16, No 33 and No 34) or with the life certificates provided for in ICCS Convention (No 27). The Regulation «should not affect the application … as between Member States or between a Member State and a third country» (Recital 49) of all these conventions[27].

3. The unsolved problem of recognition of the civil effects connected with the situation recorded in a civil status document.

Regulation 2016/1191 introduces uniform provisions for the circulation of public documents, overcoming the fragmentary and complex nature of the previous rules. However, the European institutions have been hesitant, limiting themselves to encouraging the «presentation of public documents» and not the «recognition of the civil effects connected with the situation» recorded in a civil status document. In other words, they have acted at a purely procedural level, betraying the spirit that seemed to initially animate the Commission: to enshrine the method of automatic recognition of legal situations created in another Member State in a text dedicated to the circulation of public records, on the assumption that freedom of movement should be understood as freedom to move with one's personal and family status[28].

[27] E. BONIFAY, *La circulation des citoyens européens entre États membres au lendemain de l'adoption du règlement «documents publics»*, in *Journal du droit international*, 2017, pp. 515-527, at p. 521, believes that it would have been better to invite all the EU Member States to adhere to Convention No 16 and to the following Convention No 34, rather than proposing a «pâle copie» thereof. The Regulation allows Member States to conclude agreements with third countries on the legalisation of public documents (Art. 19(4)): see A. VETTOREL, *EU Regulation No 2016/1191 and the circulation of public documents between EU Member States and Third States*, in *Cuadernos de Derecho Transnacional*, 2017, n. 1, pp. 342-351, available *online*.

[28] Proposal, cit., para 3.2.

Anchored to the distinction between *instrumenta* and *negotia*, the EU focused on the circulation of the former, eliminating all forms of legalisation, simplifying other administrative formalities and thus reducing time and costs[29]. The non-mention by the Regulation of the *negotium* is undoubtedly linked to the difficulties connected with the recognition of the effects of family *negotia* (first and foremost marriage and same-sex unions), of which the Commission was aware from the outset.

Regulation 2016/1191 lays down rules inspired by those developed by the ICCS but specifies that «it should not apply to civil status documents issued on the basis of the relevant International Commission on Civil Status (ICCS) Conventions» (Recital 11), which have followed one another from the mid-1950s to the present day. However, it should be noted that the organisation is experiencing a period of crisis due to the withdrawal of Austria first (2008) and then of Italy (2014), the Netherlands (2018) and France (2019)[30]. Hence the idea of modernising the organisation to adapt it to new challenges and to open membership «to any international organisation, any regional economic integration organisation» (Art. 2, 2020 of the ICCS Rules)[31]. The ICCS clearly intends to follow the path taken by the Hague Conference on Private International Law, which in 2005 amended its 1951 Statute to allow for the accession of the European Community, which actually took place in 2007. EU membership of the ICCS would have the advantage of systematising the measures in this area - formalising a cooperation that dates back to 1983 - and making the experience gained by the ICCS in a highly technical sector available to EU Member States.

The simplification of the circulation of civil status records brought about by Regulation 2016/1191 results in an easier circulation of the situations certified therein, removing the indirect obstacles to the free movement of people within the EU territory arising from the differences in national family rules. The legal assessment of the existence of the situation certified in the public document (the *negotium* from which the personal status originates) still remains at the discretion of individual Member States, each of which will apply its own conflict-of-law rules.

[29] The Executive Summary of the Impact Assessment (COM(2013) 207 final of 16 April 2013, p. 5) estimates the expenditure for EU citizens and businesses for obtaining apostilles for intra-EU use at over € 25 million, and the expenditure for obtaining legalisation of public documents at between € 2.3 and € 4.6.

[30] P. LAGARDE, H. GAUDEMET-TALLON, C. KESSEDJIAN, F. JAULT-SESEKE, É. PATAUT, *La Commission internationale de l'état civil en péril*, in *Recueil Dalloz*, 2020, pp. 2355-2376; H. VAN LOON, *Requiem or transformation? Perspectives for the CIEC/ICCS and its work*, in *Yearbook of Private International Law*, 2018/2019, pp. 73-93. See also the Resolution adopted on 25 September 2019 by the Bureau concerning the evolution of the ICCS, calling for the accession of the European Union, the Council of Europe, the Hague Conference on Private International Law and the UN High Commissioner for Refugees.

[31] The ICCS was established by the Berne Protocol of 25 September 1950, signed only by Belgium, France, Luxembourg, the Netherlands and Switzerland. The accession of other States was only envisaged after the additional Luxembourg Protocol of 25 September 1952.

Therefore, the impact of Regulation 2016/1191 on the mobility of EU citizens is simply a reflex. The pragmatic approach of Regulation 2016/1191 is nevertheless remarkable and could induce the Court of Justice to favour the recognition of the family situations of EU citizens certified in their public documents, consolidating a practice that has already been started, although this practice, as we will see, is not without shadows.

4. The mutual recognition of situations in the case law of the Court of Justice.

The recognition of the situations, as is well known, originates from the mutual recognition established in case-law as a «principle» of administrative law of the economy within the European Community[32]: to overcome the obstacles to the movement of goods and services, the strategy of harmonising national regulations was abandoned, since the end of the 1970s, in favour of their coordination.

As from 2000, the technique of recognition has also been used by the Court of Justice to remove obstacles to the movement of individuals, and has therefore been extended to other non-harmonised areas of law, such as that relating to names[33] and, more recently, to family relationships.

When applying Directive 2004/38/EC[34], national authorities have increasingly had to rule on the recognition of the status of European citizens as «family members», specifically on the status of «spouse»[35] and «direct descendant» (Art. 2(2)(a) and (c))[36].

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[32] On a strictly private-international-law level, some authors had reached the same conclusions by other means, i.e., the recognition of the situation originated abroad without any control as to the rules applied: we refer to the theories of acquired rights (Pillet), vested rights (Dicey and Beale), unilateralism (Niboyet) and systemic conflicts (Meijers and Francescakis): see P. LAGARDE, *La méthode de la reconnaissance est-elle l'avenir du droit international privé?*, in *Recueil des Cours de l'Académie de Droit International*, 2014, pp. 9-42, at p. 21.

[33] Mention should be made, first of all, to judgments of 2 October 2003, case C-148/02, *Garcia Avello*, EU:C:2003:539; (Grand Chamber) 14 October 2008, case C-353/06, *Grunkin and Paul*, EU:C:2008:559; 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806; 12 May 2011, case C-391/09, *Runevic-Vardyn and Wardyn*, EU:C:2011:291; 2 June 2016, case C-438/14, *Nabiel Peter Bogendorff von Wolffersdorff*, EU:C:2016:401; 8 June 2017, case C-541/15, *Freitag*, EU:C:2017:432.

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

[35] The notion was debated at that time by the European Parliament, which voted in favour of an explicit reference to same-sex spouses, buy the Commission considered that any reference to forms of marriage other than the traditional one was premature, although it did not rule out any future more progressive interpretation (see explanatory memorandum, amended proposal, COM(2003) 199 final of 15 April 2003). The Commission referred to the decisions of the Court of Justice (especially to joined cases case C-122/99 P and case C-125/99 P, *D and Kingdom of Sweden v Council*) which highlighted that most Member States were still bound by the heterosexual notion of marriage bond.

[36] In letter (b), the Directive clarifies the notion of «partner», specifying that it is the «the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member

Failing harmonisation and given the difficulty of reconstructing an autonomous notion, they resorted to a *lex fori* characterisation but soon had to face familiar situations unknown to them. This led to litigation which inevitably ended up in Luxembourg.

The Court of Justice ruled upon the notion of «spouse» in 2018 (*Coman* case)[37], pointing out that «the term "spouse" within the meaning of Directive 2004/38/EC is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned». After reaffirming, on the one hand, that «a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States and EU law does not detract from that competence» and, on the other, that «in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States», the Court clarifies that «the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that State[38], for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law»: and «does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex». It is actually an obligation «confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that State, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law». Precisely because it has limited effects, such an obligation «does not undermine the national identity or pose a threat to the public policy of the Member State concerned».

Less than one year later[39] the Court clarified the concept of «direct descendant», which «commonly refers to the existence of a direct parent-child relationship connecting the person concerned with another person». However, a teleological interpretation of the

State». A somewhat similar formulation can be found in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations-Rome I (Art. 1(2)(c) and in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations-Rome II (Art. 1(2)(b), which exclude from their scope «non-contractual obligations arising out of (…) property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage».

[37] Court of Justice (Grand Chamber), judgment of 5 June 2018, case C-673/16, *Coman and Others*, EU:C:2018:385, paras. 35, 37, 38, 45 and 46.

[38] The reference to the legislation of the Member State in which the marriage was celebrated suggests that this is not in fact an autonomous concept. Instead, in his opinion of 11 January 2018, case C-673/16, *Coman and Others*, EU:C:2018:2, the Advocate General Wathelet dwelled on the search for an autonomous definition.

[39] Court of Justice (Grand Chamber), judgment 26 March 2019, case C-129/18, *SM v Entry Clearance Officer, UK Visa Section*, EU:C:2019:248, especially paras. 52-55. The case concerned the qualification as «direct descendant» of a child placed under the permanent guardianship of a EU citizen under the Algerian *kafala*. A comment can be found in J. SÁNCHEZ CANO, *La aplicación de la directiva 2004/38/CE en supuestos de kafala internacional*, in *Cuadernos de Derecho Transnacional*, 2020, n. 1, pp. 713-727, available *online*.

directive leads to apply the notion – which «primarily focuses on the existence of a biological parent-child relationship» – to «any parent-child relationship, whether biological or legal» and, therefore, also to adoptive affiliation. «By contrast, that requirement for a broad interpretation cannot justify an interpretation (…) whereby a child placed in the legal guardianship of a citizen of the Union is included in the definition of a "direct descendant" for the purposes of Art. 2(2)(c) of Directive 2004/38»[40].

The Court returned to the concept of «direct descendant» in 2021 (*Pancharevo* case) during a dispute concerning a child born in Spain to a same-sex Bulgarian-British couple married in Gibraltar and residing in Spain. The Spanish birth certificate showed the names of two mothers, «mother» and «mother A». In dealing with an application for the issue of a birth certificate to obtain a Bulgarian identity document, the civil registrar in Sofia requested evidence of the identity of the biological mother, since the Bulgarian model birth certificate has a box for the «mother» and another for the «father», and only one name can appear in each of these boxes. The applicant did not provide any evidence and the civil registrar refused to issue the birth certificate. The applicant then started proceedings, during which a request for a preliminary ruling was made to the Court of Justice, which broadened the notion of «direct descendant», holding that «[a] child, being a minor, (…) whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same sex, one of whom is a Union citizen, must be considered, by all Member States, a direct descendant of that Union citizen within the meaning of Directive 2004/38» regardless of any (evidence of) biological parentage and, more generally, of the issue of a new birth certificate[41]. The Court specifies once again that the obligation for a Member State to recognise the parent-child relationship between a child and each of the parents of the same sex mentioned in the birth certificate issued in a Member State, in the context of the child's exercise of her rights under Art. 21 TFEU and secondary legislation relating thereto, «does not undermine the national identity or pose a threat to the public policy of that Member State»[42].

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[40] The interpretation referred to by the Court is set out in the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (para. 2.1.2): COM(2009) 313 final of 2 July 2009.

[41] Court of Justice (Grand Chamber), judgment 14 December 2021, case C-490/20, *V.M.A. v Stolichna obshtina, rayon „Pancharevo"*, EU:C:2021:1008, especially para. 68. On this occasion, the Court reaffirmed that the notion of «spouse» is gender-neutral and stems from a marriage validly celebrated in the State of origin. See also the Opinion of Advocate General J. Kokott, 15 April 2021, Paras 61, 108 and 154, EU:C:2021:296. In the same sense, the Court ruled, a few months later (24 June 2022), in a case originating from the refusal by the Polish authorities to transcribe a Spanish birth certificate bearing the indication of a Polish «mother A» and an Irish «mother B» (order in case C-2/21, *Rzecznik Praw Obywatelskich*, EU:C:2022:502).

[42] Case *Pancharevo*, cit., para. 56.

5. A new EU functional personal identity.

In the above-mentioned cases, the Court of Justice focuses on the outcome – the free movement of EU citizens – and, from this perspective, proposes a dynamic interpretation[43] of the notions used in Directive 2004/38/EC, so as not to deprive the latter of its useful effect[44] and not to discriminate against EU citizens on account of the legislative differences of the Member States. The outcome is the recognition of a personal identity functional to the exercise of the rights deriving from the EU primary law and meeting the social need to have a personal status which accompanies individuals anywhere within the EU[45]. The circulation of this personal identity is, of course, easier if the status is supported by an act issued by a public authority[46].

The possession of this EU status is based, on the one hand, on the protection of fundamental rights – namely the right to personal identity under Art. 7 of the EU Charter of Fundamental Rights and Art. 8 ECHR (according to the evolutive interpretation by the ECHR Court) – and, on the other hand, on EU citizenship «destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law»[47]. The personal status validly[48] acquired in a Member State, if meant as a prerequisite for the exercise of EU citizens' rights under Art. 20 TFEU – first and foremost the right to move and reside freely within the territory

[43] «EU law must be interpreted "in the light of present day circumstances", that is to say, taking the "modern reality" of the Union into account. In fact, the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it would run the risk of imposing outdated views and taking on a static role». These were the words of Advocate General Wathelet (opinion in *Coman and Others*, cit., para. 56), who went on to state (para. 57): «[t]hat is why the solution adopted by the Court in the judgment of 31 May 2001, *D and Sweden v Council* (C-122/99 P and C-125/99 P,), by which "according to the definition *generally accepted by the Member States*, the term marriage means a union between persons of the opposite sex", now seems to me outdated (…) It is not something associated with a specific culture or history; on the contrary, it corresponds to a universal recognition of the diversity of families».

[44] Case *Coman and Others*, cit., para. 39. See also M. GRASSI, *Sul riconoscimento dei matrimoni contratti all'estero tra persone dello stesso sesso: il caso Coman*, in *Rivista di diritto internazionale privato e processuale*, 2019, pp. 739-776, at p. 748.

[45] I. BLASQUEZ ROGRIGUEZ, *Libre circulación de personas y derecho internacional privado: un análisis a la luz de la jurisprudencia del Tribunal de Justicia de la Unión Europea*, in *Cuadernos de Derecho Transnacional*, 2017, n. 2, pp. 106-126, at p. 111, available *online*.

[46] P. LAGARDE, *La méthode*, cit., p. 38; and P. MAYER, *Les méthodes de la reconnaissance en droit international privé*, in *Le droit international privé: esprit et méthodes. Mélanges P. Lagarde*, Paris, 2005, pp. 547-568, at p. 562.

[47] Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, EU:C:2001:458, para. 31.

[48] However, the Court does not clarify the procedure necessary to verify the validity of the acquisition of the status. There are several possible solutions: the status could be considered validly acquired if it complies with the substantive and/or private international law of the State of origin; if it is officially provided for by a public document and/or entered in a public register; if it is not contrary to the public policy of the State of destination.

of the Member States[49] – seems to be on the way to automatic recognition throughout the EU, in the name of mutual trust and of equivalence of the functions exercised by administrative authorities in the Member States.

In recent years, the Court of Justice has improved its recognition technique by highlighting its special features compared with the traditional method of resolving *horizontal conflicts* among national legal systems, which is typical of private international law systems. The recognition disregards the application of conflict-of-law rules and is therefore indifferent to applicable law, focusing rather on the situation as it stands in another Member State. Moreover, it exceeds even the limit of public policy, except in very exceptional cases involving a serious threat to national identity, whose respect by the EU is enshrined in Art. 4(2) TEU. The exercise of the rights associated with EU citizenship would seem to result in a counter-limit or even in a limit of positive (European) public order[50].

The method followed in Luxembourg seems to be aimed at resolving the *diagonal*[51] *conflicts* among national legal systems and EU law, in an area – family law – where the EU has very limited margins for maneuver: thus, its purpose is to «correct» the traditional approach of coordinating national legal systems[52]. It is worth emphasizing that this is a material and result-oriented remedial action, which does not require any formality or

[49] A more extensive analysis is offered by J.-Y. CARLIER (*Vers un ordre public européen des droits fondamentaux. L'exemple de la reconnaissance des mariages de personnes de même sexe dans l'arrêt Coman*, in *Revue trimestrielle des droits de l'homme*, 2019, pp. 203-227, p. 216 ff.), who believes that the recognition of the status of spouse applies to all the rights under EU law, and therefore also to the maintenance, financial and inheritance rights conferred by the various European regulations on private international law. The scope of the recognition is uncertain: the fact that the Court only dealt with the effects in relation to the freedom of movement could in fact be explained by the specific question put to it. See P. HAMMJE, *Obligation de reconnaissance d'un marriage entre personnes de même sexe conclu dans un État member aux fins d'octroi d'un droit de séjour dérivé*, in *Revue critique de droit international privé*, 2018, pp. 816-827, at p. 820; É. PATAUT, *Intégration et ordre public: Nouvelles variations sur un vieux couple*, in *Revue trimestrielle de droit européen*, 2018, pp. 661-685, at p. 678. According to M. GRASSI (*Sul riconoscimento*, cit., pp. 764 ff.), the Court's decision on same-sex marriages cannot affect secondary legislation adopted in the context of judicial cooperation in civil matters (Art. 81 TFEU). This legislation sometimes expressly excludes from its scope the assessment of the existence and validity of the matrimonial bond, leaving it to national legislation.

[50] The relationship between national public policy and European public policy is not self-evident. It is premature to say that European public policy replaces national public policy, especially as such a replacement would infringe Art. 4(2) TEU, according to which «[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional». Undoubtedly, as the Court of Justice has made clear on several occasions and in different contexts, in relations between Member States the limit must be reconsidered in particularly restrictive terms and applied in very exceptional circumstances: in the European judicial area, the rule is the free movement of acts. It is more realistic to think of an integration of national public policy by the founding values of the European Union, and therefore of the coexistence of national public policy and European public policy, which would thus remain autonomous.

[51] D. BUREAU, H. MUIR WATT, *Droit international privé*, 4th ed., Paris, 2017, I, p. 539. See also J. HEYMANN, *The Relationship between EU Law and Private International Law Revisited: of Diagonal Conflicts and the Means to Resolve Them*, in *Yearbook of Private International Law*, 2011, pp. 557-588.

[52] «In principle, it is immaterial, from the point of view of EU law, under which national provision or procedure the applicant is able to assert his rights concerning his name»: case *Freitag*, cit., para. 41.

public intervention since it can be taken without the participation of either the registrar or the courts[53].

6. Possible future developments.

However, the idea of creating a European certificate in family matter has not been abandoned. Having set aside, at least for the time being, the creation of a European civil status certificate, the European Commission is now considering the creation of a European certificate of parenthood. Filiation is undoubtedly the most delicate area as it involves the fundamental rights of an individual, the child, who is universally considered weak and therefore in need of maximum protection (Arts. 7 and 8 of the United Nations Convention on the Rights of the Child[54]). Uncertainty as to the existence of parenthood has a major impact on the child's life, as concerns both public law aspects (citizenship, right of residence) and private law aspects (parental responsibility, maintenance obligations, succession). Therefore, to ensure protection in cross-border situations, the Commission has published the Inception Impact Assessment about a proposal concerning the recognition of parenthood between Member States[55]. A public consultation was subsequently launched (and concluded on 19 August 2021) on a proposal to facilitate the recognition of parenthood by laying down common conflict-of law rules on parenthood as well as common rules on the recognition of judgments on parenthood[56]. The aim is to

[53] This method, developed by the Court of Justice, can be found in Art. 48 of EGBGB which – with regard to the «Choice of a name obtained in another Member State of the European Union» – makes no mention whatsoever of the fact that the name was «lawfully» obtained abroad, i.e., it disregards the review of the merits («Where the name of a person is subject to German law, that person can, by declaration before the Registrar of Births, Marriages and Deaths, choose a name that he or she obtained when he or she had habitual residence in another Member State of the European Union, where that name was registered in a register of civil status, unless this is manifestly incompatible with the fundamental principles of German law»).

[54] Convention on the Rights of the Child of 20 November 1989.

[55] Ares (2021)2519673 of 14 April 2021. The Commission's starting point is the State of the European Union Speech, in which President von der Leyen (September 2020) said that «[i]f you are parent in one country, you are parent in every country». With this statement the Commission President referred to the need to ensure that the parenthood established in a Member State is recognised in all other Member States. The Hague Conference on Private International Law has been working on the new forms of parenting since 2015: the aim is to draft a private international law Convention on parenthood, accompanied by an Additional Protocol on the recognition of legal parentage established as a result of an (international) surrogacy arrangement. See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU strategy on the rights of the child, Brussels, COM(2021) 142 final of 24 March 2021.

[56] The Inception Impact Assessment, cited above, reads as follows: «the proposal would cover biological parenthood, parenthood by operation of law and domestic adoption. The recognition of intercountry adoption is already covered by the 1993 Hague Convention on Intercountry Adoption, to which all Member States are parties. Within this policy option, the Commission will examine in particular the following issues: whether the proposal should cover only the recognition of public documents (such as a birth certificate) through the adoption of common conflict rules or also the recognition of court decisions through the adoption of common rules on the recognition of judgments on parenthood; the connecting factors on which conflict rules should be based (for example, nationality and/or habitual residence);

avoid that children suffer negative consequences and see their rights diminished whenever they have to travel or move to another Member State[57]. Art. 81(3) TFEU will be used as the legal basis, and consequently action will be taken in the field of judicial cooperation in civil matters.

Looking forward to future developments, to date we can say that Regulation 2016/1191 has undoubtedly left a gap as regards the recognition of the effects of civil status records, although the Court of Justice is currently filling such a gap. Recent case-law from Luxembourg has shown that Member States are obliged to attribute extraterritorial legal effects to civil status documents originating from another Member State, thus ensuring the continuity of status across borders on which the parties legitimately rely[58]. Arguably, the next step will be the recognition as a «direct descendant» of the child born to a surrogate mother[59].

Recognition, however, is limited to the exercise of the rights deriving from EU citizenship[60]. It is not aimed at promoting the exercise of the rights provided for by national laws, and specifically by the legislation of the host Member State: for private law purposes, in short, the status resulting from foreign civil status documents, as well as its effects, remain subject to the traditional conflict-of-law method, including the limit of public policy. In other words, the recognition of personal status appears now to be heading towards a double track: with no control for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law (first and foremost the right of free movement enshrined in Art. 21 TFEU), while still subject to the traditional limit of public policy for the purpose of exercising the rights conferred under national law.

Beyond practical utility, the compatibility of such a split personal identity with the EU Charter of Fundamental Rights and the ECHR standards may be called into question. Only time will tell if the path taken is the right one[61].

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possible legal safeguards; and the possibility of introducing an optional European certificate of parenthood» (p. 4).

[57] Ares (2021) 6847413 – 8 November 2021.

[58] On this subject, see F. SALERNO, *The Identity and Continuity of Personal Status*, in *Recueil des Cours de l'Académie de Droit International*, 2019, pp. 9-198.

[59] As for the quality of «spouses» of those who have celebrated an early marriage, some German judgments (even prior to the *Coman* case) have already been reported: Oberlandesgericht Oldenburg, 18 April 2018; Amtsgericht Frankenthal, 15 February 2018; Amtsgericht Nordhorn, 29 January 2018 (in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2019, pp. 160, 161 and 162. See also Oberlandesgericht Frankfurt am Main, 28 August 2019, in *Zeitschrift für das gesamte Familienrecht*, 2019, p. 1853. See J. CROON-GESTEFELD, *Der Einfluss der Unionsbürgerschaft auf das Internationale Familienrecht*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2022, pp. 32-64, at p. 46 ff.

[60] «Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence» (Directive 2004/38/EC, Recital 3, cit.).

[61] According to É. PATAUT (*Chronique Citoyenneté de l'Union européenne – Et le statut personnel?*, in *Revue trimestrielle de droit européen*, 2016, pp. 648-656, p. 652), the effects of the Regulation, which are actually limited, will be felt in the long term: once civil status records begin to circulate automatically, the situations referred to therein will probably no longer be questioned.

ABSTRACT: Regulation (EU) 2016/1191 sets the objective of ensuring the free movement of persons through the free circulation of public documents establishing «facts» standing for legally defined and relevant situations (name, marriage, parenthood, etc.). As the aim of this Regulation «is not to change the substantive law of the Member States», the interpreter is confronted with notions whose meaning is liable to vary from State to State. The lack of harmonization of the notions of «marriage» and «parenthood», in particular, re-proposes the characterization problems already encountered with regard to the EU Citizens' Free Movement Directive 2004/38/EC, which includes spouses and direct descendants among the family members, although without providing a definition. Regulation (EU) 2016/1191 is expressly not intended to apply «to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State» (Art. 2(4)). In other words, the document certifying the existence of a marriage or parenthood guarantees the spouse or parent/child of an EU citizen free movement to another Member State, regardless of whether the marriage or parenthood at issue may be recognised in that State. In line with the Regulation, in the 2018 *Coman* judgment the Court of Justice – applying the principle of mutual recognition – stated that, in the name of the right to free movement, a Member State cannot refuse the EU citizen's same-sex spouse a right of residence on the ground that the law of that Member State does not provide for marriage between persons of the same sex. Given the limited effects of the recognition of this marriage, the Court has found no evidence of an attack on national identity (Art. 4(2) TEU) and consequently of a threat to public order of the Member State concerned. The same conclusion has been reached by the Court of Justice in the 2021 *Pancharevo* case, regarding a child born through medically assisted procreation. Birth certificates drawn up in a Member State shall be recognized by the other Member States as part of the exercise of the rights under Art. 21 TFEU. On the contrary, there is no obligation for other Member States to recognize that filiation relationship for other purposes, since respect for national identity (and public policy) may be invoked in this regard. In summary, the recognition of personal status appears now to be heading towards a double track: with no control for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law, and still subject to the traditional limit of public policy for the purpose of exercising the rights conferred under national law. As a consequence, the same person may be considered married or parent for the purposes of circulation within the EU, while unmarried or not parent for civil purposes. Beyond practical utility, the compatibility of such a split personal identity – one merely functional to circulation, while the other one to its full extent – with the EU Charter of Fundamental Rights principles may be called into question.

KEYWORDS: Characterization; content of documents; mutual recognition; split personal identity; public policy.