Papers di DIRITTO EUROPEO

www.papersdidirittoeuropeo.eu
ISSN 2038-0461

2023
numero speciale | special issue

Rivista scientifica online
Papers di diritto europeo
www.papersdidirittoeuropeo.eu

I contributi sono sottoposti ad un procedimento di revisione tra pari a doppio cieco (*double-blind peer review*).
Non sono sottoposti a referaggio esclusivamente i contributi di professori emeriti, di professori ordinari in quiescenza e di giudici di giurisdizioni superiori e internazionali.

Rivista scientifica online "*Papers di diritto europeo*"
ISSN 2038-0461
Registrazione al Tribunale di Verona n. 1875 del 22 luglio 2010

Rivista scientifica online
Papers di diritto europeo
www.papersdidirittoeuropeo.eu

2023, numero speciale | special issue

INDICE | TABLE OF CONTENTS

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,

* 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.

Reassessing Regulation (EU) 2016/1191 on public documents in the light of EU citizenship

Marion Ho-Dac[*], Elsa Bernard[**], Susanne Lilian Gössl[***], Martina Melcher[****] and Nicolas Nord[*****]

1. Introduction.

The mobility of persons is one core dimension of the European Union area «without internal borders»[1] and the principle of freedom of movement enshrined in the EU Treaties is its primary legal basis. When EU citizens and their families make use of their right to free movement within the Member States, the related circulation of their personal and family status is at stake[2]. Will their registered partnership, marriage, parenthood, name or even nationality obtained in a first Member State be accepted, with full effects, across the EU, and in particular in the host Member State?

[*] Professor of European and International Law, University of Artois (France). Coordinator of this collective research.

[**] Professor of Public Law, Jean Monnet Chair, University of Lille (France).

[***] Professor of Private International Law, Comparative Law and the Law of Digitalisation, University of Bonn (Germany).

[****] Assistant Professor, Institute of Civil Law, Foreign Private Law and Private International Law, University of Graz (Austria).

[*****] Secretary General of the International Commission on Civil Status.

[1] Art. 3(2) TEU (for the area of freedom, security and justice) and Art. 26(2) TFEU (for the internal market).

[2] Cf. beyond the European boundaries, see H. FULCHIRON (ed.), *La circulation des personnes et de leur statut dans un monde globalisé*, Paris, 2019.

Papers di diritto europeo, 2023, numero speciale/special issue, pp. 111-143 ISSN 2038-0461
Accettato a seguito di referaggio/accepted after peer-review: 12.09.2022 www.papersdidirittoeuropeo.eu

From a legal perspective, in the case of cross-border mobility from one jurisdiction to another, the personal status is connected, at least, with two different legal systems, i.e. the home jurisdiction and the host jurisdiction. The legal coordination between them is thus a central issue for individuals in terms of predictability of the applicable legal framework and of the protection of vested rights. More globally, a political consensus exists to ensure continuity of personal status through national borders, as «limping» status relations create legal uncertainty and administrative difficulties for individuals and families. However, depending on the political objectives followed by the *forum*, the legal treatment of similar cross-border situations may vary, as national legal systems are diverse, in particular in family matters. At the same time, an overly complex or uncertain legal regulation could slow down or even discourage European freedom of movement, as well as be detrimental for the private interests of EU citizens[3].

Against this backdrop, the European Commission proposed in 2013 to adopt a uniform set of rules aiming to simplify the acceptance of certain public documents in the EU[4]. As explained in its Regulation proposal, EU citizens exercising their free movement rights frequently «face a series of difficulties when presenting the necessary public documents to the authorities and getting them accepted by that Member State contrary to its own nationals. (…) Even when these documents are fully legal and unproblematic in their country of origin, the citizens (…) still have to undergo disproportionate and burdensome administrative formalities to prove their authenticity in the other Member State»[5].

To overcome this reality, the Commission proposed common rules to establish the authenticity of foreign public documents issued in the Member States, in other words their «cross-border acceptance» within the EU. However, the proposal did not address the issue of recognition of the substantial effects of public documents. Finally, Regulation 2016/1191 was adopted in 2016 with a restricted scope of application[6]. It only provides for a regime of cross-border presentation (and not acceptance) of certain foreign public documents issued in Member States. It means that the «formal» circulation of the documents is simplified principally based on «a system of exemption from legalisation or similar formality»[7].

[3] On the existence of a right of identity, see A. BUCHER, *La dimension sociale du droit international privé*, in *Recueil des Cours de l'Académie de Droit International*, 2009, pp. 9-526, in particular p. 114 ff.

[4] Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012, COM(2013) 228 final of 24 April 2013, Explanatory memorandum.

[5] COM(2013) 228 final, Explanatory memorandum, cit., p. 4.

[6] 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.

[7] Art. 1(1) of Regulation 2016/1191.

In this context, the core challenge surely is the ability for the Regulation to achieve its primary objective, that is «maintaining and developing an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured»[8]. Yet, there may be a real gap within the EU legal framework between the need to ensure the permanence of the personal status of individuals and families (such as family name, filiation or marital status), on the basis of EU citizenship pursuant to Arts. 18 to 21 TFEU, and the limited scope and effects of Regulation 2016/1191.

To shed light on the concrete effects of the cross-border circulation of public documents under EU law (i.e. mere circulation of the *instrumentum*, exclusive to any recognition of the *negotium*), a twofold approach has to be followed.

On the one hand, the analysis must be methodological. What is the legal regime for the circulation of public documents? It is common to speak of the «recognition» of personal status across borders, but this term is ambiguous because it is polysemous[9]. Mobile citizens demand that their identity and the rights attached to it take effect – be recognised – in the host States. Technically, from a private international law perspective, international recognition of status occurs when the host State considers the foreign status to be valid from its own legal perspective[10]. The circulation of public documents does not in itself give rise to such recognition.

On the other hand, the analysis must be political. Indeed, the circulation of public documents is based on the status of EU citizen. This circulation supports the rights stemming from EU citizenship. Among those rights, the fundamental right is that of free movement from one Member State to another (Art. 21 TFEU), which implies for mobile EU citizens a cross-border stability of their personal identity and the rights attached to it. While personal status and civil registry are traditionally seen as matters reserved for the Member States, the EU is in a difficult position to ensure its objective as an integrated political area[11].

Against this background, this contribution aims to propose ways of reconciling the interests at stake and combining various legal tools based on a holistic approach. It means that the EU legal system must be analysed in the light of international frameworks such as the Hague Conference of Private International Law (HCCH), the Council of Europe and the International Commission on Civil Status (ICCS). The stakes are high: to ensure

[8] Recital 1 of Regulation 2016/1191.

[9] See under a private international law perspective, P. MAYER, *Les méthodes de la reconnaissance en droit international privé*, in M.-N. JOBARD-BACHELIER, P. MAYER (eds.), *Le droit international privé: esprit et méthodes, Mélanges en l'honneur de Paul Lagarde*, Paris, 2005, pp. 547-573.

[10] D. COESTER-WALTJEN, *Recognition of legal situations evidenced by documents*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (eds.), *Encyclopedia of Private International Law*, Cheltenham, 2018, pp. 1496–1505.

[11] On the growing impact of EU law on personal and family matters, see recently E. BERNARD, M. CRESP, M. HO-DAC (eds.), *La famille dans l'ordre juridique de l'Union européenne: Family within the Legal Order of the European Union*, Bruxelles, 2020.

that citizens preserve their identities across borders while respecting Member States' competences and the related national diversity[12].

To this end, the contribution will first and foremost provide for a comprehensive overview of the legal effects of the circulation of public document under EU law, complemented by international conventions in force within all, or some, Member States (para. 2). Then, it will explain the tension between the current legal framework on cross-border circulation of public documents within the EU and the legal needs of EU citizens (para. 3). It will finally submit legal ways to overcome this tension, while taking into account the restraints of political feasibility (para. 4).

2. Legal effects of circulation of public documents for EU citizens.

Regulation 2016/1191 applies to the circulation of certain publics documents and their certified copies issued by one Member State authority, based on its national law, for presentation by a person in another Member State.[13] In order to understand the scope of the Regulation and its impact on EU citizens (para. 2.4), it is crucial to clarify what is legally meant by *circulation* and *presentation* of the public documents concerned. Therefore, a brief typology on the legal effects of public document in family matters under a general perspective is proposed (para. 2.1). Afterwards, this part of the contribution provides an overview of the legal effects of the circulation of public documents under the Regulation (para. 2.2). It is then complemented by a comparison with the regimes of circulation of civil status documents under the ICCS and HCCH frameworks applicable in the Member States (para. 2.3).

2.1. Typology of cross-border legal effects of public documents based on private international law.

From a schematic perspective, a public document may be distinguished from a situation created *ex lege*, on the one hand, and from a court judgment, on the other hand. It is to be taken as an *instrumentum* delivered by a public authority following its own law (*lex auctoris*). There is thus a core distinction between this «envelope» of a public act (e.g. a civil status record) and its private content known as *negotium* (e.g. marriage or parentage). The intervention of the public authority allows the will of private parties to be authenticated but also, sometimes, gives it a legal basis. With respect to the legal situation within the public document, its validity is in principle independent from the *instrumentum* and submitted to the law of the competent forum, including its private

[12] Cf. M. HO-DAC, *Vers une carte européenne de mobilité des personnes?*, in J. DECHEPY-TELLIER, J.-M. JUDE (eds.), *Les enjeux de la mobilité interne et internationale*, Bayonne, 2021, pp. 319-343.

[13] Arts. 1-2 of Regulation 2016/1191.

international law rules (e.g. conflict-of-laws rules, international procedural rules or recognition rules) in case of dispute. In practice, however, interplays between this twofold dimension – *instrumentum* and *negotium* – are frequent, so that the legal regime of public documents, in particular in a cross-border perspective, is not always easy to ascertain. For instance, a public document may be a condition for the validity or the opposability to third parties of the private situation within (e.g. a marriage or a family name)[14]. In that respect, the litigious facts in the *Grunkin-Paul* case[15] ruled by the Court of Justice of the European Union (CJEU) provide for a relevant illustration. German authorities refused to transcribe a child's name certificate legally drawn up in Denmark – where the child was born to German parents – because of the non-compliance of the given name with German civil law. This demonstrates how intertwined the envelope and the content of a public document may be in practice. Indeed, the transcription into the civil status registers is in principle limited to the mere presentation of the document, without any validity assessment of its content.

Furthermore, the distinction between *instrumentum* and *negotium* may get blurred in cases where the public document is drawn up to document also the agreement of the parties and this agreement itself validly changes the personal status of the people involved. For example, more and more states allow the so-called «private divorce» where spouses under certain conditions can agree on the dissolution of their marriage[16]. The agreement usually requires certain formalities, usually a notarial act or the documentation by a public authority. Thus, the document can be constitutive for the change of status (*negotium*) and simultaneously can form a public document (*instrumentum*). As party autonomy is progressing in questions of status, these forms of status changes will increase in national systems.

Against this background, a person who presents a public document issued in his/her home state to a host state authority may seek different purposes including (and not limited to) establishing a fact (e.g. being married) and making it public (e.g. registration of a foreign civil status record in his/her home State), providing proof (e.g. dissolution of a registered partnership issued abroad to get married in another State) or having a legal status recognised (e.g. a parenthood acquired abroad between a child and his/her same-sex parents). In a cross-border perspective, each of these scenarios may follow a different legal regime depending on the competent forum. In general, the more important the legal

[14] Cf. S. GÖSSL, M. MELCHER, *Recognition of a Status Acquired Abroad in the EU*, in *Cuadernos de Derecho Transnacional*, 2022, no. 1, pp. 1012-1043, at p. 1024, available *online*. This is why Professor C. PAMBOUKIS suggested in his PhD thesis that the category of «acte quasi-public» should be created, in *L'acte public étranger en droit international privé*, Paris, 1993.

[15] Court of Justice (Grand Chamber), judgment of 14 October 2008, case C-353/06, *Grunkin and Paul*, EU:C:2008:559.

[16] For an overview, see e.g. S.L. GÖSSL, *Open Issues in European International Family Law:* Sahyouni*, "Private Divorces" and Islamic law under the Rome III Regulation*, in *The European Legal Forum*, 2017, no. 3/4, pp. 68-74; M. CRESP, M. HO-DAC (eds.), *Droit de la famille – Droit français, européen, international et compare*, Bruxelles, 2018, p. 268 ff.

effects sought, the more demanding this regime will be. Indeed, the control of foreign public documents by the host authorities may seem more justified when the applicant asks for the document to produce substantial effects. In that respect, a gradual distinction can be made between practical effects[17], (procedural) evidentiary effects and (substantial) normative effects[18].

In the first case, the foreign public document does not aim at producing any legal effect, but only at being taken into consideration as a fact conditioning the application of a substantial rule (*effet de fait*). One may argue that this fact may be presumed to be authentic (e.g. the date and place of birth of a person). In the second scenario, the host authorities are requested to certify that the information contained in the foreign document is authentic. This information is thus presumed to be substantially correct (in general, until proven otherwise). In such circumstances, the host authority may ask the applicant to translate the foreign public document and to obtain a legalisation or an apostille to be able to carry out certain procedures (e.g. citizenship/nationality application, marriage, change of name) – helping local authorities to check its authenticity –. These procedures exclusively concern the envelope of the document, not its legal content (i.e. *negotium*). Finally, with respect to the normative effects, the foreign public document aims at being enforced in the host jurisdiction, giving rise to legal changes in the situation of private parties. The competent authority may request a control of the validity of the content of the public document, since the situation created abroad aims at producing normative effect in the host forum. In that respect, the circulation of the *instrumentum* has a direct impact on the content of the public document.

To take a concrete example, a child born in a State A from a same-sex couple of women obtained a birth certificate issued by the local authority in State A. Since one of the mothers is a foreign national, she asked for the registration of the birth certificate before the public authority of her State of origin B. This procedure may be necessary to obtain a birth certificate from this State. Based on this document, the parenthood may be automatically established from the perspective of State B (as it has already been established in State A) and the child may obtain the nationality of his/her mother (depending on the requirements of the domestic law of State B). In this context, the birth certificate will circulate from State A to State B and be presented to State B authorities for registration. These authorities may require supporting documents to be able to authenticate the foreign public document (such as a copy of the foreign birth certificate, its translation, the acknowledgement of co-maternity, etc.). The validity of its legal content, in particular the parenthood between the child and the two mothers (especially the co-mother who did not give birth), is however not covered by this mere circulation of

[17] The foreign public record does not aim at producing any legal effect, but only at being taken into consideration as a fact conditioning the application of a substantial rule (*effet de fait*).

[18] Regarding that matter, see e.g. S. GÖSSL, M. MELCHER, *Recognition of a Status*, cit.

the public record, limited to its legal envelope. The recognition of legal effects relating to the content of public documents issued by the state of birth depends in principle on the law of the host state B, including its private international law rules, as explained above. Again, distinctions can get blurred, as there are some countries that *de facto* do not require a separate analysis of the underlying law. Instead, they recognise the document and its content together and limit the examination of the legal issue to some formal requirements and the public policy exception[19]. Nevertheless, from a strict point of view, in these countries, two legal questions, the effect of the *instrumentum* and the recognition of the status (*negotium*) come together in one actual act but remain two different legal matters.

2.2. Legal regime of circulation based on Regulation 2016/1191 on public documents.

The keystone of the legal regime introduced by the Regulation can be summarised in a simple and general principle: free circulation of public documents is established in the European area. Such a regime appears very favourable to the citizens. Three aspects of the legal regime set up by the Regulation deserve particular attention.

Firstly, the public documents which fall within the scope of the Regulation, as well as their certified copies, are exempted from legalisation or any similar formality[20] and no alternative formality is introduced. Legalisation is understood as «the formality for certifying the authenticity of a public office holder's signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears»[21].

It means that the circulation of public documents does not provide for any legal effect (e.g. probative value or validity).

Secondly, the practical obstacle of the language used in the public documents concerned is addressed. The question is very important in the daily life of citizens. Multilingual standard forms, the different models of which are appended to the Regulation, are used to simplify procedures. This system as well as the method of coding, created and developed by the ICCS[22], are taken up by the Regulation. Therefore, the authorities of the requested Member State should have no difficulty in understanding the public document submitted to them and the citizens will not have to pay for the translation of their document.

Thirdly, in cases where the authorities of the requested Member State «have a reasonable doubt» as to the authenticity of the public document or its certified copy, a control is possible. The Regulation relies on the Internal Market Information System

[19] Cf. S. GÖSSL, M. MELCHER, *Recognition of a Status*, cit.

[20] Art. 4 of Regulation 2016/1191.

[21] Art. 3(3) of Regulation 2016/1191.

[22] C. NAST, F. GRANET, J. MASSIP, F. HONDIUS, *La Commission Internationale de l'Etat Civil*, The Hague-London-Boston, 2018, p. 81.

(IMI), established by Regulation (EU) No 1024/2012[23], to carry out the control. It is an electronic platform, managed by the European Commission and intended to facilitate the cooperation between the administrative authorities of the Member States. It can be used, as a first step, by the authorities of the requested Member State to carry out themselves a comparison between the document submitted to them and those stored in the IMI database. In a second step, if a doubt remains, the authorities of the issuing Member State may receive a request for information through the IMI platform. Such a control concerns only the form of the document and not the legal relationship itself.

Remarkably, the Regulation can be considered as a significant progress which should contribute to facilitating cross-border procedures for mobile citizens. However, the effective added-value of the Regulation may be highly nuanced. Indeed, only the *instrumentum* circulates, which could, in practice, limit the effectiveness of a free circulation of documents and citizens, beyond mere administrative obstacles. A simplification for the circulation of the mere *instrumentum* is introduced and only for the purposes of «presentation» in another Member State. In this respect, three important limitations deserve to be underlined.

First of all, the Regulation does not apply to the recognition of the legal effects attached to the content of public documents issued by the authorities of a Member State[24]. Consequently, if the act in itself benefits from a liberal regime, the legal relationship that it reflects is excluded. The requested Member State is not obliged to recognise the personal or family situations which are documented in the public documents. A simplified circulation of public documents is created but the Regulation does not go further.

Second, nor does the Regulation apply to the question of the probative force of the act in question, as indicated in Recital 47. The law of the State of the requested authority (*lex fori*) is applicable in this regard. A public document from another Member State does not even benefit from a presumption of probative force. Only a few specific details relating to the proof appear in the Regulation. On the one hand, «[w]here a Member State requires the presentation of the original of a public document issued by the authorities of another Member State, the authorities of the Member State where the public document is presented shall not also require the presentation of a certified copy thereof»[25].

On the other hand, if their internal law allows a certified copy of a public document, they must accept one drawn up in another Member State[26].

The multilingual forms attached to public documents are only a translation aid. They have no independent legal value. This is laid down three times in the Regulation[27].

[23] Regulation (EU) No 1024/2012 of the European Parliament and of the Council, of 25 October 2012, on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

[24] Art. 2(4), Recitals 18 and 26 of Regulation 2016/1191.

[25] Art. 5(1) of Regulation 2016/1191.

[26] Article 5 (2) Regulation 2016/1191.

[27] Recital 22, Arts. 1(2) and 8 of Regulation 2016/1191.

The sole purpose of these forms is to enable the understanding of the foreign document to which they are attached. While their usefulness cannot be disputed, such a limitation is surprising. The main purpose of the Regulation seems to be therefore to allow easier processing by the authorities of the requested Member State of public documents from another Member State, rather than ensuring the free movement of EU citizens, including the unimpeded circulation of their personal and family status. The emphasis is put on the administrative cooperation between Member State rather than on maintaining the vested rights of citizens concerning their personal identity.

Finally, it is worth mentioning that Regulation 2016/1191 is without prejudice to the application of special EU law rules dealing with legalisation or similar formality and also provisions on electronic signatures and electronic identification[28]. Additionally, in case of conflict with a provision of another EU act governing specific aspects of simplification of the requirements for presenting public documents, the most liberal one should prevail[29].

2.3. Comparison with the ICCS and HCCH Conventions.

Other instruments, drafted outside the EU's jurisdiction, play an essential role in the global circulation of public documents. The Apostille Convention, drafted under the auspices of the Hague Conference for Private international law, must be mentioned first (para. 2.3.1). The ICCS conventions are also essential (para. 2.3.2).

2.3.1. The Apostille Convention.

The Convention of 5 October 1961 abolishing the Requirement of Legalisation for Foreign Public Documents[30] is one of the greatest successes of the Hague Conference. Its main goal is to generalise the exemption from legalisation of public documents in relations between Contracting States. Its material scope of application is wide.[31] The system set up by the Convention is original since it is not limited to the sole abolition of legalisation. The affixing of an apostille is planned. It is issued by the competent authority of the State from which the document emanates and intended «to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears»[32].

[28] Art. 17(1)-(2) of Regulation 2016/1191.
[29] Recital 44 of Regulation 2016/1191
[30] The full-text of the Convention, in English and French, is available in the dedicated section of the website of the HCCH.
[31] Art. 1 of the Apostille Convention.
[32] Art. 3 of the Apostille Convention

The Apostille Convention provides for significant progress and contributes to simplifying the circulation of public documents, in particular civil status records.

However, it has the major drawback of continuing to impose a formality, contrary to what is provided for in Regulation 2016/1191. Moreover, the control only applies to the form of the document but does not concern the reality of the legal relationship. In that respect, the approach is similar to the European Regulation.

Currently, 121 States are Contracting Parties to the Hague Convention. All the Member States of the EU are bound. Therefore, it is crucial to clarify its relationship with the Regulation. Some provisions of the Convention itself may be applied. The general idea is that the conventional regime is only intended to operate in a subsidiary way, in the absence of a legal regime more favourable to the reception of the foreign public document. The solution is asserted twice[33]. Insofar as the Regulation sets up a more liberal regime than the Convention, it is therefore intended to prevail between the EU Member States.

The Regulation also contains relevant provisions concerning its interplay with international instruments such as the Apostille Convention. Art. 1(1)(2) provides that the Regulation shall not prevent a person from using other systems applicable in a Member State concerning legalisation or similar formality. The Regulation therefore only establishes an optional system, available to interested parties. A more restrictive formality might be used by the European citizens. This is the case for the apostille. The system of the Hague Convention has thus not disappeared in relations between Member States. However, its use is limited to situations in which the interested persons wish to use it spontaneously. The wording of the article, combined with the text of Recital 5, demonstrates that the option is not available to the authorities of the Member States but only to the citizens concerned. Against this background, it is important for individuals to be well informed by public authorities of the possible legal proceedings in use for the circulation of their public documents. The long-standing practice and the authorities' familiarity with the Convention might otherwise influence this choice against the more liberal regime of the Regulation.

2.3.2. ICCS Conventions.

The greatest success of the ICCS is the Convention (No. 16) on the issue of multilingual extracts from civil status records[34], signed in Vienna on 8 September 1976, which currently has 24 Contracting States. 16 of them are members of the EU. Multilingual forms of birth, marriage and death certificates, the models of which appear

[33] Art. 3(2) and 8 of the Apostille Convention.

[34] The full-text of the Convention, in French and English, is available in the dedicated section of the website of the ICCS.

in the appendix to the Convention, have been created. They must be issued when an interested person requests it or when their use requires a translation, therefore essentially when the document must be used abroad.[35]

An essential difference with the Regulation exists: according to Art. 8, these extracts have the same value as those issued in accordance with the rules of domestic law in force in the State from which they emanate and they are accepted without legalisation or equivalent formality in the territory of each of the States party to the Convention. They can therefore circulate autonomously. This Convention works very well in practice. However, modernisation was necessary in order to adapt it, in particular to social changes.

This is why Convention (No. 34) on the issue of multilingual and coded extracts from civil-status records and multilingual and coded civil-status certificates[36] was signed in Strasbourg on 14 March 2014. This text entered into force on 1 July 2022, following its ratification by Belgium and Switzerland, Member States of the ICCS, as well as by Germany. Art. 5 reasserts the principle that extracts issued in accordance with the Convention have the same evidential value as extracts from records issued in accordance with the rules of the domestic law of the issuing State and that they are accepted without legalisation or equivalent formality in each of the Contracting States. The implementation of a cross-border probative value for public documents in family matters is obviously a major added value for mobile citizens which does not exist under Regulation 2016/1191.

A novelty is also introduced by Convention (No. 34). In case of serious doubt as to the authenticity or the content of an extract issued, the authorities of the State where the document is being used may request the issuing authority to perform a verification of its authenticity or of its content or, in case of an error, to send to them a new extract. Such a verification procedure does not exist in Convention (No. 16). It is similar to that provided for by the Regulation and is based on the same concerns. Nevertheless, the mechanism introduced by Convention (No. 34) may concern both the form of the document and its content. It goes thus beyond legalisation, which relates only to the form of a document and not to the accuracy of its content, but also beyond the procedure provided for by the Regulation, confined to the sole formal aspects. Verification requests are sent directly to the issuing authority, without going through an intermediate authority or through the hierarchical channel. The same rule applies to responses.

These conventional solutions remain applicable, even between EU Member States. Art. 19 of the Regulation entitled «Relationship with international conventions, agreements and arrangements» is not applicable. As mentioned before, the nature of the multilingual extracts from Conventions (No. 16) and (No. 34) is different from that of the multilingual forms provided for by the Regulation. The former have independent legal

[35] Art. 1 of the ICCS Convention No. 16.

[36] The full-text of the Convention, in French and English, is available in the dedicated section of the website of the ICCS.

value, while the latter are merely a translation aid. Consequently, in accordance with Recital 49 of the Regulation, since there is no overlap between the two types of documents, the Regulation does not affect the application of the two ICCS conventions between the EU Member States bound by these instruments. A coexistence is thus setting up.

Such a juxtaposition between the EU and ICCS frameworks is reinforced by Recital 11, according to which the Regulation, and in particular the mechanism for administrative cooperation, should not apply to civil status documents issued on the basis of the ICCS Conventions. In practice, as observed within the ICCS, Convention (No. 16) is still often used between the authorities of the EU Member States[37]. One of the reasons is obviously that the multilingual extracts are more efficient than the one based on the Regulation.

2.4. Impact of Regulation 2016/1191 on public documents on EU citizens and their families.

Besides the aforementioned limits set by its rules regarding its substantive impact[38] the scope of application of Regulation 2016/1191 further shapes and confines its effect on EU citizens and their families. Most importantly, it addresses only public documents which have to be presented to the authorities of another Member State (cross-border circulation of such documents) – thereby possibly supplementing public documents that are used internally (i.e. in their Member State of origin) – and which establish one or more of the facts listed in Art. 2(1) of the Regulation (e.g. birth, death, name, marriage).

Moreover, the Regulation only applies to public documents issued by the authorities of a Member State in accordance with its national law. In this regard, its title which refers to the promotion of «the free movement of citizens», thereby seemingly addressing EU citizens[39] only, is somewhat misleading. In fact, the focus of the text is on the «European origin» of the public document in question, not the nationality of the person – as legal criterion for EU citizenship – whose status is documented therein[40]. Hence, public documents issued by the authorities of a third country and, likely also, mere copies of such documents that have been certified by another Member State do not fall within its scope pursuant to its Art. 2(3)(a)-(b). Consequently, public documents that establish a family status of an EU citizen but have been issued by a third country (e.g. Californian or

[37] H. VAN LOON, *Requiem or transformation? Perspectives for the CIEC/ICCS and its work*, in *Yearbook of Private International Law*, 2018/2019, pp. 73-93, at pp. 79-80; see also the considerations of G. SCALZINI in the report of the workshop held on 30 April 2021 in the context of the project «Identities on the move – Documents cross border – DxB» available *online*.

[37] Recital 5.

[38] See *supra*, para. 2.2.

[39] See also Recitals 17 and 19 which refer to EU citizens.

[40] Note, however, that public documents covered by Arts. 2(1)(m) and (2) of Regulation 2016/1191 deviate from this principle as they explicitly address documents that are issued for «a citizen of the Union».

Ukrainian birth certificate) are excluded from the scope of Regulation 2016/1191. In contrast, public documents which establish, for example, the birth or marriage of a non-EU national may be covered if the issuing authority is the authority of a Member State. Furthermore, the Regulation applies only to public documents that have been issued due to domestic law. Accordingly, civil status documents issued on the basis of international law, e.g. relevant ICCS Conventions analysed above, might not be covered by the Regulation. ICCS forms apply in addition to the Regulation's forms[41].

All in all, in practice, the Regulation will apply predominantly to EU citizens given that most public documents covered by the material scope of application and issued by the authorities will concern these persons. In this regard, it stays true to its objective and may actually promote the free movement of EU citizens. However, in most respects, the impact of the Regulation is not limited to EU citizens and does not affect all public documents concerning an EU citizen. Some of its «holes» may be plugged by international treaties (e.g. ICCS Conventions and Apostille Convention) which complement Regulation 2016/1191.

3. The tension between the presentation of public documents in family matters and the regime of EU citizenship.

Based on the comprehensive analysis of both the EU and international law *acquis* concerning the cross-border circulation of public documents, this part aims to show and to explain the tension between the limited effects of the European regimes of circulation of public documents and the need for individuals and their families to homogenously benefit from the recognition of their personal status within the EU territory. Indeed, EU law provides EU citizens with fundamental rights such as the freedom of movement[42] and the European Convention on Human Rights (ECHR) protects the right to respect for private and family life[43].

This tension gave rise to famous national disputes on family name, same-sex marriage and parenthood that led to preliminary references to the CJEU (para. 3.1), as well as national cases, which sometimes led to infringement proceedings before the European Court of Human Rights (ECtHR) (para. 3.2). The study of judicial reasonings in leading cases and administrative practices in the field of cross-border circulation of public documents is crucial to accurately explain and assess the current legal framework, in the light of mobile citizens and families' needs. In that respect, European legal policy should be under scrutiny (para. 3.3).

[41] See *supra*, para. 2.3.2. W. SIEBERICHS, *Die EU-Urkundenvorlageverordnung*, in *Das Standesamt*, 2016, p. 263 ff.

[42] Art. 20 TFEU.

[43] Art. 7 of the ECHR.

3.1. Analysis of that tension from the perspective of CJEU case law.

As previously mentioned[44], Regulation 2016/1191 makes clear the intention of the EU legislator to exclude an obligation for a Member State to recognise legal effects relating to the content (*negotium*) of public documents issued by the authorities of another Member State[45]. This is a significant limit for a rule aiming to «promote the free movement of citizens» – as mentioned in its title[46] – and whose legal basis is Art. 21(2) TFEU (EU citizenship) and not Art. 81 TFEU (judicial cooperation in civil matters).

Whilst Regulation 2016/1191 does not promote EU citizens' freedom of movement with respect to their civil and familial status as much as it could have, the CJEU protects this freedom and did not wait for the legislator to do so. Indeed, the Court has stated several times that EU citizenship is intended to be the fundamental status of nationals of the Member States[47]. Such a status enables those among such nationals who find themselves in the same situation to enjoy, within the material scope of the Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. The situations falling within the material scope of EU law include those that involve the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the Member States, as conferred by Art. 21 TFEU.

Thus, although the rules governing domestic family law or the way in which a person's surname and forename are entered on certificates of civil status, for instance, are matters that are subject to the exclusive competence of the Member States, the latter must nonetheless, when exercising their competence, comply with EU law and, in particular, with the freedom of every EU citizen to move and reside in the territory of the Member States[48]. For this freedom to be fully guaranteed, national authorities must recognise not only public documents issued by another Member State but also some of the legal effects relating to the content of these documents so that the civil and familial status of the EU citizen can also be recognised. That is why the Court of Justice, when interpreting the rules related to EU citizenship[49] does not refer to Regulation 2016/1191, even when a

[44] See *supra*, para. 2.1.

[45] Art. 2(4), Recitals 18 and 26 of Regulation 2016/1191.

[46] See also Recital 57.

[47] Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, EU:C:2001:458, para. 31, and among numerous cases, see for instance, judgments of 15 July 2021, case C-535/19, *A (Public health care)*, EU:C:2021:595, para. 41; 14 December 2021, case C-490/20, *V.M.A. – Pancharevo*, EU:C:2021:1008, para. 41.

[48] National measures which restrict a fundamental freedom may of course be justified on public policy grounds, but only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures (see for instance, Court of Justice, judgments of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806, para. 90; 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*, EU:C:2016:401, para. 72).

[49] 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

public document issued by another Member State is at stake. In the famous *Coman* case, the Court ruled that «the refusal by the authorities of a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States. Indeed, the effect of such a refusal is that such a Union citizen may be denied the possibility of returning to the Member State of which he is a national together with his spouse»[50].

In other words, the unhindered circulation of the marital status of the EU citizen is consubstantial with his/her fundamental freedom of movement. It can thus be seen as an extension of the mutual recognition principle, historically applied to goods and services, to the field of personal status. In this respect, the term recognition, used by the Court of Justice, does not directly refer to the recognition of the validity of the *negotium* following a private international law approach (in this case, the validity of the same-sex marriage legally celebrated in Belgium). By contrast, the mere presentation to the host authorities of the public instrument of marriage may be sufficient to confer the rights guaranteed by EU citizenship. The Court does not reason from such a (private international law) methodological perspective. It rather follows a result-oriented approach by stipulating the required outcome (namely recognition of the status) without any instructions to the Member States on how to achieve this recognition of status.

More recently, in the *Pancharevo* case, the CJEU has ruled that «in the case of a child, who is a Union 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, the Member State of which that child is a national 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»[51].

In this case, the Bulgarian administrative authorities refused to issue a Bulgarian birth certificate for a child born to a same-sex married couple (two women, one of Bulgarian nationality from which the child could derive the same nationality) in Spain. The Bulgarian authorities did not challenge the authenticity of the birth certificate issued

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.

[50] Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman*, EU:C:2018:385, para 40.

[51] Case *V.M.A. – Pancharevo*, cit. See also almost identical questions in Court of Justice, order of 24 June 2022, case C-2/21, *Rzecznik Praw Obywatelskich*, EU:C:2022:502.

by the Spanish authorities, which named both women as mothers of the child, but they refused to recognise the situation documented therein. They reasoned that a reference to two female parents in a Bulgarian birth certificate would be contrary to the public policy of Bulgaria, which does not permit marriage between two persons of the same sex. Since such a recognition is not required by Regulation 2016/1191, the Court of Justice does not even mention the Regulation.

The Court requires a twofold recognition. First, it requires the Bulgarian authorities «to recognise that parent-child relationship» for the purposes of permitting the young EU citizen «to exercise without impediment, with each of her two parents, her right to move and reside freely within the territory of the Member States as guaranteed in Article 21(1) TFEU»[52]. Second, it requires the Member States (including Bulgaria) to «recognise» a «document which mentions the parents as being persons entitled to travel with the child» and «which may consist in a birth certificate»[53].

Certainly, the Court is not directly concerned here with the cross-border recognition of the validity of such parentage from a private international law perspective. Bulgaria is not required to hold the parentage as valid under its own legal system. Interestingly, from the perspective of Regulation 2016/1191, the Court does not elaborate on how the document, i.e. a foreign birth certificate, should be accepted but apparently requires the recognition of such a document (*instrumentum*)[54] in addition to the recognition of its content (i.e. the parent-child relationship)[55].

Therefore, so far, the Regulation has not contributed to an extensive interpretation of freedom of movement, as could have been hoped. The CJEU does not seem to need it to protect this freedom. Indeed, the sole interpretation of the rights of the EU citizen gives the Court a possibility to intervene – within certain limits – in the area of domestic family law of Member States, even though it is, in principle, an exclusive competence of the Member States[56].

3.2. Analysis of that tension from the perspective of ECtHR and national courts' case law.

The aforementioned case law of the CJEU cannot strictly be separated from a parallel discussion regarding the ECHR and its interpretation by the ECtHR (para. 3.2.1). Together, the case law of the ECtHR and of the CJEU impose an obligation to their

[52] Case *V.M.A. – Pancharevo*, cit., para 49.

[53] Case *V.M.A. – Pancharevo*, cit., para 50.

[54] *Ibidem*: «(…) the authorities of the host Member State are best placed to draw up such a document, which may consist in a birth certificate. The other Member States are obliged to recognise that document».

[55] Case *V.M.A. – Pancharevo*, cit., para 49: «the Bulgarian authorities are required, as are the authorities of any other Member State, to recognise that parent-child relationship (…)».

[56] Cf. E. BERNARD, M. CRESP, M. HO-DAC (eds.), *La famille dans l'ordre juridique de l'Union européenne*, cit.

respective Member States to «recognise» a status that was validly established in another country. National courts, subsequently, had to struggle with the question of how to implement those obligations without overstretching the limits of their national competences as part of the judiciary, not the legislative (para. 3.2.2).

3.2.1. Case law of the ECtHR.

Like the CJEU, the ECtHR has never dealt with a national dispute in which Regulation 2016/1191 was at stake. The issue is not entirely anecdotal since the ECtHR has already, at least indirectly, reviewed provisions of EU law based on the fundamental rights of the ECHR[57]. The ECtHR ruled and developed its case law – somehow parallelly to the CJEU – on the «recognition» of a certain status on several occasions. The cases concerned, in particular, the recognition of foreign adoptions[58] and the parentage of intended parents in cross-border surrogacy proceedings[59]. Furthermore, similar considerations applied regarding same-sex marriages concluded abroad[60]. Finally, the ECtHR issued an advisory opinion, giving its view on the registration of a birth certificate of a child that was born by a surrogate mother but where the intended parents were established as parents in that certificate[61].

Compared with the CJEU, the ECtHR bases its decisions not on free movement but on the human rights of the persons involved. Regarding questions of status and their recognition or the mere transcription of a birth certificate, particularly the right to respect for private and family life and the right to marry are relevant[62]. Nevertheless, the Court is less eager than the CJEU to require a strict recognition of a status. According to the Court, national institutions (legislative, judiciary) have a broad margin of appreciation on how to protect and respect the human rights of the people involved. For example, in the case of surrogacy, the non-recognition of a parent-child relationship might violate the right of private and family life (Art. 8 ECHR) of the child if the child is genetically related to the intended parents. But a State may meet its ECHR obligation if – instead of a recognition

[57] See European Court of Human Rights (Grand Chamber), judgment of 30 June 2005, application no. 45036/98, *Bosphorus Hava Yollari* v *Ireland*. Cf. D. SZYMCZACK, La perspective d'un contrôle externe des actes de l'Union, in Revue des droits et libertés fondamentaux, 2014, chron. 22, available *online*.

[58] European Court of Human Rights, judgments of 28 June 2007, application no. 76240/01, *Wagner & J.M.W.L.* v *Luxembourg*; 5 December 2013, application no. 56759/08, *Negrepontis-Giannisis* v *Greece*.

[59] E.g. European Court of Human Rights, judgments of 26 June 2014, application no. 65192/11, *Mennesson* v *France*; 26 June 2014, application no. 65941/11, *Labassee* v *France*; (Grand Chamber), 24 January 2017, application no. 25358/12, *Paradiso and Campanelli* v *Italy*; 16 July 2020, application no. 11288/18, D. v *France*; 18 May 2021, application no. 71552/17, *Valdís Fjölnisdóttir and others* v *Iceland*; 24 March 2022, application no. 30254/18, *A.M.* v *Norway*.

[60] 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*.

[61] European Court of Human Rights (Grand Chamber), advisory opinion of 10 April 2019, request no. P16-2018-001.

[62] Arts. 8 and 12 ECHR.

of the status established abroad – it allows the adoption of the child by the intended parents thereby establishing a parent-child relationship[63]. If the intended parents are not genetically related, the ECtHR seems to be even more reluctant to require even such an indirect recognition/establishment of a parent-child relationship[64].

This brief presentation should give rise to two analytical remarks. First, in the light of Regulation 2016/1191 (which is not in the ECtHR's normative instruments), this case law relates to the legal relationship contained in civil status records. The object of the dispute, from the perspective of the claimants, is the cross-border acceptance of a personal situation and not the mere circulation of the form of the public document. At the same time, the ECtHR (as well as the CJEU) does not judge the validity of the private situations concerned, (indirectly) assuming that they are correct.

Secondly, the issue of «recognition» before the ECtHR is, by definition, not exactly the same as before the CJEU. As recalled above, the former operates a control based on human rights, in this case the right to respect for private and family life. It intends to preserve an individual social reality[65] and to protect the human being. The latter performs a control primarily based on intra-European free movement. The CJEU is, therefore, mainly focused on the legal status of EU citizens and the preservation of the rights attached to them. The human rights perspective is not entirely ignored[66] but it is not its primary centre of attention[67]. In this respect, Regulation 2016/1191 is a legal tool to enhance the circulation of a personal status, even if it is not very effective in practice (by limiting itself to administrative simplification), upstream from the reasoning of the CJEU, as well as of the ECtHR.

3.2.2. National courts of EU Member States.

Traditionally, EU Member States either transcribe a status registration embodied in a public document without an inherent recognition of the underlying status or recognise

[63] Case *Mennesson* v *France*, cit.; case *Labassee* v *France*, cit.; case *Paradiso and Campanelli* v *Italy*, cit.

[64] E.g. advisory opinion of 10 April 2019, cit.; case *Valdís Fjölnisdóttir and Others* v *Iceland*, cit.; case *A.M.* v *Norway*, cit.

[65] H. FULCHIRON, *Existe-t-il un droit à la libre circulation du statut personnel à travers les frontières?*, in H. FULCHIRON (ed.), *La circulation des personnes*, cit., p. 3 ff.

[66] In that respect, the case *V.M.A. – Pancharevo*, cit., is very interesting since the Court of Justice develops at the end of its judgement a control of the restriction to the free movement of citizen based on fundamental rights. Indeed, «a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter» (para 58). The result reads as follows: «[i]n those circumstances, it would be contrary to the fundamental rights which are guaranteed to the child under Articles 7 and 24 of the Charter for her to be deprived of the relationship with one of her parents when exercising her right to move and reside freely within the territory of the Member States or for her exercise of that right to be made impossible or excessively difficult in practice on the ground that her parents are of the same sex» (para. 65).

[67] H. FULCHIRON, *Existe-t-il un droit à la libre circulation*, cit.

the status. To effect recognition, the main methods are the recognition of a court decision or similar decision or – if such a procedural instrument is missing – recognition by a choice-of-law test and applying the law applicable according to the choice of law rules of the *forum*[68]. Nevertheless, both methods can fall short in cases where the CJEU or the ECtHR require the recognition of a status. In these cases, national courts and sometimes national laws have started to abolish these traditional methods to effect a swift and easy recognition or acceptance of the status. Regulation 2016/1191, unfortunately, might only help with the transcription of the document (*instrumentum*), but not with the recognition of the legal situation, the status itself (*negotium*). As already explained, the Regulation does not cover questions of the content of the instrument or how the content might be extended to other Member States. On the one hand, that leaves room for national legislation; on the other hand, national legal systems are under pressure to comply with the CJEU and ECtHR case law.

A change of national legislation is mainly apparent in questions of international name law, the area of law which the first CJEU cases concerned. Swedish, French and German law now provide possibilities for courts to just recognise or accept a name that was established in another EU Member State[69]. In other legal systems, e.g. Austria and Spain, the aforementioned case law of the CJEU is explicitly mentioned as a possible reason to accept a status in the guidelines for registrars regarding names[70].

Even though national laws, thus, are pushing courts and other competent authorities into a certain direction to recognise a status, the main motor to enhance the free movement of documents and the underlying status in the EU are national courts. Depending on the jurisdiction, EU freedom of movement or human rights arguments are used in a growing number of States to simply accept a foreign status although it could not be recognised by the available standard legal methods. For example, in Bulgaria and Lithuania, the *Coman* decision of the CJEU had the effect that nowadays foreign same-sex marriages are recognised without any further underlying control at least for the purposes of free movement/residence[71]. Furthermore, the Austrian Constitutional Court decided in two cases that Austrian authorities had to recognise the parentage of Austrian parents to

[68] See S. GÖSSL, M. MELCHER, *Recognition of a Status*, cit.

[69] Section 30 of the Swedish Act on personal names of 17 November 2016; Art. 61-3-1 (and Art. 311-24-1) of the French *Code Civil*; Art. 48 of the German *Einführungsgesetz zum Bürgerlichen Gesetzbuch*; see S. GÖSSL, M. MELCHER, *Recognition of a Status*, cit.

[70] See Austria: BMI-VA1300/382-III/4/b/2014, p. 59; Spain: *Instrucción de 24 de febrero de 2010, de la Dirección General de los Registros y del Notariado, sobre reconocimiento de los apellidos inscritos en los Registros Civiles de otros países miembros de la Unión Europea*, see also decisions such as RDGRN [3ª] 27 enero 2014, RDGRN [2ª] 27 noviembre 2013, Art. 56 of the *Ley 20/2011, de 21 de julio, del Registro Civil*.

[71] Bulgaria: Administrative court Sofia-city, 29 August 2018; Supreme Administrative Court, judgment of 24 July 2019, no. 11558/2018. Lithuania: KT, judgment of 11 January 2019, ruling no. KT3-N1/2019, case no. 16/2016.

children born by a surrogate mother in the US and in the Ukraine[72]. Both decisions are mainly based on a human rights reasoning and do not (explicitly) refer to an established Austrian method of recognition. Thus, recognition in the eyes of the Constitutional Court seems to be justifiable by a result-oriented logic and argumentation only[73]. By comparison, in France, where surrogacy is also prohibited, the French Supreme Court on civil and criminal matters authorised the full transcription of the child's foreign birth certificate in the civil status registers[74], going beyond the requirement of the ECtHR[75]. However, the French legislator then decided to put an end to this liberal case law and amended Art. 47 of the French *Code Civil* related to the legal effects of foreign public documents. Hence, there is a confusion, already pointed out earlier, between the circulation of the envelope of the personal status and its normative content[76]. The new provision lays down that evidentiary value of a foreign public record may be challenged if it does not comply with the reality «in the light of French law». As explained by an author, «[t]he formulation of the text causes confusion between the evidentiary value of the records and the recognition of the status of persons. The civil status record is used to prove that an event concerning personal status occurred abroad, but this does not mean that this personal status will produce effects in France»[77].

Finally, a huge impact of both rows of case law can be seen in court decisions of jurisdictions where courts are not strictly bound by inflexible law, e.g. in Belgium where the outcome of a decision depends often on a general balancing of interests and rights involved[78] or in Sweden, where courts also can take into account the consequences of their decision from a policy-oriented point of view[79]. Another important possibility to balance interests and rights is the refusal of recognition for public policy issues. Here, in all jurisdictions, courts enjoy at least some discretion. For example, in surrogacy cases the public policy assessment can become crucial. Following the aforementioned decisions of the ECtHR, an increasing number of Member States agree that the best interest of the child and the right to family life of the child outweighs national rules that prohibit

[72] VfGH, judgments of 14 December 2011, B 13/11; 11 October 2012, B 99/12.

[73] One has to keep in mind, however, that the Austrian Constitutional Court is not a civil law court and that methodological flaws may be explained this way.

[74] *Cour de cassation*, *Chambre civile 1*, judgments of 18 December 2019, no. 18-11815 and no 18-12337 and recently *Cour de cassation*, *Chambre civile 1*, judgment of 13 January 2021, no. 19-17929.

[75] European Court of Human Rights (Grand Chamber), advisory opinion of 10 April 2019, cit.

[76] See *supra*, para. 2.1.

[77] C. BIDAUD, *France Amends Rules on Effects on Foreign Birth Certificates*, in *EAPIL Blog*, 9 March 2022, available *online*.

[78] See for example: Court of first instance of Brussels, judgment of 13 May 2014 and Court of Appeal of Ghent, 20 April 2017, in *Tijdschrift@ipr.be*, 2017, no. 3, pp. 87-91 and pp. 71-86, respectively, available *online*.

[79] See Kammarrätten i Stockholm mål nr 862-14, KamR 862-142014-11-06, 16 January 2014.

surrogacy[80]. Nevertheless, not all courts agree, thereby benefitting from the discretion the ECtHR gives to national systems[81].

3.3. Assessment of that tension following a European legal policy approach.

In the light of European and national case law and practice, Regulation 2016/1191 clearly appears insufficient to ensure the free movement of EU citizens and their families in the EU. In this context, the main challenge is to overcome the underlined tension between the mere presentation of public documents under the Regulation and the fundamental status of EU citizenship. In the background of this tension, there is a conflict of interests between states and individuals, which is renewed in the framework of the EU.

On the one hand, states are in certain circumstances reluctant to admit the free circulation of a family status, giving it full effect in their jurisdiction. Such a free circulation could indeed conflict with their fundamental social values when the foreign status is prohibited locally. Furthermore, personal status is linked to the sovereign prerogatives of each State which confer rights and duties to its citizens within its legal system. On the other hand, in contemporary Western societies, individuals hold fundamental rights, in particular in personal and family matters and the question of the recognition of new subjective rights is regularly raised. For instance, this is the case of a «right to a child» which could justify the cross-border circulation of the filiation of a child born by surrogate motherhood abroad in a prohibitive state. At the same time, the cross-border movement of individuals is important; this is even a fundamental right for EU citizens. This inevitably leads to cases of delicate «transplants» of family models, as national conceptions are very diverse in this area, even on the limited scale of Europe.

Against this background, individuals demand the full recognition of their personal status across national borders, to avoid «limping» situations and to enjoy their rights without territorial limits. Hence, the legal regime for the circulation of public documents becomes a matter of private law, to serve private interests. States may be reluctant to go down that path since, in certain circumstances, such a recognition could have an adverse effect on public policy and on their national identity. In the *Coman* case for instance, a number of governments have submitted observations to the Court as regards public policy considerations. They «have referred in that regard to the fundamental nature of the

[80] Germany: BGH judgment of 10 December 2014, XII ZB 463/13; Austria: VfGH, judgments of 14 December 2011, B 13/11, cit., and 11 October 2012, B 99/12, cit.; Belgium: Court of first instance of Brussels, judgment of 13 May 2014, cit.; Court of Appeal of Ghent, 20 April 2017, cit.; Court of Appeal Brussels, judgment of 10 August 2018, in *Tijdschrift@ipr.be*, 2018, no. 14, pp. 15-21, available *online*; Czech Republic: Constitutional Court, judgment of 29 June 2017, I.ÚS 3226/16 and District Court in Prostejov, 0 Nc 4714/2015 – 85.

[81] Spain: Supreme Court, judgment of 6 February 2014, STS 835/2013; Sweden: HD PT mål nr Ö 2680/18; HD PT mål nr Ö 3462/18. Hungary: First Instance Court, Fővárosi törvényszék 3. K.34.141/2011/7; Metropolitan Regional Court Fővárosi Ítélőtábla 2.Kf.27.291/2012/8.

institution of marriage and the intention of a number of Member States to maintain a conception of that institution as a union between a man and a woman, which is protected in some Member States by laws having constitutional status»[82].

According to these States, even on the assumption that a refusal to recognise marriages between persons of the same sex concluded in another Member State constitutes a restriction of Art. 21 TFEU, such a restriction is justified on grounds of public policy and national identity, as referred to in Art. 4(2) TEU[83]. The Court of Justice does not share this point of view. It has repeatedly held that «the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society»[84].

In *Coman*, the Court ruled that «the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, *for the sole purpose of granting a derived right of residence* to a third-country national, does not undermine the institution of marriage in the first Member State» (emphasis added). [Indeed], «such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law»[85].

This strict interpretation of national public policy also appears in the *V.M.A. – Pancharevo* case, in which the Court held that the obligation for a Member State to issue an identity card or a passport to an EU citizen, whose birth certificate issued by the authorities of another Member State designates as her parents two persons of the same sex, and to recognise this parent-child relationship, «does not undermine the national identity or pose a threat to the public policy of that Member State»[86]. Indeed, this obligation does not require the Member State (Bulgaria, here) to amend its domestic law allowing the parenthood of persons of the same sex or even the general recognition of the parent-child relationship between a child and a same sex couple mentioned on the foreign birth certificate[87].

[82] Case *Coman*, cit., para. 42.

[83] Under Art. 4(2) TEU, the European Union is to respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional.

[84] See, for instance, case *Bogendorff von Wolffersdorff*, cit., para. 67; case *Sayn-Wittgenstein*, cit., case *Coman*, cit., para. 44.

[85] Case *Coman*, cit., para. 45.

[86] Case *V.M.A. – Pancharevo*, cit., para. 56.

[87] Case *V.M.A. – Pancharevo*, cit., para. 57.

When the rights of the EU citizens are at stake – especially their freedom of movement within the EU – the Court seemingly awards little consideration to the public policy of the Member States or their national identities. Neither these identities, nor the fact that Regulation 2016/1191 excludes the recognition of the effects of civil status records prevent the Court from assuring such a recognition when necessary for the freedom of movement of the EU citizens. However, so far, the obligation to recognise is limited to the «exercise of the rights which [EU citizens] derive from EU law»[88]. One might only wonder and speculate about the CJEU's assessment of a situation where the recognition of a family status established abroad for other purposes is at stake (e.g. refusal of inheritance rights to the child of same-sex parents)[89]. Arguably, a refusal to recognise the parent-child relationship poses an obstacle to the free movement of EU citizens in any situation. Whereas the CJEU refuses any justification on the ground of public policy and national identity as regards a direct impediment to the right to move and reside, it might be more considerate of the Member States' concerns (i.e. justification to the obstacle to the freedom of movement) if the free movement of EU citizens is not directly affected. Hence, the scope of the «rights derived from EU law» appears to be crucial. Interestingly, the CJEU explicitly mentions «the right to lead a normal family life (…) both in their host Member State and in the Member State of which they are nationals when they return to the territory of that Member State» as part of the rights which EU citizens enjoy under Art. 21(1) TFEU[90].

In any case, these questions show that the case law – both European and national – does not provide sufficient legal certainty for families moving within the EU. The inadequacy of Regulation 2016/1191 can again be underlined as well as the need to provide a predictable legal framework for the circulation of the personal status within the EU.

4. Ways of improving the circulation of personal status based on public documents within the EU.

This last part proposes possible evolutions to improve the free circulation of public documents in family matters in the EU and, by doing so, to comply with the requirements of free movement of EU citizens. There are different legal methodologies, based on the private international law *acquis*, to follow this path (para. 4.1). The experience and *acquis* of the ICCS could be particularly inspiring and relevant (para. 4.2). Both the legal technique and the political acceptance of any proposed evolutions have to be considered.

[88] *Ibidem*.

[89] For another example, see the refusal of recognition in a Member State of the name attributed in another Member State after the divorce, analysed in Question (77), in M. CRESP, M. HO-DAC (eds.), *Droit de la famille*, cit., p. 341 ff.

[90] Case *V.M.A. – Pancharevo*, cit., para. 47.

4.1. Methodological ways to improve the circulation of personal status.

In order to further improve the circulation of personal status in accordance with the EU free movement requirements and general fundamental rights requirements, one must go beyond the status quo, as it is established by Regulation 2016/1191 and the ICCS and HCCH Conventions currently in force in the EU. Three main directions could be followed: first, the adoption of a general rule of recognition of personal status in EU law (para. 4.1.1), second the creation of uniform EU public documents (para. 4.1.2), third, the establishment of a rule that protects the legitimate expectations of the parties by prohibiting a belated rejection of a foreign status (para. 4.1.3).

4.1.1. General rule of recognition.

One way to go forward could be a general rule of recognition regarding the *negotium*, i.e. the personal status. In the literature, such a general rule or principle of recognition has already been amply discussed[91]; it has even been named as a separate private international law method supplementing the system of referral (reference rules) and consideration of local and moral data[92]. However, recognition as a distinct legal method still lacks precise criteria regarding its effects and preconditions, and thus encompasses a multitude of approaches which ensure the continuity of a civil status that has been established abroad. To link a rule of recognition with the (automatic) recognition of (the authenticity of) a public document as established by Regulation 2016/1191 might prove advantageous. Already, numerous EU Regulations (e.g. Brussels Ibis[93], Brussels

[91] M. LEHMANN, *Recognition as a Substitute for Conflict of Laws?*, in S. LEIBLE (ed.), *General Principles of European Private International Law*, Alphen aan den Rijn, 2016, p. 11 ff.; P. LAGARDE (ed.), *La reconnaissance des situations en droit international privé*, Paris, 2013; P. LAGARDE, *La reconnaissance mode d'emploi*, in B. ANCEL, J. BASEDOW, G. BERMANN, A. BORRÁS (eds.), *Vers de nouveaux équilibres entre ordres juridiques, Mélanges en l'honneur de Hélène Gaudemet-Tallon*, Paris, 2008, pp. 481-501; H.-P. MANSEL, *Anerkennung als Grundprinzip des Europäischen Rechtsraums*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2006, pp. 651-731; P. PICONE, Diritto internazionale privato comunitario e pluralità dei metodi di coordinamento tra ordinamenti, in P. PICONE (ed.), *Diritto internazionale privato e diritto comunitario*, Padova 2004, p. 485 ff.; E. JAYME, C. KOHLER, *Europäisches Kollisionsrecht 2001 – Anerkennungsprinzip statt IPR?*, in *IPRax*, 2001, pp. 501-514. See also D. COESTER-WALTJEN, *Recognition of legal situations*, cit. Cf. under the perspective of the EU principle of mutual recognition, M. HO-DAC, *Le principe de reconnaissance mutuelle et la loi du pays d'origine*, in CL. MARZO, M. FARTUNOVA (eds.), *Les dimensions de la reconnaissance mutuelle en droit de l'Union européenne*, Bruxelles, 2018, pp. 59-83.

[92] M.-P. WELLER, *Referral, Recognition and Consideration: New Methodological Approaches in Private International Law (Vom Staat zum Menschen: Die Methodentrias des Internationalen Privatrechts unserer Zeit)*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2017, pp. 747-780, at p. 774 ff.

[93] 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 judgments in civil and commercial matters (recast).

IIbis[94], EU Succession Regulation[95], twin EU property Regulations[96]), provide for the intra-EU recognition (and enforcement) of judicial decisions and certain public instruments, such as notarial authentic instruments[97]. Besides the authenticity of the *instrumentum* (i.e. the decision or notarial authentic act) also its content and effects must be recognised without any special procedure in any other Member State. In several national systems of Member States, this legal method – as it is regulated by respective domestic rules on the recognition of foreign judgments[98] – has already been extended to non-judicial decisions and other public documents (i.e. birth certificates) to ensure the full recognition of the personal status regulated therein[99]. This means that in these Member States the regime of cross-border circulation of certain public documents already allows for the recognition of the legal relationship they contain. Most recently, on the EU level, also the Brussels IIter Regulation[100] provides for a similar extension of this legal method regarding authentic instruments and non-judicial agreements on legal separation and divorce[101].

Against this background, the inclusion of a general rule of recognition may grant the recognition of the *negotium* in the scope of application of Regulation 2016/1191, i.e. in cases where the aforementioned procedural method of recognition cannot be applied (yet), for example as regards a personal status documented in a birth certificate. Thus, the well-known recognition of judgments would be complemented by a recognition of public documents that equally goes beyond the mere recognition of the *instrumentum*. Since so far there is no rule regarding the recognition or acceptance of a civil status by the conflict

[94] Council Regulation (EC) No 2201/2003, of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[95] 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.

[96] Respectively, Council Regulation (EU) 2016/1103, of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and 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.

[97] For a comprehensive comparison of EU legal regimes concerning the cross-border circulation of public acts, see P. WAUTELET, *L'acceptation et l'exécution des actes publics: vers un modèle européen?*, in H. PEROZ (ed.), *La circulation européenne des actes publics*, Bruxelles, 2020, pp. 95-116.

[98] As the EU instruments' terms, e.g. judgment or authentic instrument, have to be interpreted autonomously they cannot be extended in such a way.

[99] For example, Austria (OGH, judgment of 27 November 2014, 2 Ob 238/13h; for further references see F. HEINDLER, M. MELCHER, *Recognition of a Status Acquired Abroad: Austria*, in *Cuadernos de Derecho Transnacional*, 2022, no. 1, pp. 1148-1168, at pp. 1149, 1152 and 1161-1162, available *online*) and Hungary (see Art. 3(a) Hungarian PIL code; T. SZABADOS, *Recognition of Personal Status Validly Acquired or Modified Abroad: Hungary*, in *Cuadernos de Derecho Transnacional*, 2022, no. 1, pp. 1210-1225, at pp. 1221-1222, available *online*.

[100] Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

[101] See the case of «private divorce» and Art. 64 ff. of Regulation 2019/1111.

of laws methodology[102], a principle of recognition would not supplant such EU rules but rather complement them in an efficient way. Also, public documents issued by EU Member States should generally benefit from an enhanced mutual trust in the issuing authority which should facilitate recognition[103].

Despite the numerous advantages such a general rule of recognition may have regarding the free movement of EU citizens, one must also keep in mind that the European Commission already suggested the recognition of the content of public documents alongside the mere recognition of the (authenticity of the) document when preparing Regulation 2016/1191[104]. In the Green Paper[105], among the policy options the European Union had at its disposal to tackle the practical problems faced by citizens in cross-border situations, the Commission had proposed the automatic recognition, in a Member State, of civil status situations established in other Member States. According to the Commission, «this would mean that each Member State would accept and recognise, on the basis of mutual trust, the effects of a legal situation created in another Member State».

One of the advantages of that solution for EU citizens would have been the full respect of the EU citizen's freedom of movement throughout the European area. However, this Commission advance was heavily criticised[106] and rejected by the Member States. Instead, Art. 2(4) Regulation 2016/1191 now explicitly provides that the Member States are not required to recognise the content of any foreign public document[107].

Nevertheless, much time has passed since and new CJEU (and ECtHR) rulings[108] have strengthened the EU primary law requirement for status recognition and extended the reasoning from name law to family relations (same-sex marriage, same-sex parentage)[109]. Recent studies show the struggle of the Member States to methodologically cope with these result-oriented requirements[110]. Furthermore, the European Commission is willing to go further by pushing for mutual recognition of family relations in the EU. According to the LGBTIQ Equality Strategy 2020-2025, «if one is parent in one country,

[102] See especially Court of Justice, judgements of 12 May 2016, case C-281/15, *Sahyouni I*, EU:C:2016:343; 20 December 2017, case C-372/16, *Sahyouni II*, EU:C:2017:988.

[103] See for instance Court of Justice, judgement of 22 December 2010, case C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828, regarding the free movement of decisions relating to the right of access and the return of the child (Arts. 41-42 of the Brussels IIbis Regulation) in the event of wrongful removal or retention, without legalisation and any possible control on the part of the authorities of the required Member State. The situation created in another Member State must be accepted within the entire European area, based on the uniform technique of certification by public authorities.

[104] The actual proposal did not contain such a suggestion anymore, see COM(2013) 228, cit.

[105] 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 15 December 2010.

[106] See, for example, H.-P. MANSEL, *Kritisches zur "Urkundeninhaltsanerkennung*, in *IPRax*, 2011, pp. 341-342; H.-P. MANSEL, K. THORN, R. WAGNER, *Europäisches Kollisionsrecht 2010: Verstärkte Zusammenarbeit als Motor der Vereinheitlichung?*, in *IPRax*, 2011, pp. 1-30, at p. 2 ff.

[107] See also Recital 18.

[108] Case *Coman*, cit.; case *V.M.A. – Pancharevo*, cit.

[109] See *supra*, para. 3.1.

[110] See S. GÖSSL, M. MELCHER, *Recognition of a Status*, cit., p. 1042.

one is parent in every country», which is why the Commission will propose «a horizontal legislative initiative to support the mutual recognition of parenthood between Member States, for instance, the recognition in one Member State of the parenthood validly attributed in another Member State»[111].

To advance this objective, an Experts' Group on the Recognition of Parenthood between EU Member States[112] has been set up by the European Commission in answer to recent developments. Hence, one may still keep some hope for a more enthusiastic reception of an EU advance. In this respect, much could depend on the determination of appropriate and well-balanced limitations which satisfactorily protect national identity concerns while not impeding recognition altogether. Questions of family status touch upon particularly sensitive issues which in principle fall within the exclusive competence of the Member States and which are characterised by an important diversity of conceptions and values[113]. For instance, only 13 of the 27 EU Member States have, at the present time, extended marriage to same-sex couples. Among those 13 Member States, only 7 provide for the «automatic» parenthood of the wife of the biological mother of a child. In this context, the legal recognition as well as the social acceptance of such family status are problematic and are likely to be fragile in practice at national level. Hence, similar to the recognition of judicial decisions, it should at least be possible to reject the recognition of a status that has been established and documented abroad in case of an *ordre public* (public policy) violation or other serious misgivings (e.g. *fraus legis*). In any case, the future of such an extended recognition of documents is hard to predict[114].

4.1.2. Uniform EU public documents.

Another way to accelerate the intra-EU circulation of certain public documents and to make it more efficient by harmonisation could be the creation of uniform EU public documents for civil status, e.g. birth, marriage, death. In this regard the European certificate of succession[115], which demonstrates, among others, the status of an heir, might serve as an example. The main advantage of such an instrument and also one of the major challenges it has to face is the harmonisation of requirements. In accordance with the

[111] COM(2020) 698 final of 2 November 2020.

[112] See Register of Commission Expert Groups, Recognition of parenthood between Member States (E03765).

[113] Cf. E. PATAUT, *La famille saisie par l'Union*, in E. BERNARD, M. CRESP, M. HO-DAC (eds.), *La famille dans l'ordre juridique de l'Union européenne*, cit., p. 91 ff.

[114] Cf. for future-oriented (*de lege lata*) proposals, see S. FULLI-LEMAIRE, *Le droit international privé de la famille à l'épreuve de l'impératif de reconnaissance des situations*, Paris, 2022; E. BONIFAY, *Le principe de reconnaissance mutuelle et le droit international privé. Contribution à l'édification d'un espace de liberté, sécurité et justice*, Institut Universitaire Varenne, 2017; A. PANET, *Le statut personnel à l'épreuve de la citoyenneté européenne : contribution à l'étude de la méthode de reconnaissance mutuelle*, PhD 2014 Université Lyon 3.

[115] See Art. 62 ff. of Regulation 650/2012.

general requirements for public documents shared by civil law countries, a uniform EU public document should be issued only by public authorities, which act within their material and geographic competence and comply with pre-set formal criteria[116]. To determine the authorities of which Member State should be authorised to issue such a certificate, a rule similar to the rule(s) on jurisdiction could be established. Such a competence should be based on a close connection of the state to the person(s) whose status is concerned. If established in accordance with the requirements, such a uniform EU public document shall provide proof of its content, which may be rebutted or rejected in case of (full) proof to the contrary. The aforementioned Expert Group on the Recognition of Parenthood, therefore, was also discussing the establishment of a European certificate of parenthood/filiation[117].

Besides the challenge of harmonisation, an instrument that is issued for use in another Member State only might be criticised from an economic point of view. A duplication of public acts, i.e. purely cross-border EU uniform public acts complementing purely domestic public acts, might not be the best solution in terms of efficiency. Hence, instead of following the role-model of the European succession certificate, one might think to replace the domestic instruments altogether. Moreover, to be of any additional value, a uniform EU public document must be drafted with a view to national registries (e.g. birth registry, marriage registry)[118]. Finally, from a political acceptance point of view, one must keep in mind that the European Parliament as well as certain legal practitioners (i.e. notaries) have already repeatedly – but unsuccessfully – suggested that the European Commission propose a European authentic act[119]. In this regard, the principle of subsidiarity and also of the question of EU competence shall be taken into consideration. In the background, the political will of the Member States is necessary, being probably, *in fine*, the most blocking element[120].

4.1.3. Protection of legitimate expectations.

[116] Cf. C. HERTEL, Legalization of public documents, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (eds.), *Encyclopedia of Private International Law*, cit., pp. 1095-1104; see also Court of Justice, judgement of 17 June 1999, case C-260/97, *Unibank*, EU:C:1999:312.

[117] See, for example, EG Agenda meeting of the 2 December 2021, available *online*. The author S. GÖSSL is member of that Expert Group. The views here stem, nevertheless, not from inside information but data publicly available online. Views presented here are all personal.

[118] For a similar issue regarding the European certificate of succession see E. GOOSSENS, *A Model for the use of the European Certificate of Succession for Property Registration*, in *European Review of Private Law*, 2017, pp. 523-551.

[119] European Parliament resolution of 18 December 2008 with recommendations to the Commission on the European Authentic Act (2008/2124(INI)). Cf. C. NOURISSAT, P. CALLE, P. PASQUALIS, P. WAUTELET, *Pour la reconnaissance des actes authentiques au sein de l'espace de liberté, de sécurité et de justice*, in *Petites Affiches*, 4 April 2012, no. 68, p. 6 ff.

[120] See *infra* for a comparison with the proposal for a uniform family record book (in the framework of the ICCS).

Finally, one might think about perforating the usual separation of *negotium* and *instrumentum* by establishing impediments to challenge a status validly registered/transcribed in a national register. Some Member States already provide inspiration for such a perforation: Under German law, the protection of the legal expectations of a person whose name has been validly registered and who has lived with that name in good faith for several years can overcome the rejection of a recognition if the name was established in the wrong way from the start[121]. Similarly, the Dutch conflict of laws system knows the doctrine of *fait accompli*[122]. Again, the protection of the legal expectations of the parties require recognition even though the usual method of recognition would not. Therefore, one might think about establishing a rule that does not allow a challenging or rejection of a status that had been validly registered and where the persons concerned lived with that status in good faith and were accepted as such for a certain period of time, e.g. five years. Such a rule would provide legal certainty regarding the durability of a registration and, thus, enhance the portability of a status and the trust put into public documents, public authorities and their registrations[123]. At the same time, it would encourage the competent authorities to assess the recognisability of a foreign status already before its registration.

4.2. Source of inspiration under the auspices of the ICCS.

It is proposed to consider that the current situation based on both statutory laws (such as Regulation 2016/1191, HCCH and ICCS Conventions in the field of public documents and national laws of the Member States) and European case law (i.e. CJEU, ECtHR and national courts) is only a starting point. Based on the interplay between Regulation 2016/1191 and the ICCS acquis in particular, three main operational paths of evolution could be explored to achieve legal and social improvements of circulation of personal status in the EU.

The first evolution echoes the above-mentioned proposal for EU uniform public documents[124], based on the methodology of (international) substantive rules (*règles matérielles internationales*). It could consist, in addition to the circulation of public documents within the EU, of creating an act making the circulation of citizens between Member States easier. The international family record book created by the ICCS

[121] S. GÖSSL, Recognition of a status acquired abroad: Germany, in Cuadernos de Derecho Transnacional, 2022, no. 1, pp. 1130-1147, at p. 1142, available *online*.

[122] Article 10:9 DCC; see T. BENS, M. PEEREBOOM-VAN DRUNICK, *Recognition of a status acquired abroad: Netherlands*, in *Cuadernos de Derecho Transnacional*, 2022, no. 1, pp. 1062-1082, p. 1075, available *online*.

[123] See to this proposal already S. GÖSSL, M. MELCHER, *Recognition of a Status*, cit., p. 1042 ff.; S. GÖSSL, M. MELCHER, *The Obstacles to Free Movement of Family Status in Europe*, in E. BERNARD, M. CRESP, M. HO-DAC (eds.), *La famille dans l'ordre juridique de l'Union européenne*, cit., pp. 343-359.

[124] See *supra*, para. 4.1.2.

Convention (No 15)[125] of 1974, could be a source of inspiration. A family record book model, appearing in an annex to the text of this Convention, has been developed. It is composed of a multilingual form of marriage certificate and multilingual forms of birth certificates and allows persons concerned to register, in Contracting States, civil status events concerning their family. Such an instrument will always be up-to-date, whatever the country in which the persons are. An agreement was reached regarding the creation of this instrument. However, the Convention was not very successful. In fact, only four states have signed and ratified the Convention: Greece, Italy, Luxembourg and Turkey. The text entered into force but without having the influence initially imagined. The essential reason is the exclusivity of the model introduced. National family record books can no longer be issued in the contracting States. Such approach presents an intrusive character. In fact, the registrars' attachment to the national documents was noted by an ICCS inquiry in the different Member States. At the EU level, however, the solution could then be to consider such a record book as a model but to leave an option to the citizens. They would, thus, have the choice between the national model and this international record book, following the principle of party autonomy.

The second evolution is of an institutional nature. The ICCS Rules have recently been modernised[126]. According to its Art. 2, membership of the ICCS is not only open to States but also to any international organisation and any regional economic integration organisation. This means that the EU could become member of the ICCS, exactly as the EU did within the HCCH in 2007[127]. A better coordination of the instruments and policies implemented would certainly result from such membership. A reflection is also underway on the possibility of modifying the ICCS conventions in order to allow such organisations to adhere.

The third proposed evolution would be to achieve a more satisfactory interplay between the instruments of the ICCS and EU law regarding the cross-border circulation of public documents. This is not only desirable but also feasible. The agreement concluded by exchange of letters of 14 and 26 July 1983 between what was still the Commission of the European Communities (CEC) and the ICCS could be used to this end. According to its point 3, «[t]he CEC may recommend to the Member States of the European Communities to sign and ratify the Conventions prepared by the ICCS on matters submitted to it or to accede to these Conventions. The ICCS may invite the CEC to recommend to the Member States of the European Communities to sign and ratify any other Conventions adopted by it or to accede to them».

---

[125] Convention (No.15) introducing an international family record book, signed in Paris on 12 September 1974.

[126] M. HO-DAC, N. NORD, ICCS adopts new internal regulation, in EAPIL Blog, 19 January 2021, available *online*.

[127] Council Decision 2006/719/EC, of 5 October 2006, on the accession of the Community to the Hague Conference on Private International Law.

Based on the lessons learned from the effective operation of Convention (No. 16) over several decades, Convention (No. 34), now into force, could then be used to allow genuine cooperation between EU Member States, with the same tool that could also be used in the relations with third States. The question of the probative force of many public documents would thus be resolved on solid foundations. This solution would make it possible to simplify reasoning, to avoid the complex coexistence while having a modern and efficient instrument. This would be a major development for European and international civil status and a clear benefit for citizens. They could, thus, easily prove their personal status in the EU Member States but also in third States which would join this system. A specific EU Regulation on the subject does not therefore seem essential.

Other formulas are conceivable. The Regulation, perfected in the light of the experience of the ICCS conventions, could apply between Member States and Convention (No. 16) or Convention (No. 34) could be the preferred instrument in relations between Member States and third States. The ICCS conventions could serve as a basis for the Regulation which could make some improvements on specific points, as has been done with various Hague conventions.

Of course, in all cases, only the probative force of the documents is in question. Imposing recognition of the situations reflected in the act seems impossible. The experience of the ICCS is again significant. Conventions that favoured the so-called «recognition method» were not successful and did not enter into force[128]. The States are not yet ready to go that far and wish to keep control on questions relating to personal status. Even confined to this single aspect, it would be a considerable progress, simplifying the citizens' daily life. Therefore, also on the EU level one can doubt that the EU Member States will agree to a new instrument that will contain simple rules on the recognition of legal situations embodied in a civil status registry without a deeper control of the underlying law, at least in areas of policy sensitive questions such as same-sex parenthood or surrogacy.

It must also be underlined that the coding system on which Convention (No 34) is based is compatible with new technologies and could be helpful in the EU context[129]. This system, co-financed by the EU, does not work yet, for lack of sufficient ratifications of the relevant instruments, since all States are not at the same level of development in this area. It is therefore difficult for them to embark on such a path. However, the ICCS platform remains operational and available. A reflexion on the interplay between the use

[128] Convention (No. 31) on the recognition of surnames, signed in Antalya on 16 September 2005; Convention (No. 32) on the recognition of registered partnerships, signed in Munich on 5 September 2007.

[129] It allows the use of the extract by computer means and their electronic transmission. Of course, the idea was to have recourse to the ICCS platform for the exchange of civil status data by electronic means when it would be put into operation. See especially Convention (No. 30) on international communication by electronic means, signed at Athens on 17 September 2001; Convention (No. 33) on the use of the International Commission on Civil Status Platform for the international and communication of civil-status data by electronic means, signed at Rome on 19 September 2012.

of that platform and the implementation of Regulation 2016/1191 is conceivable. The fact of being able to use only one platform, in relations between Member States but also with third States bound by Convention (No. 34), would be a considerable asset to facilitate the circulation of public documents and that of EU citizens, consequently.

A final essential remark must be made. Citizen mobility is not confined to the EU. It is understandable that the authorities of the EU are concerned first and foremost with circulation between Member States. However, having recourse to instruments which are likely to be applied also in relations with third States has many advantages, in particular that of not having to manage the plurality of legal regimes. Such a consideration is very important especially for countries in which registrars have no legal training, such as France. To be convinced of this, the examples of Switzerland, Turkey, Moldova and countries of former Yugoslavia may be given. These States are parties to several conventions of the ICCS, in particular Convention (No 16). One of the obvious justifications is the desire to allow a simplified circulation of civil status documents in relations with EU Member States, their neighbours. The adoption of the ICCS texts by the EU, in one way or another, would therefore be an excellent solution in this respect. If these third States decide to be bound by Convention (No. 34), which is the case for Switzerland, this text could be a precursor of such a global approach.

Whatever solution is adopted, it seems necessary that the various actors engaging in this area cooperate more effectively. Regulation 2016/1191 is only one piece of a much larger puzzle!

ABSTRACT: The contribution aims to analyse the effects of cross-border circulation of public documents under EU law (i.e. mere circulation of the *instrumentum*, exclusive to any recognition of the *negotium*), following a twofold approach based on legal methodology (i.e. EU free movement law and private international law techniques) and legal policy (i.e. EU integration and functionalism).

The starting point of the analysis is the current contradiction/tension within the EU legal order between, on the one hand, the need to ensure the permanence of the personal status of individuals and families (such as family name, parentage or marital status) on the basis of EU citizenship (Arts. 18 to 21 TFEU) and, on the other hand, the limited scope and effects of the legal instruments in force in EU law, i.e. Regulation 2016/1191 on public documents, complemented by international conventions in force within all or some Member States, such as the HCCH Apostille Convention of 1961 and ICCS Convention (No 16).

In this context, the article proposes to explain this contradiction, to assess it and finally to submit legal ways to overcome it, while considering the restraints of political feasibility. It provides for a cross-cutting analysis of the (above-mentioned) legal frameworks, complemented by relevant case law of the CJEU, of the ECtHR and of national courts of the Member States, under this specific perspective.

KEYWORDS: Regulation 2016/1191; circulation of public documents; EU citizenship; freedom of movement; cross-border recognition of personal status; European and international legal framework; ICCS; private international law; family law.