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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.

Case law of the European Court of Justice on free movement of persons and public documents: focus on Romania

Mădălina Cocoșatu* and Claudia Elena Marinică**

CONTENTS: 1. Short introduction. – 2. Regulation (EU) 2016/1191 on free movement of public documents within the EU: certain aspects. – 3. Romania's perception of the Regulation. – 4. Effects of the European Court of Justice case law on citizenship, rights and free movement of public documents and persons. – 5. A brief, comprehensive and actual approach to the European Court of Human Rights case law regarding Romania. – 6. Conclusions.

1. Short introduction.

The history of the right of citizens of the European Union (hereafter «EU») to free movement begins with the Treaty of Paris (1951)[1], continuing with the Treaties of Rome (1957)[2], Regulation no. 1612/1968[3] on freedom of movement, the Maastricht Treaty (1992) – extending the right to free movement to all nationals of EU Member States, Directive 2004/38[4] governing the right of free movement of EU citizens at present and, last but not least, the Lisbon Treaty (2009), in which Arts. 20-21 of the Treaty on the Functioning of the EU (TFEU) govern European citizenship and, consequently, free movement of EU citizens, but is also supported by Art. 45 of the Charter of Fundamental Rights of the European Union. According to Art. 3(2) of the EU Treaty (TEU), «the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured».

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[1] Establishing the European Coal and Steel Community.

[2] Establishing the European Economic Community and the European Atomic Energy Community.

[3] Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

[4] 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.

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The right of EU citizens to free movement is linked to European citizenship[5], citizenship of the respective Member State and, implicitly, of the Union, family[6], marriage, civil events taking place in the life of a citizen (childbirth, divorce, death, etc.), work, including free movement of public documents, the right of their family members to settle with them in the host Member State etc.

The Court of Justice of the European Union (hereafter «CJEU») is the main actor in the legal system of the European Union, but also a regional actor worthy of attention alongside the European Court of Human Rights (hereafter «ECtHR»), which enjoys a remarkable interpretative authority, making a decisive contribution to the standardization of EU law (through case law), given that the Member States are also members of the Council of Europe. Through their interpretations, the CJEU and the ECtHR ensure the mobility of the EU citizens, in a European Union based on the protection of fundamental rights and freedoms, in which the personal status of the citizen is a competence belonging to the Member States but also presupposes openness and continuous research on the part of every party involved.

It is well known that family relations, marital status and personal and property relations between spouses / partners are subject to the specific instruments of private international law, in particular that family law is subject to the national law of each EU Member State. Marriage and the establishment of family relationships give citizens a recognized legal status in EU countries, but the national issues related to them differ from one EU country to another in terms of the rights and obligations of married couples (e.g. property or marriage rights, marriage name), the relationship between religious and civil marriage (e.g. some EU countries recognize religious marriage as equivalent to civil marriage, others do not) or the possibility of same-sex marriage[7]. In this landscape, cross-border marriage[8] involving different EU countries comes to amplify and diversify the legal effects of such *de facto* situations and to these are added the aspects of civil unions[9] or registered partnerships[10], civil partnerships, legal cohabitation, civil solidarity pacts,

[5] The Court of Justice of the European Union underlined that citizenship – a concept with a clear constitutional dimension of the EU - is destined to be the fundamental status of the nationals of the Member States.

[6] T. PFEIFFER, Q.C. LOBACH, T. RAPP (eds.), *Facilitating Cross-Border Family Life – Towards a Common European Understanding EUFams II and Beyond*, Heidelberg, 2021.

[7] The EU countries that recognize same-sex marriage are: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Portugal, Spain, Sweden and the Netherlands.

[8] In 2011, according to the European Commission, of the approximately 122 million marriages in the EU, about 16 million (13%) had such a cross-border dimension. For more information see https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX:52010DC0603.

[9] In countries where same-sex marriage is allowed, same-sex partnerships are generally recognized in other countries, and where the law provides for a form of registered partnership, without allowing same-sex marriage; same-sex couples married abroad will generally enjoy the same rights as registered partners.

[10] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

etc. recognized or not by EU countries. As for Romania, it only recognizes the marriage between a woman and a man. On the other hand, if we refer to the Council of Europe (which – as said – includes all EU Member States) and to the interpretations offered by the ECtHR, we can see that family life and not necessarily the institution of the family is the one that should be the subject of all concerns[11], changing the classic concept of «marriage», even if the European Convention on Human Rights does not impose on States the obligation to allow access to marriage for same-sex couples.

All this in the context of a migration phenomenon which «is now a global one and globalization as well as the permanent circulation of people are extremely important current landmarks that permanently support the migration phenomenon»[12]. As EU citizens who have benefited from the free movement of persons face cross-border issues (marriage, divorce, succession, etc.), the mere acquisition of the rules of national law governing such areas will become insufficient in relation to the complexity of certain cases, requiring knowledge of relevant European regulations. These are key factors in adopting EU-wide legislation, within the limits of EU powers under EU law, which the EU has come to regulate, taking into account the diversity of substantive and private international law regulations.

Free movement of public documents[13] appears as a necessity and a direct consequence of all the above situations, the need to present public documents in another EU country being imminent for any citizen. EU intervention was necessary and expected, with EU measures designed and taken only to simplify the circulation and authenticity of certain public documents, not to recognize their legal effects (governed by the national law of the EU country where the document is presented) in countries other than those where they were released, without the need to present an apostille or any other similar requirement to prove their authenticity.

Free movement of public documents in the EU also refers to a number of civil status documents, which are particularly relevant in practice, mainly due to their impact, the mobility of each citizen leading to the movement of such documents, the consequences they entail are already complex and common in practice. Of course, this simplification of the cross-border movement of such civil status documents, also found in Regulation (EU) 2016/1191[14] (hereinafter referred to as «the Regulation»), is intended to provide fewer but more efficient administrative procedures for citizens by removing legalization formalities or any other similar procedure of certain public documents granted by

[11] J.F. RENUCCI, *Tratat de drept european al drepturilor omului*, București, 2009, pp. 260-279.

[12] M. COCOȘATU, C.E. MARINICĂ, *International Recognition of Documents – A Result Of Globalization And Mobility Of Individuals*, in *Revue Européenne du Droit Social*, 2020, no. 3, pp. 16-30.

[13] Whether a document is a public document or not is determined by the law of the State in which the document was executed.

[14] 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) No 1024/2012.

Member State authorities, but not dealing with the recognition of the content of the official document; at the same time, the Regulation proposes the use of standardized multilingual forms and a system of cooperation between the authorities acting when there are reasonable doubts as to the authenticity of the document.

To what extent Regulation (EU) 2016/1191 ensures progress in the circulation of certain public documents is one of the questions we will try to answer later on in this article. Another question concerns the European jurisprudence emanating from the CJEU and the ECtHR, namely whether and to what extent this has an effect on the free movement of persons and certain public documents, facilitating inter alia the acceptance of certain public documents covered by the Regulation mentioned above in the EU Member States and leading to the creation of a uniform practice and free movement in the EU, based on the administrative cooperation required by the IMI system[15], which gives the possibility to verify the authenticity of the public document.

2. Regulation (EU) 2016/1191 on free movement of public documents within the EU: certain aspects.

In this section we will not go into the actual analysis of the Regulation, but we will address the entire content of the Regulation, connecting the essential theoretical aspects introduced by it with the practical ones, pointing out in the following section 3 some aspects regarding its perception in Romania.

In ensuring the free movement of persons within the EU, the adoption of the Regulation was an important and rather avant-garde step if we refer to the beginning of the discussions on its main regulatory object, to which the need to legally recognize cross-border family relations has certainly contributed in the Member States (e.g. in the case of same-sex marriages, civil partnerships, parentage issues of same-sex parents and their children, etc.). Romania, a Member State of the European Union, not taking into account the existing legislative vacuum due to the non-recognition of some of these family relations, has always shown a reluctance on the part of both citizens and state authorities to address these issues.

It is true that «facing this situation, the area of freedom, security and justice without internal borders, in which the free movement of persons is ensured (...)» (Art. 3(2) TEU), (the State) must «ensure the correct implementation of the effectiveness of these public

[15] IMI is a tool created to promote communication and administrative cooperation between competent authorities of the Member States and between the competent authorities of the Member States and the European Commission, with the aim of implementing the acts of the European Union in the field of the market internal.

acts»[16] so that «it must therefore be ensured that a legally existing legal relationship according to the document / act issued by an authority of a Member State is considered to exist and (be) valid in the other Member States» and «it must have the same effects in the host Member State as well. Otherwise, citizens will not be able to move freely within the EU»[17].

The Regulation guarantees the free movement of documents issued by public authorities, which are subsequently presented in other EU Member States, without imposing the condition of application of the apostille, the IMI system offering the possibility to verify the authenticity of the document and therefore safer results sometimes than those provided by apostille applied to the document. Recently, regarding IMI, the Commission presented the statistics for the year 2020 as well as those for the first semester of 2021. Statistics show that: «106 Central Authorities are registered in IMI, among which 41 are responsible for the transmission of requests. In 2020, 122 requests for verification of the authentication of public documents were sent out. In the first half of 2021, a total of 91 requests have been sent out. Most of the requests are related to the authentication of public documents establishing marriage, birth and divorce. 54% of the requests have been answered within two weeks. Almost 28% of requests however were answered in more than a month»[18].

Applicable from 16 February 2019, the Regulation establishes «a system to further simplify administrative formalities concerning the movement of certain public documents and their certified true copies when those public documents and their certified copies are issued by an authority in one Member State for presentation in another Member State»[19].

At the conceptual level, the Regulation provides for a system of exemption from legalization or similar formalities and, at the same time, simplification of other formalities for certain public documents issued by the authorities of one Member State and to be presented to the authorities of another Member State, without fundamental principles of public order to be violated.

At the same time, it establishes the use of standard multilingual forms, perceived as facilitating tools in terms of content, accompanied by public birth documents, the fact that a person is alive, death, marriage (including marital capacity and marital status), registered partnership (including the ability to enter into a registered partnership and registered partnership status), domicile and / or residence, and absence of criminal record, provided that such public documents are issued to a citizen of the Union by the authorities

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[16] 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, no. 1, pp. 104-126, available *online*.

[17] *Ibidem.*

[18] European Commission, Directorate-General for Justice and Consumers, Expert Group, Meeting of the Committee on Public Documents Regulation (EU) 2016/1191, Minutes of 9 December 2021.

[19] Recital 3 of Regulation (EU) 2016/1191.

of the Member State of which he is a national. In addition, Art. 19(4)[20] expressly provides that Member States may negotiate, conclude, accede to, amend or apply international agreements and arrangements with third countries on the legalization of public documents, or other similar formality, on matters covered by the Regulation, issued by the authorities of the Member States or of third countries for use in relations between the Member States and the third countries concerned.

It is true that «perhaps the most important regulation brought about by this European text is the elimination of the requirement for the application of the apostille and simplification of formalities for certified copies and translations»; at the same time «as in the case of the apostille, the Regulation confirms the authenticity of the official document, not the recognition of its content or effects»[21].

It is interesting and important to note that the Regulation does not introduce an obligation to recognize in a Member State the legal effects associated with the content of public documents issued by the authorities of another Member State, which is why this Regulation could affect the free movement of people within the EU.

Hence the growing concern in the European Union about the probative value of public documents, which is closely linked to the free movement of persons, given that if the EU compels through its legislation the recognition of public documents, the probative force of these documents automatically raises concerns in the field of theory and, in particular, in practice, having as its premise the presumption of validity and the corresponding direct consequences.

We must not forget that over time a number of problems have been identified (some of which have been removed because of technological advancement) «which can be directly or indirectly associated with the requirement of legalizing foreign public documents, such as: (1) legal diversity and fragmentation of the legal framework regarding the cross-border use of public documents; (2) heterogeneity of public documents; (3) heterogeneity of competent public authorities; (4) the differences between the public administration systems of the Member States; (5) the differences between the public registration systems of the Member States; (6) differences between Member States regarding public document authentication systems; (7) diversity of languages; (8) the uncertainty regarding public documents that are solicited abroad in order to ascertain proof for certain rights; (9) incorrect application or failure to comply with the applicable formalities; (10) lack of relevant and up-to-date information; (11) lack of e-governing;

[20] A. VETTOREL, *EU Regulation no. 2016/1191 and the circulation of public documents between EU member states and third countries = Il regolamento (UE) n. 2016/1191 e la circolazione dei documenti pubblici tra stati membri e paesi terzi*, in *Cuadernos de Derecho Transnacional*, 2017, no. 1, pp. 342-351, available *online*.

[21] M. COCOȘATU, C.E. MARINICĂ, *Free Movement Of Persons And The Legal Security Of Documents Within The European Union*, in *Revue Européenne du Droit Social*, 2021, no. 53, pp. 76-89.

(12) lack of confidence in foreign public authorities and the documents produced by them; (13) lack of confidence in the reliability of foreign public registers»[22].

3. Romania's perception of the Regulation.

In reality, it is a tool not very well known in Romania, perhaps because it has a relatively limited scope, but also because of the reluctance of citizens and institutions to apply this «simplification» of procedures and, consequently, to ensure a free movement of public documents within the EU, which in turn is a component of the free movement of persons within the EU. In Romania, Regulation (EU) 2016/1191 is not a major topic discussed in the literature, although it has attracted the attention of public authorities and those who have a close connection with its scope (e.g. public notaries, translators, etc.), at the moment of its entry into force, a decrease in the demand for legalized translations is expected considering the use of multilingual standard forms, but we appreciate that whether or not this decrease is/will be significant, it will certainly not have the direct and visible impact on citizens as it might be expected.

At present, the Regulation needs a continuous and complex approach and interpretation offered both by experts in the field, researchers, academia, etc., and by European and national courts, among which the CJEU and ECtHR occupy preeminent positions, taking into account the binding character of their decisions.

The challenges facing the Regulation are the impact on the free movement of public documents in the Member States, from confirming and verifying the authenticity of the document to its translation, cost, time and bureaucracy, and last but not least, the legal probative value of foreign public documents as long as the Regulation does not cover the legal recognition of the documents in question. In Romania, we can talk about the authentic document that fully proves, to any person, until its declaration as false, to parties and third parties, being opposable *erga omnes*. Regarding public documents, which are subject to the law of the place where they were concluded, but in order to produce effects before foreign authorities, they must be subject to the authentication procedure regarding these documents. There is also the need of legalization or application of the apostille on public documents that attest the authenticity of public documents from a formal point of view, for recognizing their substantive legal effects, confirming the veracity of the signature and seal applied on public documents, and the quality in which the issuing institutions and their officials acted.

[22] J. VAN DE VELDEN, *The Use of Public Documents in The EU*, Synthesis Report, British Institute of International and Comparative Law, London, July 2007, p. 37, available *online*, in M. COCOȘATU, C.E. MARINICĂ, *International Recognition of Documents*, cit., p. 26.

The Apostille[23] has become an obligatory condition for confirming the authenticity of foreign documents, but «both the procedure for applying the apostille and the procedure for applying the over-legalization do not involve an analysis of the content of the act, but only of recognizing the authenticity of the signature and also of the capacity of a person to issue and sign the document subject to the procedure of applying the apostille/over-legalization, as well as the identity and authenticity of the seal or stamp the document in question is bearing»[24].

As the future looks set to be one of electronic documents, the e-apostille being a welcomed addition, it will be possible to ensure security, efficiency, ease of transmission, reduction of time, and verification of the authenticity of public documents.

For public documents it is assumed that they are authentic, the elimination of the requirement of legalization or application of the apostille falling under the impact of judicial cooperation in civil matters[25], in order to ensure their free movement within the EU. It should be noted that the Regulation is without prejudice to the possibility of using the apostille or any other form of exemption from legalization[26], this procedure is still accessible to those who want to use it.

In the three years since its application, the Regulation is not yet as well-known as it should be, in the context of ensuring that EU citizens simplify the movement of certain public documents within the EU. A key word in this Regulation is the «simplification» of the circulation of certain public documents, which means that bureaucracy is reduced accordingly for a category of public documents, including the apostille regulated by the Hague Convention of 5 October 1961 on abolishing the requirement of legalisation for foreign public documents on the abolition of foreign officials («Apostille Convention»[27]).

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[23] G.A.L. DROZ, *Rapport sur Légalisation des actes officiels étrangers*, Conférence de La Haye de droit international privé, 1 March 1959, available *online*.

[24] M. COCOȘATU, C.E. MARINICĂ, *International Recognition of Documents*, cit., pp. 16-30.

[25] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels Ia); Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession; Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1907/2006 Regulation (EC) No 1347/2000 (Brussels IIa); Council Regulation (EU) 2016/1103 implementing enhanced cooperation on jurisdiction, applicable law and recognition, and enforcement of decisions on matrimonial property regimes; Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the field of jurisdiction, applicable law and the recognition and enforcement of decisions on the property effects of registered partnerships, etc.

[26] E.g. treaties, conventions, agreements, etc. For example, Convention No. 16 of the International Commission on Civil Status regarding the issue of multilingual extracts of civil status records, signed in Vienna on September 8, 1976. Romania has accessed the Convention by Law no. 65/2012 published in the *Official Gazette of Romania*, Part I, no. 277 of 26 April 2012.

[27] Romania is a signatory State of the Hague Convention following Government Ordinance no. 66/1999 for Romania's accession to Hague Convention of 5 October 1961 – Abolishing the Requirement

Simplification of translation of certain public documents from other EU Member States by introducing standard multilingual forms (only for certain types of documents)[28], attached to an official document of the Member State, undoubtedly confers a legal responsibility regarding the content on the part of the authority issuing the official document.

In line with the usual concerns regarding the free movement of EU citizens, their documents and, consequently, the abolition of the requirement to legalize foreign public documents, which are just as current today, the Regulation encounters possible difficulties in practice, as the abolition of any forms of legalization is very difficult, mobility raising concerns in regard to falsifying such documents, legal certainty being questioned. At the same time, the effectiveness of the common rules stated in EU Regulation (EU) 2016/1191 may be conditioned by a possible extension of the scope of the regulation to documents from third countries, foreshadowed as a possible future development[29] of its use.

4. Effects of the European Court of Justice case law on citizenship, rights and free movement of public documents and persons.

In order to understand the effects of CJEU case law (mainly) on national citizenship, the free movement of persons within the EU and certain categories of public documents, we need to see this phenomenon as extremely important in the cross-border aspect of it; in the following section we are aiming to place the CJEU jurisprudence in a broader context comprising decisions having effects that are widely visible, and their impact at national level (Romania).

The relationship between EU citizenship and nationality is based on the primacy of national citizenship, as an emblem of national sovereignty, and the conditioning of access to EU citizenship[30], strengthening the European and cross-border dimension offered by these. The rights enjoyed by EU citizens include the right to move and reside freely in other Member States and non-discrimination on grounds of nationality, so that all decisions taken at national level in the field of nationality and citizenship have cross-border effects.

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of Legalisation for Foreign Public Documents, approved by Law no. 52/2000, with subsequent amendments.

[28] They can be used in various procedures (e.g in the matter of succession with foreign element regulated by Regulation 650/2012, as follows: forms 3 and 4 regarding death and marriage).

[29] A. VETTOREL, *EU Regulation no. 2016/1191 and the circulation of public documents between EU member states and third countries*, cit.

[30] J. SHAW, *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, Robert Schuman Centre for Advanced Studies, Working Paper no. 2011/62, available online; M. VAN DEN BRINK, *Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?*, in *German Law Journal*, 2022, vol. 23, pp. 79-96, available online.

To begin with, we will take a brief look at some of the CJEU cases related to the concept of «family». From the interpretation offered by CJEU to the relations outside the marriage, the term «spouse»[31] in Art. 10 of Directive 2004/38 refers only to a conjugal relationship, a possible broader interpretation not being justified, so that the concept of «spouse» does not cover out of wedlock. At the same time, in case 267/83 *Aissatou Diatta* v *Land Berlin*[32] the CJEU was asked about the interpretation of the terms cohabitation and separation in Arts. 10-11 of EEC Regulation no. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, considering that members of the family of a migrant worker do not have to live permanently with him in order to qualify for a right of residence. With regard to separation, the CJEU's approach[33] is that it may affect the right of residence of family members if the EU citizen has left the host Member State, leaving the family member behind, before the divorce proceedings are officially opened.

In the situation where the citizen who wants to exercise his right to free movement in the EU is a minor citizen, the CJEU has ruled in the case of *Zhu and Chen*[34] (Irish minor born in Ireland to a Chinese mother-citizen who later wanted to settle in the UK) in the sense that the minor has the right to move freely within the EU, accompanied by the primary caregiver, who must have the right to live with the child in the host Member State during the residence of the child and who does not necessarily have to be a relative of the child. In the *Alokpa* case[35], the application for a residence permit in Luxembourg was based on the premise that the applicant was the primary caregiver of EU citizens (two minor children-French nationals) residing in another Member State. The CJEU considers that in that case the application for a residence permit could be interpreted in the sense that the applicant can be granted the status of personal caregiver, only if he has proven that he meets the requirements mentioned in Art. 7 of Directive 2004/38.

With regard to same-sex relationships, the evolution of the interpretations given by the CJEU is ascendant, if we refer to the fact that, at the beginning, none of the EU Member States recognized, from a legal point of view and following the consequences of certain requisites, same-sex couples, a situation that has now changed considerably at EU level, but there are still countries where this type of relationship and even same-sex

[31] Court of Justice, judgment of 17 April 1986, case 59/85, *State of the Netherlands* v *Ann Florence Reed*, EU:C:1986:157.

[32] Court of Justice, judgment of 13 February 1985, case 267/83, *Aissatou Diatta* v *Land Berlin*, EU:C:1985:67.

[33] Court of Justice, judgment of 16 July 2015, case C-218/14, *Kuldip Singh and Others* v *Minister for Justice and Equality*, EU:C:2015:476.

[34] Court of Justice, judgment of 19 October 2004, case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen* v *Secretary of State for the Home Department*, EU:C:2004:639.

[35] Court of Justice, judgment of 10 October 2013, case C-86/12, *Alokpa and Others* v *Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2013:645.

marriage or civil partnerships[36] are not recognized (Romania, as remembered, is one of these States).

This is a very interesting interpretation given by the CJEU in *Coman*[37], case directly related to Romania, in which it started from the premise that Directive 2004/38 does not make any further clarification regarding the notion of «spouses», the CJEU decision not requiring the recognition of the status of same-sex spouse married in another State except for the recognition of the right of residence of the same-sex spouse, a right of residence deriving from the right of free movement of family members under Directive 2004/38. The object of the case is the recognition of the right of residence of the same-sex spouse (Mr. Hamilton) with the Romanian citizen (Mr. Coman, who holds Romanian and American citizenship), being married on the territory of another State (Belgium), in this sense the Romanian citizen addressing (2012) the General Inspectorate for Immigration within the Romanian Ministry of Internal Affairs in order to obtain information on the conditions under which Mr. Hamilton could obtain the right to reside legally in Romania as a family member. The response of the Romanian authorities was a negative one, supported by the fact that the Romanian legislation does not recognize same-sex marriage. In those circumstances, the Romanian Constitutional Court referred a question to the CJEU regarding the concept of «spouse»; in Art. 2(2)(a) of Directive 2004/38 it may be interpreted as including same-sex spouses, provided that one of them is an EU citizen, legally married under the law of a Member State other than the host Member State.

In its decision, the CJEU stated that the EU respects the national identity of the Member States, inherent in their fundamental political and constitutional structures, strengthening the exclusive competence of the Member States to define marriage, considering that the refusal prevents the exercise of the right of free circulation within the EU. Thus, the recognition of same-sex spouses exclusively concerns the granting of a derived right of residence to a third-country national who does not undermine issues of national identity or threaten the public policy of the Member State concerned. At the same time, it is stated that «Article 21 (1) TFEU must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a third-country national of the same sex as a citizen of the Union, whose marriage to the latter was concluded in a Member State under the law of that State shall have a right of residence for more than three months in the territory of the Member State of his spouse who is a citizen of the Union. This derived right of residence may not be subject to more stringent conditions than those laid down in Article 7 of Directive 2004/38»[38].

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[36] For more information on their applicability see https://e-justice.europa.eu/36687/EN/property_consequences_of_registered_partnerships?init=true.

[37] Court of Justice, judgment of 5 June 2018, case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept* v *Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, EU:C:2018:385.

[38] *Ivi*, par. 56.

Therefore, the domestic legislation (Art. 277(1) of the Civil Code) regarding the prohibition of same-sex marriage is constitutional, and as for the right of residence of the same-sex partner, it derives from the very final paragraph of Art. 277 of the Civil Code[39], reconfirmed by the provisions of Art. 2(6)-(7) and Art. 3(2) of the Government Emergency Ordinance no. 102/2005 on the free movement on the Romanian territory of the citizens of the Member States of the European Union, of the European Economic Area and of the citizens of the Swiss Confederation.

The CJEU decision emphasizes that it seeks to give a broader interpretation to the concept of family members of EU citizens, but we must not forget that «marital status is a matter for the Member States and competences, and that Union law does not affect that competence, so that those States are free to accept or not to accept same-sex marriage». Moreover, the Romanian legislation mentions the narrow meaning of the notion of family (Art. 258(1) of the Romanian Civil Code), namely that «the family is based on freely consented marriage between spouses, on their equality, as well as on the right and duty of parents to ensure the upbringing and education of their children». We agree with the statement that «the EU principle of supremacy provides that EU law prevails even over constitutional provisions of a Member State, in case there is a conflict between the two […] In this way, the Court has gone further than its Strasbourg counterpart which in its judgement in *Orlandi*[40] …, interpreted Article 8 ECTHR as merely requiring states to provide some form of legal recognition to married same-sex couples from abroad»[41].

As mentioned above, the ECtHR case law[42] imposes a positive obligation (according to the provisions of Art. 8 of the European Convention on Human Rights [43]) to provide same-sex couples with a specific legal framework providing for the recognition and protection of their unions as same-sex couples, but EU law does not have the power to impose same-sex marriage.

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[39] The legal provisions regarding the free movement on the Romanian territory of the citizens of the member states of the European Union and of the European Economic Area remain applicable.

[40] European Court of Human Rights, judgment of 14 December 2017, applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, *Orlandi and Others* v *Italy*.

[41] A. TRYFONIDOU, *Free Movement of Same-Sex Spouses within the EU: The ECJ's Coman judgment*, in *European Law Blog*, 19 June 2018, available *online* (accessed on 10 April 2022).

[42] European Court of Human Rights, judgment of 21 July 2015, applications nos. 18766/11 and 36030/11, *Oliari and Others* v *Italy*. For this reason, it can be seen that the Council of Europe's Member States have a possible positive obligation to adopt legislative measures recognizing the possibility of concluding a civil partnership for same-sex couples.

[43] According to Art. 8 of the Convention «1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. The interference of a public authority in the exercise of this right shall be admissible only in so far as such interference is provided by law and constitutes a measure which, in a democratic society, is necessary for the national security, public security or economic well-being of the country, the protection of order and the prevention of criminal acts, the protection of health or morals or the protection of the rights and freedoms of others».

Relatively recently, ECtHR was notified by application no. 5926/20 in the case of *S.K.K. and A.C.G.* v *Romania* and seven other claims[44], the subject of which relates to same-sex couples who complain that the Romanian legislation does not allow them to get married or to enter into any other type of civil union and thus they are being discriminated against as a result of their sexual orientation and disadvantaged by the lack of legal recognition of their relationship. They invoke Art. 8 taken alone and in conjunction with Art. 14 of the Convention and the questions are: «1) Has there been a violation of the applicants' right to respect for their private and family life contrary to Article 8 of the Convention? In particular, should they be afforded a possibility to have their relationship recognised by law (see *Oliari and Others* v. *Italy*, nos. 18766/11 and 36030/11, 21 July 2015)?» and the second question is: «Have the applicants suffered discrimination in the enjoyment of their Convention rights on the ground of their sexual orientation, contrary to Article 14 of the Convention read in conjunction with Article 8 of the Convention, in respect of their inability to get married or enter into any other type of legally recognised union?»

Other cases referred to the CJEU provide further clarification regarding the notion of «other family members», with reference to unregistered partners[45], considering that Member States have a wide margin of appreciation in this respect for the provisions of Directive 2004/38, the concept of «spouse» being perceived as an autonomous concept that does not depend on the concept of marriage adopted by the Member States.

To this end, in 2021, the European Parliament proposed a draft Resolution[46] which shows that «The EU must take a common approach to recognizing same-sex marriages and partnerships», calling on «Member States to specifically introduce relevant legislation to ensure full respect for the right to privacy and family life, without discrimination, and for the free movement of all families, including measures to facilitate the recognition of the legal gender of transgender parents».

Ensuring the rights of such families in all Member States and, in particular, the right to free movement within the EU and the mutual recognition of their relationship and parenting is another important issue in the context of «major obstacles to freedom of movement» in 2021 (e.g. transgender parents whose identity documents are not recognized after crossing the border and who may lose all legal ties with their children, seriously affecting the best interests of the children).

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[44] Introduced on 23 January 2020, communicated on 30 March 2020 and published on 25 May 2020 available *online*.

[45] See Court of Justice, judgment of 5 September 2012, case C-83/11, *Secretary of State for the Home Department* v *Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman*, EU:C:2012:519, and judgment of 12 July 2018, case C-89/17, *Secretary of State for the Home Department* v *Rozanne Banger*, EU:C:2018:570.

[46] Available *online*.

Relevant to mention in this context is the case *Pancharevo* (Sofia municipality, Pancharevo district)[47] where the CJEU ruled that «the Member State[48] is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States».

The Advocate General's position was that: «the obligation to recognize family ties established in Spain solely for the purpose of enforcing secondary European Union law on the free movement of citizens does not affect the concept of filiation or marriage in Bulgarian family law, nor does it lead to the introduction of new concepts in it».

Therefore, such an obligation does not jeopardize national identity, succeeding in removing many of the obstacles to free movement. However, by invoking national identity, Bulgaria may justify the refusal to recognize the child's parentage, established in accordance with the Spanish birth certificate, with a view to drawing up a birth certificate which determines the child's parentage within the meaning of domestic law.

By this decision, the CJEU: «ensures both the effectiveness of the rights of citizens of the Union, including the protection of fundamental rights and respect for the competence and national identity of the Member States. However, it is clear that in its judgements *Coman*, *MS* and now *Pancharevo*, the CJEU has set out on a progressive path, open to diversity and new forms of family, for the benefit of mobile citizens of the Union»[49].

All the above clarifies that, over time, the CJEU has tried to interpret all these legal instruments as «living tools» in the evolutionary interpretation of the concepts of «family», «citizenship», «free movement» in relation to the primary law of EU, adapted to the present society, but greater harmonization of EU law is desirable, in the context in which it should be noted that the ECtHR has its own approach, with quite broad interpretations.

5. A brief, comprehensive and actual approach to the European Court of Human Rights case law regarding Romania.

[47] Court of Justice, judgment of 14 December 2021, case C-490/20, *V.M.A.* v *Stolichna obshtina, rayon „Pancharevo"*, EU:C:2021:1008.

[48] Namely, the Member State «of which a national minor child, European citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex».

[49] See *Functional Recognition of Same-sex Parenthood for the Benefit of Mobile Union Citizens – Brief Comments on the CJEU's Pancharevo Judgment*, in *EAPIL Blog*, 3 February 2022, available *online* (accessed on 10 April 2022).

ECtHR case law points out that regarding Romania, it was found relatively recently (January 2021)[50] the violation of Arts. 6, 8, 12, 13 and 14 of the Convention and a violation of privacy and personal autonomy, for lack of a clear and predictable procedure in Romanian law, regarding recognition of gender identity that allows for sex change and, therefore, changing personal name and code in public documents in a fast, transparent and accessible manner. In the case of *X and Y* v *Romania*, the applicants, transgender persons, submitted requests for rectification on the identity documents of information relating to sex, first name and numerical code, which were rejected by the administrative and judicial authorities on the grounds that, first, the applicant must prove that he has undergone sex reassignment surgery.

At the same time, the ECtHR could not identify the reasons of general interest which led to the refusal to change the information in the civil status record in order to match the gender identity of the applicants. In Romania, the national legislation allows, through a civil lawsuit, transgender people to have legal approval of the change of sex in order to have (legally) recognized their chosen gender, followed by the change of first name by administrative means, not by court. A change of marital status requires a court decision, subsequently assigning a new personal numerical code, then the corresponding entries on the civil status documents are entered and the new identity documents are obtained. Practically, Romania recognizes that the change of sex in a legal manner, attested by a final court decision, allows the subsequent marriage with the opposite sex to the one chosen, provided that the partner is aware of the case/sex change.

One cannot but notice that, to the extent that same-sex marriages will be regulated in more and more States, through a total manifestation of openness, the adoption of legislation on registered partnerships is called into question or, there where it exists, it becomes of little interest as long as same-sex couples have the opportunity to turn the partnership into a real marriage. As it is a sensitive issue, no consensus has been reached at European level, and the ECtHR has in most cases relied on the margin of appreciation enjoyed by/in the States that are parties. However, we can appreciate that ECtHR interpretations are evolving and innovative.

As far as the ECtHR is concerned, it manages to harmonize the national legislative systems and the jurisprudence created, by the authority of the interpreted work contained in the judgments pronounced, with effects *erga omnes*. With regard to the jurisprudence of the ECtHR, we consider that we can discuss an evolving interpretation of the rights of the Convention (in this analysis, Art. 8 – respect for family life and Art. 14 – non-

[50] European Court of Human Rights, judgment of 19 January 2021, applications nos. 2145/16 et 20607/16, *X and Y* v *Romania*. For more information about this topic, see also European Court of Human Rights, judgment of 6 April 2017, applications nos. 79885/12, 52471/13 and 52596/13, *A.P., Garçon and Nicot* v *France*, that if it had been carried out by more than 20 Member States of the Council of Europe (including Romania) by adopting legislative reforms on the legal recognition of gender in order to eliminate the mandatory condition of sterilization, it would not lead to condemn (e.g. Romania), in this matter.

discrimination, in particular), the European court offering a wide scope and interpretation of the notion of «family life», including *de facto* family relationships, which are not based on marriage. However, neither EU law nor the right to family life under the European Convention on Human Rights imposes a certain family model, which is why the concept of «family» is implemented and applied on an equal footing with regard to established family relationships in another State.

The issue presented in this section is undoubtedly a sensitive topic even at this moment in Romania, determined on the one hand by the argument of defending religious values and moral precepts, and on the other hand by the alignment and harmonization of national legislation according to the jurisprudence of the two European courts, as we are talking about *de facto* situations that have and will have an impact on the present and future of our society.

6. Conclusions.

The analysis outlined in the previous pages shows the undisputed connection between European case law and the right to free movement of citizens throughout the EU, one of the greatest achievements in the construction of Europe. Mobility, a direct consequence of the free movement of citizens, has brought with it an intense movement of documents, hence the reconfiguration of national and European regulations and legislative procedures.

There is no doubt that Regulation (EU) 2016/1191, in which mutual trust between state authorities prevails, ensures the facilitation of the circulation of foreign public documents provided for in Art. 2 (a relatively limited category), by accepting them without further additional formalities (e.g. apostille or other similar formalities), while also offering the option of multilingual standard forms and the possibility of verifying the authenticity of information passed through the IMI system.

There is also no doubt that Regulation (EU) 2016/1191 has an impact on the free movement of certain foreign public documents in a cross-border context, which is becoming more common among EU citizens. It is just a puzzle piece in the full picture of the free movement of citizens in the EU, ensuring the premise of the complete elimination of the obligation to legalize not only the documents in question, but even a wider category of public documents. As for the way it is perceived in Romania, we can speak of a relatively low perception, perhaps also due to the fact that the period 2020 – present is still influenced by the effects of the Covid-19 pandemic.

The doctrine[51] states that «at the moment, in terms of public acts / documents that must circulate in the EU, we have important and useful European legislation, intended

[51] M. FONT I MAS, *La libera circolazione degli atti pubblici in materia civile: un passo avanti nello spazio giudiziario europeo*, cit., pp. 104-126.

first to guarantee the common market and then to guarantee the area of freedom, security and justice» in which we can distinguish «two legislative phases in relation to public acts», being now in the second phase, the current one, related to citizenship and access to justice (area of freedom, security and justice), and the executive effect of public acts has been extended to non-contractual matters (family, alimony and succession).

In addition, the probative effect of public acts (succession, matrimonial and registered unions regimes) has been introduced, including the elimination of the need for legalization or other formalities applied to public acts on marital status in the EU. We are of the same opinion that, most likely, a third stage is expected, by «extending the elimination of legalization or apostille to other public documents».

We strongly believe and reiterate that «the need for a minimum of requirements to ensure the de-bureaucratisation of procedures, greater ease in obtaining the documents required for cross-border circulation, but also the legal recognition and security of these public documents represent small, but important steps that must be constantly reviewed, completed and, why not, reinterpreted»[52].

In our opinion and in general terms, the assessment of the impact of the CJEU case law on the free movement of persons and public documents is a positive one as it leads to harmonization of national laws and greater legal certainty, accepting that the EU faces a constant and difficult challenge that requires the support of all actors involved. All this because free movement and its exercise are essential for EU citizens, complementing the other freedoms of the EU internal market, enjoying recognition and popularity as the EU's greatest achievement after peacekeeping[53].

We hope that Romania will be able to maintain a balance in addressing these issues, fulfilling its positive obligation to comply with EU and Council of Europe law, as well as the jurisprudence of the CJEU and ECtHR, showing an equally balanced/unbiased but responsible vision of human and family relationships, which we will definitely focus on.

We conclude by saying that globalization, the free movement of citizens, cross-border mobility within the EU put citizens at the centre of the EU's constant attention, ensuring that the citizens' rights and respect for the provisions of the Lisbon Treaty, the Charter and EU law are a priority and at the same time, recognising that there is a constant challenge in upholding them, an aspect which must be adequately addressed through enhanced cooperation adapted to the evolution of society. So, «EU is not perfect, but it is the best tool we have to deal with the new challenges we face», that is why «we need the EU to guarantee not only peace and democracy, but also the security of our citizens. We need the EU to better serve their needs and desires to live, study, work, move and prosper

[52] M. COCOȘATU, C.E. MARINICĂ, *International Recognition of Documents*, cit., p. 28.

[53] Report from the European Parliament on the 2017 EU Citizenship Report: Strengthening citizens' rights in a Union of Democratic Change (2017/2069 (INI)), 30 November 2017.

freely across our continent and to benefit from Europe's rich cultural heritage» (Bratislava Declaration of 16 September 2016)[54].

[54] I. MOROIANU ZLĂTESCU, C.E. MARINICĂ, *Instituțiile Uniunii Europene*, Bucharest, 2020, p. 269.

ABSTRACT: Free movement of persons in the European Union, a foundation of European Union citizenship which implies an increase in the movement and cross-border nature of public documents, is a topic that has become part of the discussions in the European Union and in the member states in recent years, that are known for their commitment to help regulate a regional order regarding the mobility of citizens in an area without borders. It was therefore not at all surprising that Regulation (EU) 2016/1191 on the promotion of free movement of citizens was adopted and entered into force by simplifying the requirements for the presentation of certain public documents in the EU, as a facilitator and accelerator factor for enforcing cross-border free movement, so that now, five years after its adoption, its effects are increasingly visible.

The purpose of this article is to encourage the analysis and reflection at the level of the European Union and at national level (in Romania) on a series of challenges determined by the jurisprudence of the Court of Justice of the European Union, which seeks to ensure compliance with the provisions of the Treaties, the Charter of Fundamental Rights, as well as all other legislative acts in force. Such an approach cannot be taken out of the context of public and private international law applicable in this field and of treaties, conventions or agreements to which Member States are a part of, in particular the Convention concerning the abolishing of the Requirement of Legalisation for Foreign Public Documents, signed in The Hague on 5 October 1961 (Apostille Convention) regarding public documents and their authenticity but it should only be regarded as a supplement.

The article will focus on the case law of the Court of Justice of the European Union related to the scope of Regulation (EU) 2016/1191, in cases concerning citizenship and a number of family law issues that have a direct impact on public documents and the free movement of persons, without bringing prejudice to the national identity or public policy of the Member States. The analysis mainly concerns the different legislative regulations of the Member States and how to use their common points that should follow the provisions of Regulation (EU) 2016/1191, for the most efficient free movement of persons and public documents in order to ensure the predictability of EU freedoms in cases with a cross-border impact. The conclusions drawn from this analysis emphasize the need for collaboration between theoretical and practical aspects, taking into account the considerable impact on the authenticity, recognition and legal security of these documents that are meant to create the facilitation of free movement in the European Union, while respecting EU law and the material law of the Member States.

KEYWORDS: Public documents; free movement; CJEU case law; ECtHR case law; Romania; European citizenship; apostille.