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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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\* Full Professor of International Law, University of Bergamo (Italy); editor in chief of *Papers di diritto europeo* and staff member of the DxB Project.

\*\* Full Professor of Labour Law, University of Verona (Italy); coordinator of the DxB Project.

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.

# Public documents on the move in the Area of Freedom, Security and Justice: uniformisation or free circulation?

Marco Gerbaudo\*

CONTENTS: 1. Introduction. – 2. Residence documents: civil status records or identity documents? – 3. Uniformisation of visas. – 4. Uniformisation of residence permits. – 5. Free circulation of civil status records: a new and improved model of documents' mobility? – 6. Conclusions.

## 1. Introduction.

Throughout the history of the European Union (EU), freedom of movement has been the most visible and celebrated milestone of European integration. However, the content, target, and shape of this freedom changed considerably over time. Initially granted only to European workers as an ancillary provision of the internal market<sup>1</sup>, freedom of movement morphed with the Maastricht Treaty into a right enjoyed by all Union citizens<sup>2</sup>.

The space where to exercise such freedom was shaped by the Amsterdam Treaty as an Area of Freedom, Security and Justice (hereafter «AFSJ»)<sup>3</sup>. Inside the AFSJ, the liberty to freely circulate is generalised, and enjoyable not only by Union citizens but also by third-country nationals, with noticeable differences<sup>4</sup>. For Union citizens, freedom of movement is a fundamental right enshrined in the Treaties and regulated by the Citizens directive<sup>5</sup>. Third-country nationals' intra-EU mobility is very limited and prescribed

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\* PhD Student, Department of Legal Studies, Bocconi University (Italy).

<sup>1</sup> Treaty Establishing the European Economic Community 1957, Art. 48.

<sup>2</sup> Treaty Establishing the European Community (TEC) (Maastricht consolidated version) 1992, Art. 8b.

<sup>3</sup> Treaty Establishing the European Community (TEC) (Amsterdam consolidated version) 1997, Art. 8b. Such space was labelled as internal market before the Amsterdam Treaty.

<sup>4</sup> TEC (Amsterdam consolidated version), Title IV «Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons». Under this Title, the EU is given competence to rule 'on the conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States' (Art. 63 TEC).

<sup>5</sup> Treaty on the Functioning of the European Union (TFEU) (Lisbon consolidated version) 2012, Art. 21; Charter of Fundamental Rights of the European Union 2000, Srt. 45; [Directive 2004/38/EC](#) 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 (Citizens Directive). The only condition posed to Union citizens' freedom of movement is

exclusively by secondary law, inasmuch it cannot qualify as a constitutional freedom, but instead as a set of «mobility rights»<sup>6</sup>.

In the past two decades, all EU measures introduced in the field of freedom of movement were aimed to «achieve», «create», «maintain» and «develop» the AFSJ<sup>7</sup>. However, the two dimensions of the AFSJ, freedom of movement for Union citizens and intra-EU mobility rights for third-country nationals, remained strictly separated. In this context, the circulation of public documents is no exception: to determine the applicable regime of mobility, it must be considered not only the type of document at stake, but the nationality of their holder as well.

Regulation (EU) 2016/1191 (hereafter «the Public Documents Regulation») states from the title its focus on Union citizens, as it is devoted to «promoting the free movement of *citizens* by simplifying the requirements for presenting certain public documents in the European Union»<sup>8</sup>. Documents issued by third countries are explicitly excluded from the scope of the Regulation and third-country nationals are never mentioned in the legal text<sup>9</sup>. Furthermore, no migration-related document is covered by the scope of the Regulation<sup>10</sup>.

Such exclusion is understandable, as the circulation of residence permits and visas in the AFSJ is already covered by EU law. While the Public Documents Regulation facilitates the free circulation of public documents by lifting the legalisation requirement, free circulation of migration-related documents is achieved with their uniformisation in a common and single format. This paper claims that the uniformisation approach, despite its many flaws and limits, is in some of its key features more far-reaching than the free circulation of public documents model prescribed by the Public Documents Regulation.

## 2. Residence documents: civil status records or identity documents?

Regulation 2016/1191 applies to public documents that are broadly defined as «documents issued by the authorities of a Member State in accordance with its national

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the possession of «sufficient resources (...) not to become a burden on the social assistance system of the host Member State» (Art. 7(1)(b) of the Citizens Directive).

<sup>6</sup> S. IGLESIAS SÁNCHEZ, *Free Movement of Third Country Nationals in the European Union?: Main Features, Deficiencies and Challenges of the New Mobility Rights in the Area of Freedom, Security and Justice*, in *European Law Journal*, 2009, pp. 791-805.

<sup>7</sup> All the Regulations analysed below in the next paragraphs are all good examples on the inclusion of the AFSJ in the objectives listed in the Preambles.

<sup>8</sup> [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 (Public Documents Regulation) (*emphasis added*).

<sup>9</sup> Art. 2(3)(a) of Regulation 2016/1191.

<sup>10</sup> No migration-related document is included in the list of documents covered in Art. 2 of Regulation 2016/1191.



law [...] and the primary purpose of which is to establish» a fact<sup>11</sup>. In a nutshell, the Regulation covers (some) public documents, which fulfil two conditions: one, they are issued by a public authority of a Member State; and two, they are civil status records, namely they certify an event governing a person's status (e.g. birth, marriage, death)<sup>12</sup>.

Before dwelling on the comparison between the mobility regimes of civil status records and migration-related documents, it must be assessed whether the two sets of documents have enough similarities to justify the comparison exercise. Ultimately, it must be answered the question: what kind of documents are visas and residence permits?

Visas and residence permits fall under the category of «residence documents», defined as «any authorisation issued by a Member State authorising a third-country national or a stateless person to stay on its territory»<sup>13</sup>. More specifically, visas govern short-term stays or transit not exceeding three months, while residence permits grant authorisation for stays for longer periods<sup>14</sup>. The documents attesting the possession of such authorisation are public documents, being issued by a national public authority.

Despite being public documents, residence documents do not qualify as civil status records. They do not attest a fact, but instead they grant their holders the right to enter and reside in the territory of a Member State: to obtain the document, the applicant must follow precise criteria and fulfil a set of conditions. Consequently, the issued document does not acknowledge an event: it represents the positive outcome of an application.

Third-country nationals do not possess, but rather acquire, the right to reside inside the territory of Member States. The acquisition of such a right, however, is not under the

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<sup>11</sup> Art. 2 of Regulation 2016/1191. The article lists the types of facts that the documents could establish, being: (a) birth; (b) a person being alive; (c) death; (d) name; (e) marriage, including capacity to marry and marital status; (f) divorce, legal separation or marriage annulment; (g) registered partnership, including capacity to enter into a registered partnership and registered partnership status; (h) dissolution of a registered partnership, legal separation or annulment of a registered partnership; (i) parenthood; (j) adoption; (k) domicile and/or residence; (l) nationality; (m) absence of a criminal record, provided that public documents concerning this fact are issued for a citizen of the Union by the authorities of that citizen's Member State of nationality.

<sup>12</sup> Art. 3(1) of Regulation 2016/1191 provides for a very broad definition of the typologies of public documents covered, which in this paper are grouped under the typology of «civil status records»: administrative documents; notarial acts; official certificates which are placed on documents signed by persons in their private capacity; documents drawn up by the diplomatic or consular agents of a Member State acting in the territory of any State in their official capacity.

<sup>13</sup> The definition is sourced from Art. 2(l) of [Regulation \(EU\) No 604/2013](#) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

<sup>14</sup> Visas are defined at Art. 5 of [Regulation 1683/1995/EC](#) laying down a uniform format for visas, as: «an authorization given by or a decision taken by a Member State which is required for entry into its territory with a view to: an intended stay in that Member State or in several Member States of no more than three months in all; or transit through the territory or airport transit zone of that Member State or several Member States». Residence permits are identified by Art. 1 of [Council Regulation \(EC\) No 1030/2002](#) laying down a uniform format for residence permits for third-country nationals, as «any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally on its territory».

sole and unchecked discretion of national authorities. First, the criteria and conditions for issuing residence documents are listed in secondary legislation, both at EU and national level. Second, such criteria and conditions are so prescriptive and precisely defined that, if met, they lead to the automatic acquisition of the right to reside. At EU level, the Court of Justice of the European Union (CJEU) confirmed the existence of the substantive right to reside in the cases of family reunification and long-term residence status<sup>15</sup>. In the 2003 *European Parliament v Council of the European Union* case, the Court stated that EU law imposes «precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification (...) without being left a margin of appreciation»<sup>16</sup>. Such positive obligation was interpreted as a substantive right to reside in the 2010 *Commission v Netherlands* case, where the Court noted that «where the third-country nationals satisfy the conditions and comply with the procedures laid down in that directive, they have the right to obtain long-term resident status as well as the other rights which stem from the grant of that status»<sup>17</sup>.

Seen from this perspective, the distance between civil status records and residence documents is shortened: despite not establishing a «fact», residence documents issued by national authorities are a mere acknowledgment of a substantive right to reside which is possessed by third-country nationals from the moment they fulfil the conditions and criteria determined by applicable EU and national law.

To further ground the legitimacy of the comparison, it can be argued that residence documents are extensively compared with another type of document with which they shared some -but not all- features: identity documents.

An identity document, like an identity card or a passport, is «a document issued by a State authority to an individual for providing evidence of the identity of that individual»<sup>18</sup>. Based on this definition, identity and residence documents share the qualification as public documents, but not much more: identity documents prove the identity of their holder, residence documents attest their holder's authorization to stay in a Member State territory.

Looking more closely at the main features and information contained in the two categories of documents, however, more similarities become visible: residence

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<sup>15</sup> [Council Directive 2003/86/EC](#) of 22 September 2003 on the right to family reunification (Family Reunification Directive); [Council Directive 2003/109/EC](#) of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Long-term Residents Directive).

<sup>16</sup> Court of Justice, judgment of 27 June 2006, [case C-540/03](#), *Parliament v Council*, EU:C:2006:429, par. 60.

<sup>17</sup> Court of Justice, judgment of 26 April 2012, [case C-508/10](#), *Commission v Netherlands*, EU:C:2012:243, par. 68.

<sup>18</sup> European Migration Network (EMN), Glossary, *Migration and Home Affairs (European Commission)*, available [online](#).

documents now store not only alphanumeric data (e.g. name, age, nationality), but biometric data (photograph and fingerprints) as well, which are typically found on identity documents<sup>19</sup>.

The progressive transformation of residence documents into *quasi*-identity documents has been exacerbated by the imposition of a securitisation logic on the EU and national migration policies in the aftermath of the terrorist attacks of 11 September 2001<sup>20</sup>. Since then, academics are systematically looking at residence and identity documents as part of the same category, especially in the field of biometric data<sup>21</sup>. Even EU institutions have started to do the same: Back in 2003, the European Council decided with the Thessaloniki Declaration to set up a «coherent approach on biometric identifiers or biometric data, which would result in harmonised solutions for documents for third-country nationals, EU citizens' passports and information systems»<sup>22</sup>. Since then, document security concerning identity and resident documents has been tackled homogeneously, with the introduction of very similar advanced security features and biometrics<sup>23</sup>.

Against this background, the focus of literature and EU institutions on the links between residence and identity documents is understandable and appropriate, despite the different primary objectives tackled by the two sets of documents. Following the same reasoning, the comparison between civil status records and residence documents is a promising, yet still unchecked, field of study. In the next paragraphs, the model of uniformisation governing residence documents will be outlined and then compared to the free circulation of civil status records introduced by the Public Documents Regulation in search of similarities, influences, and room for improvement.

### 3. Uniformisation of visas.

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<sup>19</sup> See *infra*, paras. 3-4. The most common data included in identity documents are: full name, parents' names, age, date and place of birth, sex, address, profession, nationality as well as other biographic information, and additional electronic biometric data, such as fingerprints, photographs, and face, hand, or iris measurements. See: EMN, *Glossary*, cit.

<sup>20</sup> A. BALDACCINI, *Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases*, in *European Journal of Migration and Law*, 2008, pp. 10-31. On the securitisation of the EU migration policy, see: A. GEDDES, L. HADJ-ABDOU, L. BRUMAT, *Migration and Mobility in the European Union*, London, 2020; S. LÉONARD, C. KAUNERT, *Refugees, Security and the European Union*, London, 2019.

<sup>21</sup> See: K. ROMMETVEIT, *Introducing Biometrics in the European Union: Practice and Imagination*, in A. DELGADO (ed.), *Technoscience and Citizenship: Ethics and Governance in the Digital Society*, Cham, 2016; D. HOUEAU, *Second Wave of Biometric ID-Documents in Europe: The Residence Permit for Non-EU/EEA Nationals*, in N. POHLMANN, H. REIMER, W. SCHNEIDER (eds.), *ISSE 2009 Securing Electronic Business Processes*, Cham, 2010; R. THOMAS, *Biometrics, International Migrants and Human Rights*, in *European Journal of Migration and Law*, 2005, pp. 377-411.

<sup>22</sup> Thessaloniki European Council 19 and 20 June 2003, Presidency conclusions [2003] D/03/3, par. 11.

<sup>23</sup> For more information, see: European Commission, Migration and Home Affairs, Document security, available [online](#).

Short-term visas were the first block of the migration policy to be communitarised at EU level, as a counterweight to the creation of an internal area without border controls<sup>24</sup>. After the mutual recognition achieved under the Schengen Implementing Convention<sup>25</sup>, short-term visas became the first migration-related measure to fall under Community competence with the Maastricht Treaty<sup>26</sup>. All public documents allowing transit or entry and movement for up to three months in a Member State were uniformised under a common format. This way, the uniformised visas were granted free circulation within the Union.

The uniformisation of short-term visas is normed by Council Regulation (EC) No 1683/95 (hereafter, Visa Format Regulation)<sup>27</sup>. The Visa Format Regulation is a quite peculiar legal text. First, it is the oldest EU migration-related legislation. Signed in 1995, the Regulation has never been codified and it is still in force and applicable. Secondly, it is the only EU legal act on migration matters applicable in all 27 Member States: The Visa Format Regulation was indeed approved and implemented before Ireland and then-member state United Kingdom (UK) enjoyed opt-outs for migration policy measures, and it is therefore legally binding also upon Ireland<sup>28</sup>.

The uniformisation tackles two main categories of short-term visas: Schengen visas, the single and common document issued by all Member States participating in the Schengen *acquis* and granting access and movement in the Schengen Area, and national short-term visas, issued by non-Schengen Member States for intended stays of no more than three months in their territory<sup>29</sup>. Alongside short-term visas, the Regulation covers also transit visas, namely documents allowing transit through the territory or airport transit zone of the Member States, both at Schengen and national level<sup>30</sup>.

The Visa Format Regulation lists common standards to produce a single and common visa document, under the format of a sticker. Such uniformisation was deemed necessary to make the internal market (the AFSJ had still to be introduced) «an area

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<sup>24</sup> K. HAILBRONNER, D. THYM, *EU Immigration and Asylum Law: A Commentary*, Munich, 2016, pp. 272-273.

<sup>25</sup> Chapter 3 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (Schengen Implementation Convention) 2000, Title II.

<sup>26</sup> Treaty on European Union (Maastricht text) 1992, Art. 100c(3).

<sup>27</sup> [Council Regulation \(EC\) No 1683/95](#) of 29 May 1995 laying down a uniform format for visas.

<sup>28</sup> M. HEDEMANN-ROBINSON, *The Area of Freedom, Security and Justice with regard to the UK, Ireland and Denmark: The “opt-in opt-outs” under the treaty of Amsterdam*, in D. O’KEEFFE, P.M. TWOMEY (eds.), *Legal issues of the Amsterdam Treaty*, Oxford, 1999, pp. 289-302.

<sup>29</sup> The Member States outside the Schengen area are Croatia, Cyprus, Ireland Romania, and Bulgaria. Schengen visas are used also by non-EU Member States participating to the Schengen *acquis*, namely Norway, Iceland, Switzerland, and Liechtenstein.

<sup>30</sup> Art. 5 of Regulation 1683/95/EC.

without internal frontiers in which the free movement of persons is ensured»<sup>31</sup>. The uniformisation of visas was considered instrumental for achieving a border-free internal market and ensuring free movement. At the same time, such uniformisation was presented as a tool to contrast counterfeiting and falsification<sup>32</sup>.

The Visa Format Regulation underwent several amendment processes, following the progressive leaning of the EU migration policy towards securitisation<sup>33</sup>. The uniformisation of visas has progressively become a security tool protecting Union citizens from external threats rather than an instrument facilitating freedom of movement. In the aftermath of the 9/11 terrorist attacks, Regulation 334/2002/EC provided for the inclusion of a photograph in the visa sticker<sup>34</sup>. The design of visa documents was further tackled by Regulation 2017/1370, aimed at improving the anti-forgery features of the visa sticker<sup>35</sup>. The main action towards the securitisation of visas was made by Regulation 856/2008, which ensured the compliance of the format of short-term visas with the Visa Information System (VIS)<sup>36</sup>.

With the introduction of the VIS, the uniform visa format definitively morphed into a security and counter-terrorism tool. The visa sticker is now a collector of relevant data, both alphanumeric and biometric, stored in the database<sup>37</sup>. Most worryingly, data in the VIS are accessible to law-enforcement authorities, that can check the database in search for «terrorist offenses» and other broadly defined «serious criminal offences»<sup>38</sup>.

The Visa Format Regulation is not only the oldest brick of the EU migration policy, but also one of the first measures addressing free circulation of public documents in the EU. The visa sticker was conceptualised as a tool to ease the administrative burden for Member States and to facilitate third-country nationals' intra-EU mobility. Over time, its anti-fraud features became progressively more relevant. Now, short-term visas are part of

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<sup>31</sup> Regulation 1683/95/EC, recital.

<sup>32</sup> *Ibidem*.

<sup>33</sup> T. BALZACQ, S. LÉONARD, *Information-Sharing and the EU Counter-Terrorism Policy: A 'Securitisation Tool Approach*, in C. KAUNERT et al. (eds), *European Security, Terrorism and Intelligence*, London, 2013, pp. 127-142.

<sup>34</sup> [Council Regulation \(EC\) No 334/2002](#) of 18 February 2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas.

<sup>35</sup> [Regulation \(EU\) 2017/1370](#) of 4 July 2017 amending Council Regulation (EC) No 1683/95 laying down a uniform format for visas.

<sup>36</sup> [Council Regulation \(EC\) No 856/2008](#) of 24 July 2008 amending Regulation (EC) No 1683/95 laying down a uniform format for visas as regards the numbering of visas. The VIS was introduced by [Regulation \(EC\) No 767/2008](#) of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

<sup>37</sup> Such data are not stored physically on the visa sticker, but they are collected in the VIS upon the granting of a visa.

<sup>38</sup> Art. 3 of Regulation (EC) No 767/2008.



the puzzle of provisions enforcing the general securitisation approach adopted by the EU on migration management, a key element of the EU digitalised external borders<sup>39</sup>.

#### 4. Uniformisation of residence permits.

Under the Amsterdam regime and shortly after the entry into force of the Visa Format Regulation, residence permits underwent a similar uniformisation process as part of the «flanking measures» ensuring the free movement of persons within the AFSJ<sup>40</sup>.

Residence permits had already begun a harmonisation process under the Maastricht regime. Back then, measures related to long-term migration were allocated under the third pillar and subjected to intergovernmental decision-making<sup>41</sup>. Following the intergovernmental rules, the Council adopted Joint Action 97/11/JHA, which laid down the design for a uniform format for residence permits<sup>42</sup>. Its content and structure mimicked the Visa Format Regulation. The Joint Action was translated into a community act, Regulation 1030/2002 (hereafter, Residence Permit Format Regulation), as soon as migration-related measures were communitarised with the Amsterdam Treaty<sup>43</sup>.

Like the visa format, the Residence Permit Format Regulation is aimed at progressively establishing an internal area without border checks, the AFSJ. Such an objective is linked to the broader set of measures harmonising national migration policies under the EU competence<sup>44</sup>. Since its introduction, the uniformisation of residence permits was conceptualised not only as an instrument ensuring freedom of movement of people, but as a migration control tool as well.

The level of harmonisation achieved under the Residence Permit Format Regulation is quite high, as the uniform format applies to a vast array of documents connected to different types of legal statuses. Its scope comprises not only the residence permits covered by an EU legal act, but any residence permit issued by a Member State to third-

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<sup>39</sup> G. GLOUFTSIOS, *Engineering Digitised Borders: Designing and Managing the Visa Information System*, Singapore, 2021.

<sup>40</sup> Art. 61 of the Treaty establishing the European Community (TEC) (Amsterdam consolidated version). Within the Amsterdam framework, migration-related measures were conceptualised as a compensation for the enjoyment of freedom of movement within the EU.

<sup>41</sup> Under the third pillar, the Council had the power to adopt joint positions, resolutions, joint actions, and international conventions on the matters covered by the pillar. The decision making was governed by the rule of unanimity. Treaty Establishing the European Community (TEC) (Maastricht consolidated version), Arts. K(3) and K(4).

<sup>42</sup> [Joint Action 97/11/JHA](#) of 16 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning a uniform format for residence permits.

<sup>43</sup> [Council Regulation \(EC\) No 1030/2002](#) of 13 June 2002 laying down a uniform format for residence permits for third-country nationals.

<sup>44</sup> Recital 1 of Regulation 1030/2002.

country nationals<sup>45</sup>. Only visas, residence permits issued to asylum seekers during their application for international protection, and permits for stays not exceeding six months are excluded<sup>46</sup>. Such a level of harmonisation is quite a unicum in the context of migration policies, where Member States jealously retained control and decision-making autonomy. Differently from the vast territorial scope of the Visa Format Regulation, the Residence Permit Format Regulation applies the variable geometry to which the AFSJ is subjected: Ireland opted-out from the application of the Regulation, and it is not covered by it<sup>47</sup>.

Content-wise, the Residence Permit Format Regulation strongly resembles the Visa Format Regulation, starting with the focus on anti-forgery and security features. There is an additional article restating the maintenance by Member States of the prerogatives on recognition of passports, identity documents, and travel documents issued by third countries<sup>48</sup>. Lastly, the public details on the content of the residence permit sticker listed in Annex 1 are very detailed and already include the photograph of the residence permit holder<sup>49</sup>.

As for the Visa Format Regulation, the Residence Permit Format Regulation underwent several amendment processes, which increased the use of residence permits as security and migration control tools. Such development was already envisaged in Regulation 1030/2002: Recital 6 hints at the possibility for future incorporation and use of new biometric features to «improve protection of residence permits against counterfeiting and falsification»<sup>50</sup>.

Regulation 380/2008 provided for the integration of biometrics in residence permits<sup>51</sup>. Such inclusion is contextualised as part of the «one document one person» approach, aimed at having more reliable links between the holder and the residence permit<sup>52</sup>. The approach is in line with the EU strategy on the inclusion of biometrics in identity documents adopted with the Thessaloniki Declaration<sup>53</sup>. With the inclusion of biometric data, residence permits are now assimilable to identity cards and passports, despite not being conceptualised as an identity control device but rather as an authorisation for stay<sup>54</sup>. Different from visas, where biometrics are solely stored in the VIS, biometrics in residence permits are included in the public document issued.

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<sup>45</sup> Art. 1 of Regulation 1030/2002.

<sup>46</sup> Short-stay visas are covered by the Visa Format Regulation, while long-stay visas are left under national competence.

<sup>47</sup> Recital 15 of Regulation 1030/2002.

<sup>48</sup> Ar. 8 of Regulation 1030/2002.

<sup>49</sup> The insertion of the photograph is also regulated by Art. 9 of Regulation 1030/2002.

<sup>50</sup> Recital 6 of Regulation 1030/2002.

<sup>51</sup> [Council Regulation \(EC\) 380/2008](#) of 18 April 2008 amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals.

<sup>52</sup> Art. 1(4) of Regulation 380/2008.

<sup>53</sup> Thessaloniki European Council 19 and 20 June 2003.

<sup>54</sup> See *supra*, para. 2.

Regulation 380/2008 indeed provides for the inclusion of a facial image and two fingerprint images of the holder, both in interoperable formats, on residence permits<sup>55</sup>.

The strict interconnection between the inclusion of photograph and fingerprints on residence permits and their storage in the Schengen Information System II (SIS II)<sup>56</sup> puts the use of biometrics under the shadow of the overall EU securitisation agenda on migration: the SIS II is being increasingly exploited not only for border control issues, but also and mainly as an investigation system for general crime-detection purposes<sup>57</sup>. Consequently, the uniformisation of residence permits – originally purposed to enable free movement within AFSJ – now serves as a disproportionate tool of security control over third-country nationals, whose presence and mobility in the AFSJ are looked at with growing suspicion.

The Residence Permit Format Regulation was amended a second time with Regulation 2017/1954, with an update of the anti-fraud features of residence permits<sup>58</sup>. Acknowledging the importance of intra-EU mobility rights, the Regulation introduced new features for national authorities to better identify the holder, its status and the rights connected to it, in cases of mobility.

Since its entry into force, the Residence Permit Format is included in all legal migration directives, with *ad hoc* provisions prescribing the application of the uniform format to the specificities of the residence permit at stake<sup>59</sup>. Furthermore, the Regulation also applies to residence permits issued based on national law.

The uniformisation model has been implemented in the field of visas and residence permits for twenty years. It is now a well-established and predictable approach enabling the free circulation of residence documents across the EU. Against this background, the provisions on uniformisation can be compared with the ones on the free circulation of

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<sup>55</sup> New Arts. 1(1) and 4a of Regulation 1030/2002.

<sup>56</sup> [Council Regulation \(EU\) No 1272/2012](#) of 20 December 2012 on migration from the Schengen Information System (SIS 1+) to the second-generation Schengen Information System (SIS II) (recast).

<sup>57</sup> D. HOUDEAU, *Second Wave of Biometric ID-Documents in Europe*, cit.

<sup>58</sup> [Regulation \(EU\) 2017/1954](#) of 25 October 2017 amending Council Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals.

<sup>59</sup> Art. 2(e) of the Family Reunification Directive; Art. 2(g) of the Long-term Residents Directive; Art. 9(3) of the [Directive 2021/1883/EU](#) of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (Blue Card Directive); Art. 3(d) of the [Directive 2014/36/EU](#) of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (Seasonal Workers Directive); Art. 13(3) of the [Directive 2014/66/EU](#) of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Intra-Corporate Transfers Directive); Art. 3(22) of the [Directive \(EU\) 2016/801](#) of 11 May 2016 of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) (Students and Researchers Directive); Art. 2(c) of the [Directive 2011/98/EU](#) of the European Parliament and of the Council 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (Single Permit Directive).

public documents prescribed by the Public Documents Regulation. The uniformisation of visa and residence permit formats preceded any other form of regulation in the field of migration management, especially concerning intra-EU mobility rights. As such, all secondary legislation on legal migration is tributary to this first legal exercise. The journey leading to the adoption of Regulation 2016/1191 is rather different.

## **5. Free circulation of civil status records: a new and improved model of documents' mobility?**

The Public Documents Regulation is one of the last pieces of the variegated puzzle of legal acts covering freedom of movement achieved through the circulation of documents. The Regulation was negotiated and approved decades after the establishment of freedom of movement as a Union citizenship's right. Therefore, it inherited the narrative and structure revolving around Union citizens' rights: the text is much longer if compared to the Visa Format and Residence Permit Format Regulations (hereafter, the residence documents formats Regulations), and it is interconnected with many other pre-existing EU law measures.

In 2010 the Commission published a Green Paper highlighting the necessity to improve the circulation of public documents within the EU<sup>60</sup>. The Green Paper listed innovative measures to facilitate the mobility of Union citizens. On one hand, it proposed to exempt from legalisation all public documents, considering a sectoral approach to be inefficient. On the other hand, the Green Paper envisaged not only the free circulation of documents, but the mutual recognition of the effects of civil status records as well. If implemented, the combination of free circulation and mutual recognition of documents would have led to the creation of «European public documents»: when exercising freedom of movement, Union citizens' documents would have been automatically recognised as authentic by the authorities of the hosting Member State, and the status they represent would maintain its effect across borders.

The proposals listed in the Green Paper only partially became reality with the Public Documents Regulation. The Regulation only tackles the issue of free circulation of public documents, with the exemption from legalisation, without providing for their mutual recognition. Furthermore, the exemption does not cover all public documents, but only those included in an exhaustive list<sup>61</sup>.

If compared with the residence documents formats Regulations, the first and most evident difference that stems out from the Public Documents Regulation is the audience

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<sup>60</sup> Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, [COM\(2010\)747 final](#) of 14 December 2010.

<sup>61</sup> Art. 2(1) of Regulation 2016/1191.

it targets: instead of third-country nationals, Union citizens. Such difference has many implications, especially in the way similar objectives are tackled.

First, both the Public Documents Regulation and the residence documents formats Regulations are aimed at facilitating freedom of movement inside the AFSJ<sup>62</sup>. In the Residence Permit Format Regulation, the AFSJ provides the legal basis for the regulation to be adopted. In the Public Documents Regulation instead, the reference to the AFSJ is rather incidental. The Regulation, aimed at ensuring free movement of persons within the AFSJ, is more specifically intended to promote the free movement of *Union citizens*<sup>63</sup>. The focus on this more limited audience is confirmed by the legal basis chosen, Art. 21(1) TFEU, which regulates the right to move and reside freely within the EU territory for Union citizens<sup>64</sup>. Such a legal basis suggests quite explicitly that third-country nationals are not included in the scope of the Regulation. Theoretically, the application of Regulation 2016/1191 is not limited to Union citizens, as it applies to public documents issued by the authorities of a Member State<sup>65</sup>. If a third-country national asks for a document issued in a Member State while being resident there (e.g. a certificate of marriage or divorce contracted in that Member State), the Regulation would apply. Apart from this (quite rare) case, Union citizens are the exclusive target of the Public Documents Regulation.

Second, the Public Documents Regulation and the residence documents formats Regulations also share the commitment to fight against frauds and counterfeit documents. Here, Both the rhetoric and measures adopted to meet such an objective are different. Looking at visas and residence permits, there is a prominent attention to anti-fraud measures, which overshadows the other objective of the Regulations, the facilitation of the mobility of their holders. The securitisation features of the subsequent amendments confirm the importance of anti-fraud measures, unveiling the imposition of security concerns in the EU migration policy. Strikingly different is the focus on anti-fraud measures in the Public Documents Regulation: the number of anti-fraud provisions is very limited, and the term «fraud» is present only in the recitals and incidentally in a couple of articles<sup>66</sup>. On the contrary, there are many provisions on how to ensure the «authenticity» of public documents: most of Chapter IV is dedicated to this topic<sup>67</sup>. The

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<sup>62</sup> The Visa Format Regulation references the internal market, as the AFSJ had yet to be introduced.

<sup>63</sup> Recital 1 of Regulation 2016/1191 indeed follows by stating: «In order to ensure the free circulation of public documents within the Union and, thereby, promote the free movement of Union citizens, the Union should adopt concrete measures to simplify the existing administrative requirements relating to the presentation in a Member State of certain public documents issued by the authorities of another Member State».

<sup>64</sup> Art. 21 TFEU (Lisbon consolidated version).

<sup>65</sup> Art. 2 of Regulation 2016/1191. *Emphasis added*.

<sup>66</sup> Recitals 30 and 33 and Arts. 23(2) and 26 Regulation 2016/1191.

<sup>67</sup> Chapter IV («Requests for information and administrative cooperation») of Regulation 2016/1191.



choice of wording is quite important. What in the migration field is defined as «fight against fraud», in the Public Documents Regulation is named «reasonable doubt as to the authenticity of that public document»<sup>68</sup>.

Content-wise, the measures taken to verify the authenticity/fraud of EU public documents and residence permits greatly differ. Visas and residence permits have progressively become identity documents incorporating biometric data and embedded in a far-reaching surveillance system over third-country nationals' presence on EU territory. Nothing similar is present in the Public Documents Regulation. Regarding Union citizens, biometric-based security features are already stored in identity cards and passports<sup>69</sup>. Understandably, the Public Documents Regulation does not replicate similar provisions in the field of civil status records. However, the differences in the rules on the verification of the authenticity of the documents are striking, especially concerning the IT databases where data can be accessed. VIS and SIS II contain sensitive data and information that can be accessed, with little safeguards, by law enforcement authorities. For public documents, the database where national authorities can check the authenticity of the documents is the Internal Market Information System (IMI)<sup>70</sup>. The rules on accessing the database are listed in detail in Art. 14 of the Public Documents Regulation, in stark contrast with the broad rules on access to VIS and SIS II. Most importantly, the access to the database is exclusively purposed for the verification of the authenticity of a public document: law enforcement authorities are not granted access to IMI and no additional information other than what is necessary is stored or made accessible to national authorities.

Compared to the residence documents formats Regulations, the Public Documents Regulation contains more upgraded and effective provisions for facilitating free movement and ensuring the authenticity of the circulating documents. However, the uniformisation of residence documents remains for many aspects a more successful harmonisation exercise.

First, the Public Documents Regulation and residence documents formats Regulations both provide for harmonised rules on the cross-EU recognition of the authenticity of a public document. In neither case, the mutual recognition of the legal effects of the documents issued is prescribed. For residence documents, the lack of mutual recognition stems from a clear political will: Member States retain sovereignty in determining the volumes of admission to their territory<sup>71</sup>. Consequently, a third-country

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<sup>68</sup> Art. 14 of Regulation 2016/1191.

<sup>69</sup> [Council Regulation \(EC\) No 2252/2004](#) of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

<sup>70</sup> [Regulation \(EU\) No 1024/2012](#) of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

<sup>71</sup> Art. 79(5) TFEU (Lisbon consolidated version).

national wishing to permanently move from one Member State to another cannot rely on the residence permit issued by the first Member State. Instead, they will have to request a new authorisation of stay from the second Member State<sup>72</sup>. On the contrary, in the field of EU public documents, the limitation of the scope to the sole recognition of authenticity is a step back from the 2010 Green Paper, whose broader reforms were not included in the 2013 Commission proposal<sup>73</sup>.

Second, the legalisation exemption is achieved differently. Residence documents are uniformised under a common single format which covers all types of short-term visas and residence permits issued by Member States' authorities. In the Public Documents Regulation, the legalisation exemption does not cover all «EU public documents». Instead, an exhaustive list of documents is provided, identifying a limited set of civil status records<sup>74</sup>. Furthermore, in the Public Documents Regulation, the abolition of the legalisation requirement is not mandatory *per se*. Despite not being required, Member States authorities are not prevented to issue an apostille when a person requests it<sup>75</sup>. This provision weakens the overall efficiency of the Regulation: it is up to the person requiring the issuance of a public document to know whether such document is covered by the Regulation and therefore exempted from legalisation. This way, the legalisation exemption provided by the Public Documents Regulation remains optional in nature.

Lastly, residence documents have been uniformised under a single common format which is automatically recognised by all Member States with no need for translation. For EU public documents instead, the exemption from legalisation ensures the automatic recognition of authenticity, but it does not solve the issue of translation. To deal with the problem, the Public Documents Regulation introduced the multilingual standard forms<sup>76</sup>. These documents, attached to the public documents in their original language, are used as a translation aid and do not have autonomous legal value. Such a solution is not as efficient as the uniformisation of the format of residence documents. The provisions regulating multilingual standard forms are detached from the ones on the legalisation exemption, which applies regardless a multilingual standard form is issued or not. Consequently, the regime governing the circulation of EU public documents is inhomogeneous, and the ability of the Regulation to reach its scope is weakened. Furthermore, the multilingual standard forms do not exempt *a priori* further translation

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<sup>72</sup> The enjoyment of mobility rights stems from the fulfilment of the conditions provided for in secondary law. All intra-EU mobility provisions of the EU legal migration directives request a second application upon the movement to a second Member State, even if with more advantageous conditions than the first application.

<sup>73</sup> Proposal for a Regulation 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.

<sup>74</sup> Art. 2 of Regulation 2016/1191.

<sup>75</sup> Recital 5 of Regulation 2016/1191.

<sup>76</sup> Chapter III of Regulation 2016/1191.

requirements. The Regulation indeed specifies that translation shall not be required if a document is accompanied by a multilingual standard form, «provided that the authority to which the public document is presented considers that the information included in the multilingual standard form is sufficient for processing the public document»<sup>77</sup>. In addition, not all documents listed in Regulation 2016/1191 are paired with a multilingual standard form, and therefore not all civil status records are exempted from the translation requirement<sup>78</sup>.

All summed up, the issuance of multilingual standard forms alongside public documents is far less efficient than the uniformisation of documents under a single format. The regime regulating the forms has no general application and it is subjected to the discretion of national authorities, that can ultimately decide to ask for additional information and translation, consequently weakening the added value of multilingual standard forms.

## **6. Conclusions.**

The Public Documents Regulation is a positive effort to ease the administrative burden for Member States and to facilitate the circulation of civil status records, and hence the free movement of their holders. The rhetoric and measures adopted in the field of civil status records greatly depart from the residence documents formats Regulations. The Public Documents Regulation is explicitly intended first and foremost to facilitate freedom of movement for Union citizens, with all other measures being conceptualised as ancillary provisions and never overshadowing its main purpose. The uniformisation process of residence documents is instead progressively conceptualised as a security and migration-control tool, with overarching attention to the anti-fraud measures, to the detriment of the use of uniformised documents for easing third-country nationals' intra-EU mobility.

At the same time, the free circulation of public documents envisaged in the Public Documents Regulation is for many aspects less efficient than the uniformisation of visas and residence permits. All residence documents are issued under a single format recognised by all Member States with no need for translation or legalisation. In the field of civil status records, only some typologies of documents are covered by the legalisation exemption, which does not rule automatically out the possibility of the apposition of an apostille. Furthermore, the abolition of the legalisation requirement does not solve the translation issue, which is only partially addressed with the multilingual standard forms.

The comparison exercise made in this paper showed how multifaceted and variegated is the set of norms regulating public documents' mobility in the EU. It is impossible to

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<sup>77</sup> Art. 6(2) of Regulation 2016/1191.

<sup>78</sup> S. SCHLAUB, *The EU Regulation on Public Documents*, in *ERA Forum*, 2020, pp. 117-128.

establish *a priori* which model, free circulation or uniformisation, is more successful. Indeed, Public documents and residence documents belong to two different sets of Treaty provisions, they target different audiences, and are embedded in very different narratives. Furthermore, the correct implementation of the Regulations plays a key role in their efficacy in meeting their objectives. Visas and residence permits are issued under a single format thanks to a well-established application of precisely defined provisions introduced decades ago. Instead, the free circulation of public documents is still not fully achieved due to the only partial implementation of Regulation 2016/1191, which has entered into force relatively recently and contains less prescriptive norms.

Notwithstanding the differences in conceptualisation and implementation, the Public Documents Regulation and the residence documents formats Regulations share the same ultimate purpose: to create and maintain the AFSJ. Coexisting under the same area, the regimes on free circulation and uniformisation of public documents are part of the universe of sectorial policies allowing freedom of movement to exist and be feasible. Looking at the interlinks between the two models and comparing their respective strengths and weaknesses could be a source of inspiration for improving the overall mobility of documents within the EU.

**ABSTRACT:** The maintenance of the Area of Freedom, Security and Justice (AFSJ), introduced with the Amsterdam Treaty, is one of the main challenges of EU legislation on freedom of movement and external migration. An impressive body of legislation has been adopted to «achieve», «create», «maintain» and «develop» such an area. In 2016, Regulation 2016/1191 was added to the group. The simplification of the requirements for presenting certain public documents is indeed purposed to ease free movement and, consequently, maintain the AFSJ.

The circulation of public documents is an important issue also in the other pillar of the Area: external migration. Contrary to freedom of movement, migration from third countries is neither free nor communitarised, as Member States retain a great degree of discretion in regulating migration flows. At the same time, once entered the AFSJ, third-country nationals are entitled to a certain degree of intra-EU mobility. To better control and facilitate such mobility, the format of migration-related public documents, such as residence permits and visas, has been uniformised across the EU. These legal acts are expressively purposed to «establish progressively» an Area of Freedom, Security and Justice.

This paper aims to compare administrative cooperation on public documents in the field of free movement, on one side, and external migration and intra-EU mobility, on the other. Through the analysis of primary sources, Regulation 2016/1191 will be compared with Regulation 1030/2002 (uniform format for residence permits) and Regulation 1683/95 (uniform format for visas). Differences and similarities between uniform formats and multilingual standard forms will be assessed. Also, the respective provisions on anti-fraud and data collection on IT databases will be analysed.

The free circulation of public documents is an often overlooked yet critical component of the AFSJ. It is thanks to these practicalities that values such as freedom of movement and common policies as migration become (or not) a reality. Many elements of Regulation 2016/1191 are an advancement if compared to the provisions governing the uniformisation of visas and residence permits. However, if compared to the uniformisation process of migration-related documents, free circulation of EU public documents still maintains several flaws and imperfections.

**KEYWORDS:** Area of Freedom, Security and Justice; civil status records; visa; residence permit; uniformisation; free circulation.