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Foreword

Maria Caterina Baruffi* and Laura Calafà**

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

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

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

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

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

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

Civil status and circulation of public documents in EU and worldwide: the need for a European common framework for third countries

Francesca Maoli*

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1. Introduction.

The free movement of persons within the EU represents one of the cornerstones of EU citizenship: this is a consolidated acquisition, as consecrated in Art. 3 TEU, Art. 21 TFEU and Art. 45 of the EU Charter of Fundamental Rights[1]. At the same time, within the area of freedom, security and justice, the EU has tackled the issues surrounding migration, providing common rules for the reception of third country nationals[2]. In both scenarios – *i.e.* intra-EU movements and immigration from outside the EU – one of the objectives is to ensure the continuity of personal and family status. It is well known that the enjoyment of rights deriving from EU law in this field can only be effective is accompanied by the possibility to reunite with family members and live together in the same country[3]. This logical connection is evident when one considers the perspective of

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[1] On the topic, see *ex multis* I. QUEIROLO, *EU law and family relationships. Principles, rules and cases*, Roma, 2015; B. NASCIMBENE, F. ROSSI DAL POZZO, *Diritti di cittadinanza e libertà di circolazione nell'Unione europea*, Padova, 2012; P. DOLLAT, *Libre circulation des personnes et citoyenneté européenne: enjeux et perspectives*, Brussels, 1998; D. MARTIN, *La libre circulation des personnes dans l'Union européenne*, Brussels, 1995; E. MEEHAN, *Citizenship and the European community*, London, 1993; R. ADAM, *Prime riflessioni sulla cittadinanza dell'Unione*, in *Rivista di Diritto Internazionale*, 1992, pp. 622-656.

[2] C. FRATEA, *Accesso alle procedure di protezione internazionale e tutela delle esigenze umanitarie: la discrezionalitá in capo agli Stati membri non viene intaccata dal nuovo Patto sulla migrazione e l'asilo*, in *Freedom, Security and Justice: European Legal Studies*, 2021, pp. 124-149, available online; D. MUSUMECI, *Sul partenariato UE-Stati terzi in ambito migratorio: le proposte del Nuovo Patto sulla migrazione e l'asilo in tema di rafforzamento delle capacità di "border management"*, *ivi*, 2021, pp. 194-214, available online; R. BAUBÖCK, *Refugee Protection and Burden-Sharing in the European Union*, in *Journal of Common Market Studies*, 2018, pp. 141-156, available online; E. GUILD, P. MINDERHOUD, *The First Decade of EU Migration and Asylum Law*, Leiden-Boston, 2012.

[3] R. CAFARI PANICO, *Identità nazionale e identità personale*, in A. DI STASI (a cura di), *Cittadinanza, cittadinanze e nuovi status: profili internazionalistici ed europei e sviluppi nazionali*, Napoli, 2018, pp.

the right of a European citizen to move and reside in the territory of another Member State: a person would be refrained to exercise this right, if this would mean to be separated from his or her family[4]. However, even in the different hypothesis of the entry and residence of third-country nationals in the European Union, the European lawmaker has deemed it appropriate to provide for special rules on family reunification[5].

The EU does not hold competences in the field of substantial family law[6]. On the other hand, the latter assumes relevance when the existence of a family relationship is a prerequisite for the application of a rule of EU secondary law. Moreover, in order for individuals to demonstrate their status, public documents usually need to be presented to the local authorities. Each national legal system has its own rules regarding public documents and their effects, as well as the entry and effectiveness of public documents from abroad. Therefore, it can be difficult for the authorities of the State addressed to rely on the truthfulness of a foreign document. The EU lawmaker has introduced rules to facilitate the presentation of public documents abroad[7], but – as it will be seen – the fragmentation of the legal framework is still high, especially when considering the differences between the intra-EU movements of EU citizens and the reception of third-country nationals.

The scope of the present contribution is to dwell on the existing legal framework, in order to highlight its drawbacks, as well as the opportunity for the EU to promote the creation of a «global framework» for the circulation of public documents.

215-239; C. BERNERI, *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens*, Oxford-Portland, Oregon 2017; L. TOMASI, *La tutela degli status familiari nel diritto dell'Unione europea tra mercato interno e spazio di libertà, sicurezza e giustizia*, Padova, 2007.

[4] The Court of Justice of the EU has underlined this functional link in its case law: see *infra*, para. 2. V. DI COMITE, *Ricongiungimento familiare e diritto di soggiorno dei familiari di cittadini dell'Unione alla luce del superiore interesse del minore*, in *Studi sull'integrazione europea*, 2018, pp. 165-178; A. ADINOLFI, *La libertà di circolazione delle persone e la politica dell'immigrazione*, in G. STROZZI (a cura di), *Diritto dell'Unione europea, Parte speciale,* Torino, 2015, pp. 63-126, at pp. 81-89.

[5] Reference is made to the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. On the perspective of children, see the study, requested by the Council of Europe, by F. BOREIL, E. DESMET, G. DIMITROPOULOU, M. KLAASSEN, *Family Reunification for Refugee and Migrant Children: Standards and Promising Practices*, Council of Europe, 2020, pp. 30-32. On the topic also C. FRATEA, *La tutela del diritto all'unità familiare e i meccanismi di protezione dei minori migranti nel sistema europeo comune di asilo alla luce della proposta di rifusione del Regolamento Dublino III: alcune osservazioni sul possibile ruolo degli Stati membri*, in *Rivista della cooperazione giuridica internazionale*, 2018, pp. 129-157.

[6] L. CARPANETO, F. PESCE, I. QUEIROLO, *La famiglia nell'azione della comunità e dell'Unione europea: la progressiva erosione della sovranità statale*, in L. CARPANETO, F. PESCE, ILARIA QUEIROLO (a cura di), *La "famiglia in movimento" nello spazio europeo di libertà e giustizia*, Torino, 2019, pp. 3-36; W. PINTENS, *La famiglia e il diritto in Europa: sviluppi e prospettive*, in S. PATTI, M.G. CUBEDDU, *Introduzione al diritto della famiglia in Europa*, Milano, 2008, pp. 89-109; C. HONORATI, *Verso una competenza della Comunità europea in materia di diritto di famiglia?*, in S. BARIATTI (a cura di), *La famiglia nel diritto internazionale privato comunitario*, Milano, 2007, pp. 3-45.

[7] 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.

2. The EU area of freedom, security and justice: the relevance of personal and family status for migration and free movement of persons.

Since Member States enjoy exclusive competence on substantial family law, it may happen that a family relationship established abroad may not be recognized by the requested country for public policy reasons, because of the differences existing in national laws[8]. For instance, not every Member State allows same-sex marriages or the recognition of parentage in case of children born through surrogacy[9]. This influences the attitude and legislative policies concerning the recognition of legal situations established in another country.

On the other hand, as already mentioned, the boundaries between the Member States' and EU's competences are often stretched when matters covered by substantial family law have effects on the application of EU law. The existence of a family relationship is a prerequisite for the application of EU rules on family reunification. Even after a person has moved with his or her family in a Member State, there are many issues surrounding the administrative and/or professional needs that they may encounter while living in a foreign country.

As concerns the movement of EU citizens across the member States, the Court of Justice has underlined how the refuse to recognize the family status of a EU citizen may cause important drawbacks that may undermine the enjoyment of the right of free movement. As a consequence, Member States cannot refuse to recognize a family status, if this circumstance constitutes an obstacle to the application of EU law. Most recently,

[8] See recently S. GÖSSL, M. MELCHER, *Recognition of a status acquired abroad in the EU – a challenge for national laws from evolving traditional methods to new forms of acceptance and bypassing alternatives*, in *Cuadernos de Derecho Transnacional*, 2022, pp. 1012-1043, available online. With specific reference to the Italian legal system, see M. GIACOMINI, M. VIVIRITO PELLEGRINO, *Recognition of a status acquired abroad: Italy*, in *Cuadernos de Derecho Transnacional*, 2022, n. 1, pp. 1044-1061, available online; A. DI BLASE, *Genitorialità della coppia omosessuale e riconoscimento della status filiationis nell'ordinamento italiano*, in *Rivista di diritto internazionale privato e processuale*, 2021, pp. 821-843; On the formal and substantial problems surrounding the circulation of civil status records in the EU, see E. DE GOTZEN, *Child's civil status, birth certificates' effects and the free movement of public documents: grasp all, lose all?*, in *GenIUS*, 2016, pp. 56-72, available online.

[9] See S. TONOLO, *Lo* status filiationis *da maternità surrogata tra ordine pubblico e adattamento delle norme in tema di adozione*, in *GenIUS*, 2019, pp. 1-9, available online; M.C. BARUFFI, *Co-genitorialità same-sex e minori nati con maternità surrogata*, in *Famiglia e diritto*, 2017, pp. 674-686; A. VETTOREL, *International Surrogacy Arrangements: Recent Developments and Ongoing Problems*, in *Rivista di diritto internazionale privato e processuale*, 2015, pp. 523-540.

the Court has expressed those principles in the *Coman*[10] and *Pancharevo*[11] cases. However, in both decisions, the Court did not impose an obligation on Member States to fully recognise the status by applying the the traditional instruments and institutes of private international law[12]. Instead, a «functional recognition» has been introduced, which is strictly interconnected with the enjoyment of rights deriving from EU law.

In *Coman*, the Romanian authorities refused to recognize the marriage between a Romanian national and his husband (an US national), with the subsequent denial of a residence permit as a family member of a European citizen. However, according to the Court of Justice, Member State cannot invoke their national law to deny the right to family reunification: on the contrary, same-sex marriages contracted in one Member State shall be recognized in all other Member States in order to ensure the free movement and residence of the Union citizens. It is important to catch the nuance between full recognition and functional recognition: according to the latter, the family status is accepted only for the purpose of application of EU law. This means that Member States are not obliged to offer full recognition of family relationships outside the scope of EU law (*e.g.* for taxes, acquisition of citizenship, survivor's pension, etc.).

[10] Court of Justice, judgment of 5 June 2018, case C-673/16, *Relu Adrian Coman e a.* v. *Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, EU:C:2018:385. See A.M. SCARAVILLI, *Il diritto alla vita familiare come strumento di estensione per via giurisprudenziale dei diritti del cittadino alla persona migrante*, in *Rivista della Cooperazione Giuridica Internazionale*, 2020, pp. 133-152; J.-Y. CARLIER, *Vers un ordre public européen des droits fondamentaux – L'exemple de la reconnaissance des mariages de personnes de même sexe dans l'arrêt Coman*, in *Revue trimestrielle des droits de l'homme*, 2019, pp. 203-227; M. GRASSI, *Sul riconoscimento dei matrimoni contratti all'estero tra persone dello stesso sesso: il caso "Coman"*, in *Rivista di diritto internazionale privato e processuale*, 2019, pp. 739-776; G. KESSLER, *La consécration par la CJUE du droit de séjour du conjoint de même sexe du citoyen européen: un pas supplémentaire vers la libre circulation des situations familiales au sein de l'Union européenne?*, in *Journal du droit international*, 2019, pp. 27-47; A. SPALDING, *Where next after Coman?*, in *European Journal of Migration and Law*, 2019, pp. 117-139; A. TRYFONIDOU, *The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The Coman ruling*, in *European Law Review*, 2019, pp. 663-679; P. FARAGUNA, *L'amore vince (e l'identità nazionale perde?): il caso Coman alla Corte di giustizia*, in *Quaderni costituzionali*, 2018, pp. 711-715; A. LANG, *Il mancato riconoscimento del matrimonio tra persone dello stesso sesso come ostacolo alla libera circolazione delle persone nell'Unione: il caso Coman*, in *GenIUS*, 2018, pp. 138-150, available *online*.

[11] Court of Justice, judgment of 14 December 2021, case C-490/20 PPU, *V.M.A.* v. *Stolichna obshtina, rayon «Pancharevo»*, EU:C:2021:1008, commented by L. BRACKEN, *Recognition of LGBTQI+ parent families across European borders: case note: case C-490/20 V.M.A. v. Stolichna obshtina*, in *Maastricht Journal of European and Comparative Law*, 2022, pp. 399-406; O. FERACI, *Il riconoscimento «funzionalmente orientato» dello status di un minore nato da due madri nello spazio giudiziario europeo: una lettura internazionalprivatistica della sentenza Pancharevo*', in *Rivista di diritto internazionale*, 2022, pp. 564-579; F. MAOLI, *La sentenza Pancharevo della Corte di giustizia UE sul riconoscimento del rapporto di filiazione e diritti connessi alla cittadinanza europea*, in *Ordine internazionale e diritti umani*, 2022, pp. 555-565, available *online*.

[12] On the topic F. SALERNO, *The Identity and Continuity of Personal Status in Contemporary Private International Law*, in *Collected Courses of The Hague Academy of International Law - Recueil des cours*, 2019, vol. 395, pp. 9-198; P. PICONE, *Diritto internazionale privato comunitario e pluralità di metodi di coordinamento tra ordinamenti*, in P. PICONE (a cura di), *Diritto internazionale privato e diritto comunitario*, Padova, 2004, pp. 485-528, at p. 495; G. ROSSOLILLO, *Mutuo riconoscimento e tecniche conflittuali*, Padova, 2002, pp. 239-250.

A similar reasoning can be found in the *Pancharevo* case, which concerned the refusal of Bulgarian authorities to release an identity document to a child, who was born in Spain and whose Spanish birth certificate mentioned two mothers (one of whom was a Bulgarian national). On the premises of the European citizenship of the child, the Court of Justice has stated that the Member State of which a child is a national (in this case, Bulgaria) had the obligation to issue an identity document which would allow the child to travel with both her parents and therefore exercise her right to free movement. For this purpose, the Member State of nationality had the obligation to recognize the parentage link as already ascertained by the Member State in which the child was born and resided with her family (in this case, Spain)[13]. According to the Court of Justice, this kind of obligation imposed upon Member States would not result in a prejudice for their public policy and national identity and therefore it would not violate Art. 4(2) TEU[14]. In fact, the obligation to issue an identity card or a passport and to recognize the parent-child relationship with both the mothers is only functional to the objective to grant the exercise of the right to free movement[15]. It does not require Member States to provide, in their national law, rules admitting same-sex couples to parenthood, or to recognise, for purposes other than the exercise of the rights deriving from EU law, the parent-child relationships in question[16].

While the recognition of family ties involving a European citizen is closely related to the enjoyment of the right to free movement, different issues concern third country nationals, especially considering the importance of the portability of civil status in a migration context. To cite some examples, the protection of unaccompanied children[17], partially provided for by the Return Directive[18], depends on proof of age and requires the identification of possible family members[19]; the right to family reunification, implemented in particular by the Directive 2003/86/EC[20], depends on the proof of marriage and parentage; according to the Dublin III Regulation[21], the existence of family

[13] More specifically, the Court of Justice refers to the Member State in which the child was born (para. 36 of the decision), which is also the «host Member State» of the child (para. 46).

[14] For some references M.C. BARUFFI, *Articolo 4 TUE*, in F. POCAR, M.C. BARUFFI (diretto da), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, pp. 13-24.

[15] Court of Justice, *Pancharevo*, cit., par. 56.

[16] Court of Justice, *Pancharevo*, cit., par. 57.

[17] B. GORNIK, *At the Crossroad of Power Relations: the Convention of the Rights of the Child and Unaccompanied Migrant Minors*, in B. GORNIK, B. SAUER, M. SEDMAK (edited by), *Unaccompanied Children in European Migration and Asylum Practices: in Whose Best Interest?*, Oxon-New York, 2019, pp. 16-36, at p. 10.

[18] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive).

[19] O. LOPES PEGNA, *Minori migranti e tutela dello* "status filiationis", in *Eurojus*, 2020, pp. 296-310, available *online*.

[20] Council Directive 2003/86/EC, cit.

[21] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an

ties determines which State is responsible for asylum applications. Thus, the reception of persons from third countries depends on the portability of family and personal status.

In this context, the human rights perspective shall be considered. In particular, EU Member States are bound by the EU Charter of fundamental rights, which is primary EU law[22] and is part of a multilevel system of protection of fundamental rights. It is inspired by the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR)[23], which contributes to the common constitutional traditions of Member States, constituting themselves EU primary law according to Art. 6(3) TEU[24]. The European Court of Human Rights (ECtHR) has stated that the right to respect for private and family life (Art. 8 ECHR, corresponding to Art. 7 of the Charter) comprehends the duty of States to guarantee the continuity of family status validly acquired abroad, unless there are legitimate collective interests to the contrary[25].

In order for individuals to demonstrate their status – and subsequently enjoy their right to residence and/or free movement, as well as to exercise other rights in the host State – it is not unusual that documents such as civil status records, birth or marriage certificates need to be presented to the local authorities. The recognition of a public document is not, *per se*, decisive for the substantial recognition of the status: as already mentioned, the latter may be refused for public policy reasons. However, the presentation

application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation).

[22] Art. 6(1) TEU.

[23] Art. 52(3) EU Charter: «In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection».

[24] Art. 6(3) TEU. Art. 6 TEU consecrates fundamental rights as general principles of EU law, other than providing for the EU accession to the ECHR. As concerns the accession to the ECHR, the procedure is still ongoing. On the criticalities of the accession process, see G. GAJA, *Lo statuto della Convenzione Europea dei Diritti dell'Uomo nel diritto dell'Unione*, in *Rivista di diritto internazionale*, 2016, pp. 677-689; E. CANNIZZARO, *Unitarietà e frammentazione delle competenze nei rapporti fra l´ordinamento dell´Unione e il sistema della Convenzione europea: in margine al parere della Corte di giustizia 2/2013*', in *Il diritto dell'Unione europea*, 2015, pp. 623-635, available *online*; J. CALLEWAERT, *The Accession of the European Union to the European Convention on Human Rights*, Strasbourg, 2014; C. ECKES, *EU Accession to the ECHR: Between Autonomy and Adaptation*, in *The Modern Law Review*, 2013, pp. 254-285, available *online*; P. IVALDI, C.E. TUO, *Diritti fondamentali e diritto internazionale privato dell'unione europea nella prospettiva dell'adesione alla CEDU*, in *Rivista di diritto internazionale privato e processuale*, 2012, pp. 7-36; A. TIZZANO, *The European Courts and the EU Accession to the ECHR*, in *Il diritto dell'Unione europea*, 2011, pp. 29-57.

[25] See European Court of Human Rights, judgment of 6 May 2004, application no. 70807/01, *Hussin* v *Belgium*; 28 June 2007, application no. 76240/01, *Wagner and J.M.W.L.* v *Luxembourg*; 29 April 2008, application no. 18648/04, *McDonald* v *France*; 3 May 2011, application no. 56759/08, *Negrepontis-Gianninis* v *Greece*. On the topic F. PESCE, I. QUEIROLO, *La surrogazione di maternità tra diritto internazionale, dell'Unione europea e ordinamento interno (Panorama). Parte I: la surrogazione di maternità innanzi alla Corte di Strasburgo*, in *La Cittadinanza Europea*, 2021, pp. 223-250; P. FRANZINA, *Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad*, in *Diritti umani e diritto internazionale*, 2011, pp. 609-616.

of the document is a prerequisite for the legal relationship to produce its effects in the host State.

Each national legal system has its own rules as concerns the type of documents that can be object to entries in registers, as well as the content and the form of those documents such as signatures, seals or stamps. The production of legal effects by public documents is regulated by national law, which is not affected by EU competences. It can hence be difficult for the authorities of the State addressed to rely on the truthfulness of a foreign document, *i.e.* to be sure that it has been issued by the competent authority in the State of origin and that the signature is authentic. Consequentially, a translation of the official document is often necessary, as well as other formalities such as legalization, which consists in a «diplomatic» authentication procedure, which often involves several steps. Firstly, the competent authority of the issuing State certifies the veracity of the signature affixed to the document, the capacity in which the signatory of the document acted and, where applicable, the identity of the seal or stamp. Secondly, the document shall be certified also by the embassy or consular authority of the requested State. All those supplementary passages often require time and additional costs.

In order to overcome those difficulties and to reduce the obstacles to free movement of EU citizens, the EU has adopted the Regulation (EU) 2016/1191[26], which applies to public documents issued in a Member State and eliminates legalization and other forms of administrative formalities when such documents are to be presented in another EU country. However, the regulation is the result of a compromise: it does not apply to public documents released in a third State and its provisions have much smaller effects than the original plan[27].

As a consequence, the Regulation is not exhaustive and needs to be coordinated with a huge framework of already existing international conventions. Indeed, well before the creation of the European space of freedom, security and justice, the international community has addressed the issue of circulation of public documents. Over the years, countless bilateral conventions have been concluded between States, with the aim to reduce the administrative formalities related to the presentation of public documents abroad. At the same time, several international organizations have promoted the conclusion of multilateral conventions. The ICCS and the Hague Conference of Private International Law (HCCH) have played a key role in this regard.

3. The 1961 Hague Apostille Convention.

[26] Regulation (EU) 2016/1191 simplifying the requirements for presenting certain public documents in the European Union, cit.

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

The 1961 Hague Apostille Convention[28] is one of the most successful instruments promoted by the HCCH and it has been defined as «a jewel in the HCCH crown»[29]. The Convention has a global appeal, considering the high number of ratifications worldwide: it currently counts 122 States parties[30]. It demonstrates that, a few decades ago – and when the European Community did not hold competences in this field – the issue of circulation of public documents was already on the plate. More specifically, the work of the HCCH was launched following a request from the Council of Europe. The Convention was aimed at reducing the recurse to the (often) burdensome practice of legalization, usually required for public documents issued in a contracting State and presented to the public authorities in another contracting State. This procedure has been replaced by the affixing of a standard «apostille», consisting in a model stamp which certifies «the veracity of the signature, the quality in which the signatory of the document has acted and, where applicable, the identity of the seal of stamp»[31].

The Convention has a broad scope of application, as specified in its Art. 1, even though it does not provide an express definition of «public document». The provision itself does not contain an exhaustive list of documents that shall be subject to the Convention. The public nature of a document is determined by the law of the place where the document originates[32]. The scope of the Convention does not expressly target civil status, but those documents are in practice the most popular ones to benefit from the Apostille mechanism.

On the other hand, the Apostille Convention does not determine a complete elimination of the administrative formalities surrounding a public document, being necessary for contracting States to appoint a competent authority to receive requests for the placement of the apostille[33]. Moreover, the apostille does not authenticate the content

[28] Hague Convention of 5 October 1961 abolishing the Requirement of Legalisation for Foreign Public Documents, entered into force on 24th January 1965. See M.Y. LOUSSOUARN, *Explanatory Report on the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public* Documents, Acts and Documents of the Ninth Session (1960), tome II, available *online*. In the legal literature, see P. ZABLUD, *The 1961 Apostille Convention – authenticating documents for international use*, in T. JOHN, R. GULATI , B. KOEHLER (eds), *The Elgar Companion to The Hague Conference on Private International Law*, Cheltenham-Gloucestershire, 2020, pp. 277-287; J.W. ADAMS, *The Apostille in the 21st Century: International Document Certification and Verification*, in *Houston Journal of International Law*, 2012, pp. 519-559; M. LEICH, *The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, in *The American Journal of International Law*, 1982, pp. 182-183; P. AMRAM, *Toward Easier Legalization of Foreign Public Documents*, in *American Bar Association Journal*, 1974, pp. 310-314.

[29] P. ZABLUD, *The 1961 Apostille Convention*, cit., p. 277.

[30] Saudi Arabia has ratified the Convention on 8 April 2022.

[31] Arts. 3, 4 and 5 of the 1961 Apostille Convention.

[32] P. ZABLUD, *The 1961 Apostille Convention*, cit., p. 282.

[33] On the electronic Apostille Programme (e-APP), see C. BERNASCONI, *The Electronic Apostille Program (e-APP): Bringing the Apostille Convention into the Electronic Era*, in J.J. FORNER I DELAYGUA, C. GONZÁLEZ BEILFUSS, R. VIÑAS FARRÉ (edited by), *Entre Bruselas y La Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado. Liber Amicorum Alegría Borrás*,

of the public document, since its effects only extend to the authenticity of the signature, the quality of the signatory and of the seal/stamp (Art. 5 of the Convention). Those and other disadvantages have been noticed also in the context of the preliminary works and studies preceding the adoption of the Regulation (EU) 2016/1191[34].

4. The role of the International Commission on Civil Status.

The International Commission on Civil Status (ICCS) is the only international organization dealing exclusively with the objective to facilitate international co-operation in civil-status matters and to further the exchange of information between civil registrars[35]. Being a specialized organization, working in the field since 1949, it has promoted several international conventions and it has drafted recommendations, developing original methods for the harmonization of national law in matters relating to the status and capacity of persons, family and citizenship[36].

If the 1961 Apostille Convention has a global appeal, the ICCS conventions are more oriented towards being applied in the European area and the number of contracting States is vary according to the instrument considered. Among the 34 Conventions adopted under the auspices of the ICCS, the Convention No. 16[37] represents a remarkable example of successful international cooperation in the area. At the moment, it is one of the most relevant ICCS conventions for the issue under consideration, as well as one of the most successful one. The instrument has introduced multilingual extracts of civil status records concerning birth, marriage and death, which is mandatory when an interested party requests it or when their use abroad requires a translation. For this purpose, the requesting citizen does not have to demonstrate any particular need for the multilingual extract. Therefore, the Convention makes a step forward compared to the 1961 Apostille

Madrid, 2013, pp. 199-214; M.M. CELIS AGUILAR, *Novedades del Programa Piloto de Apostillas Electrónicas (e-APP)*, in *Revista Española de Derecho Internacional*, 2011, pp. 320-324.

[34] See the Comparative Study on Authentic Instruments for the European Parliament - National Provisions of Private Law, Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union (United Kingdom, France, Germany, Poland, Romania, Sweden), Brussels, 2008 available *online* (accessed 8 July 2022).

[35] An updated internal regulation of the organization has entered into force on 1 January 2021 and is available *online* on the official website. According to the new rules, the ICCS membership is now also open to any international organisation, any regional economic integration organisation and any other international entity.

[36] H. VAN LOON, *Requiem or transformation? Perspectives for the CIEC / ICCS and its work*, in *Yearbook of Private International Law*, 2018-2019, pp. 73-94; J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *International Commission on Civil Status (ICCS)*, Cheltenham, 2018, p. 10; W. PINTENS, *The Impact of the International Commission on Civil Status (ICCS) on European Family Law*, in J. M. SCHERPE (edited by), *Europen Family Law, Volume I, The Impact of Institutions and Organizations on European Family Law*, Cheltenham, 2016, pp. 124-142.

[37] Convention (No. 16) on the issue of multilingual extracts from civil-status records, signed in Vienna on 8th September 1976 and entered into force on 30 July 1983. Currently, the Convention has 24 State parties and sixteen of them are EU Member States.

Convention, since the latter maintains an additional administrative formality (the Apostille), while the system created by the ICCS abolishes any form of legalization or other similar procedure. Moreover, the multilingual model solves the translation issues without the need to translate every single document: the model is accompanied by a coding system, which makes it possible for national authorities to understand the content of the foreign document.

Following societal changes and ongoing developments concerning not only individuals, but also family law, Convention No. 16 has been updated by Convention No. 34[38], which has been adopted on 26 September 2013 and has not entered into force yet[39]. The new Convention extends its scope of application to registered partnerships and recognition of children: for this purpose, the multilingual forms have been amended and new categories have been introduced. On the other hand, contracting States have the possibility to make reservations on these points.

Despite the massive work of the ICCS and its contribution in facilitating the continuity of personhood when people cross international borders, the organization is facing a period of crisis, due to the withdrawal of some States. A crisis that, according to authoritative legal literature, is incomprehensible in the light of the growing importance of the issues that constitute the core mission of the organization[40].

5. Regulation (EU) 2016/1191: shortcomings and the difficult coordination with international conventions.

The Regulation (EU) 2016/1191 has been adopted in the context of the already existing international legal framework, characterized by the presence of the 1961 Apostille Convention and the ICCS conventions.

As detected by the European Commission with the Green Paper of 14 December 2010[41], the Regulation follows the need to facilitate the circulation of public documents between Member States and, consequently, to consolidate the freedom of movement within the EU[42]. The preliminary consultation that preceded the adoption of the

[38] Convention (No. 34) on the issue of multilingual and coded extracts from civil status records and multilingual and coded civil status certificates, signed in Strasbourg on 14 March 2014.

[39] P. LAGARDE, *The Movement of Civil Status Records in Europe, and the European Commission's Proposal of 24 April 2013*, in *Yearbook of Private International Law*, 2013-2014, pp. 1-12, at p. 8.

[40] See the appeal by P. LAGARDE, H, GAUDEMET-TALLON, C. KESSEDJIAN, F. JAULT-SESEKE, E. PATAUT, *La Commission internationale de l'état civil en peril*, in *Recueil Dalloz*, 2020, p. 2355, translation in English available *online*.

[41] European Commission, *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. See C. CAMPIGLIO, F. MOSCONI, *Osservazioni sul libro verde della Commissione europea*, in *Iustitia*, 2011, p. 329.

[42] On the Regulation, see A. ZANOBETTI, *La circolazione degli atti pubblici nello spazio di libertà, sicurezza e giustizia*, in *Freedom, Security and Justice: European Legal Studies*, 2019, pp. 20-35, available *online*; M. FONT I MAS, *La libera circolazione degli atti pubblici in materia civile: un passo avanti nello*

Regulation dealt with *i)* the freedom of movement of public documents within the EU, in order to overcome legalization formalities, and *ii)* the recognition of the effects of civil status records, so that legal status granted in one Member State could be recognized and have the same legal consequences in another. However, only the first one became part of the proposal for a new Regulation, whose final version only disciplines the regime of circulation of public documents. The strong resistance against the mutual recognition of civil status effects made it impossible to extend the proposal to other aspects.

According to Arts. 1 and 4 of the Regulation, certain public documents issued by the authorities of a Member State with its national law, which have to be «presented» to the authorities of another Member State, are exempted from all forms of legalization or similar formalities[43]. This rule applies to all public documents concerning birth, a person being alive, death, marriage (including capacity to marry and marital status), registered partnership (including capacity to enter into a registered partnership and registered partnership status), domicile and/or residence, or absence of a criminal record (concerning EU citizens and released by their State of nationality)[44]. Further simplifications are established as concerns other formalities, such as the requirement to provide certified copies and translation[45]. When the latter is required[46], the Regulation provides a multilingual standard form to be attached to the document (Art. 7). The form is a translation aid and it is conceived to be an *addendum* to the public document: it has, therefore, no autonomous effects.

Lastly, the Regulation aims at improving administrative cooperation between national authorities involved in the verification of doubtful documents, through the

spazio giudiziario europeo, in *Freedom, Security and Justice: European Legal Studies*, 2017, pp. 104-125, available online; I. FERRETTI, *Brevi osservazioni sul regolamento UE n. 1191/16 in tema di semplificazione dei requisiti per la presentazione di alcuni documenti pubblici dell'Unione europea*, in *Contratto e Impresa/Europa*, 2016, pp. 820-827; A. VETTOREL, L*a circolazione dei documenti pubblici stranieri dopo il regolamento (UE) n. 2016/1191*, in *Rivista di diritto internazionale privato e processuale*, 2016, pp. 1060-1075.

[43] As expressly specified by Art. 3(4), «similar formalities» means the addition of the certificate provided for by the 1961 Apostille Convention. As observed by E. DE GOTZEN, *Child's civil status*, cit., p. 70, the choice of the broad term «presentation», instead of other wordings such as «recognition» or «acceptance» that has been introduced in other EU Regulations, derives from the will to avoid any misunderstanding as regards the aim of the new instrument.

[44] According to Art. 1, the material scope of application of the Regulation covers public documents «the primary purpose of which is to establish one or more of the following facts: (a) birth; (b) a person being alive; (c) death; (d) name; (e) marriage, including capacity to marry and marital status; (f) divorce, legal separation or marriage annulment; (g) registered partnership, including capacity to enter into a registered partnership and registered partnership status; (h) dissolution of a registered partnership, legal separation or annulment of a registered partnership; (i) parenthood; (j) adoption; (k) domicile and/or residence; (l) nationality; (m) absence of a criminal record, provided that public documents concerning this fact are issued for a citizen of the Union by the authorities of that citizen's Member State of nationality».

[45] Arts. 4, 5 and 6 of the Regulation.

[46] Translation is not necessary when «the public document is in the official language of the Member State where the document is presented or, if that Member State has several official languages, in the official language or one of the official languages of the place where the document is presented or in any other language that that Member State has expressly accepted» (Art. 6(1)(a)).

recourse to the Internal Market Information System (IMI)[47] and the designation of Central Authorities with the duty to answer to request for information in case of reasonable doubt as to the authenticity of a public document or its certified copy.

From the above, it results that the Regulation has made a step towards the simplification of administrative incumbencies of EU citizens moving within the EU judicial space. In doing so, the Regulation covers all the main civil status documents that are to be presented to public authorities. On the other hand, the text represents an important downsizing if compared with the original and ambitious project of the European Commission.

Firstly, the Regulation does not impose the recognition of the legal effects relating to the content of a public document. Therefore, it concerns only the *instrumentum*, and not the *negotium*. The substantial circulation of personal and family status is left untouched and follows national law.

Secondly, it is not clear whether the Regulation may be useful when it comes to public documents issued by authorities of third States (Art. 2(4)). Certified copy issued by the authorities of a Member State may be subject to the EU discipline, even though the Regulation does not expressly clarify this point. Should this not be the case, it would mean that third country nationals are not exempt from legalization of documents issued by their country of origin, or from another formality provided by the international convention eventually applicable to the relationships between the two States. This also applies to third country nationals lawfully residing in the EU and eventually moving from the Member State of first entry to another, in the limited cases in which this is allowed by EU law.

Thirdly, the coordination regime between the Regulation and international Conventions has been criticized since it does not solve the fragmentation of the legal framework already existent prior to the entry into force of the EU regime[48].

According to Art. 19, the Regulation allows for the application of international conventions whose scope of application overlaps with the one of the Regulation, and to which Member States are already party[49]. On the other hand, the European discipline prevails over bilateral or multilateral agreements concluded by the Member States, in the relations between them[50]. In other words, the Regulation does not affect the application

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

[48] E. DE GOTZEN, *Child's civil status*, cit., p. 71 notes that «(…) ultimately the Regulation simply adds another uniform regime ("*separate and autonomous"*) to the existing authentication (multilevel) system of foreign public documents, without replacing the latter».

[49] Art. 19(1) of the Regulation (EU) No 2016/1191: «This Regulation is without prejudice to the application of international conventions to which one or more Member States are party at the time of adoption of this Regulation and which concern matters covered by this Regulation».

[50] Art. 19(2) of the Regulation (EU) No 2016/1191: «[n]otwithstanding paragraph 1, this Regulation shall, in relation to matters to which it applies and to the extent provided for therein, prevail over other

of international agreements to which Member States are already parties, if the legal situation at hand does not concern the relationships between EU countries. This means that Member States shall continue to receive public documents issued in a third State according to the relevant applicable law, as the 1961 Apostille Convention, in respect of which the Regulation qualifies itself as a «separate and autonomous instrument»[51]. The same is true if one of the ICCS Conventions or a bilateral Convention is in force between the concerned States.

On the other hand, the Regulation applies to «public documents which are issued by the authorities of a Member State and which have to be presented to the authorities of another Member State» (Art. 1(1)), and shall therefore prevail in those cases. By the same token, the Regulation does not preclude Member States from negotiating, concluding, acceding to, amending or applying international agreements and arrangements with third States concerning legalization or similar formality in respect of public documents covered by EU instrument (Art. 19(4)).

From the above, it results that the Regulation has not solved the problem of fragmentation of the legal framework, as concerns the circulation of public documents on civil status in Europe. The instrument has promoted a minimum harmonization between Member States, concerning exclusively intra-EU presentation of public documents and addressing only the *instrumentum* (*i.e.* providing the exemption from legalization and other similar formalities). The Regulation did not introduce any rule on the recognition of legal effects relating to the content of a public document. It is doubtful whether documents adopted by the authorities of third States, or issued in a Member State for presentation in a third country, are subject to the EU regime.

6. The «global appeal» of the EU in synergy with other international organizations: towards a common legal framework for civil status documents?

From the described legal framework, it results that the position of third country nationals in the EU is still fragmented when it comes to present public documents certifying their personal and family status. The minimum compromise that has led to the Regulation (EU) 2016/1191 is not sufficient to guarantee the free movement of public documents, without mentioning the circulation of their substantial effects. Overall, the Regulation does not seem to improve the cross-border portability of family status, especially when linked with civil status records. The exclusion of the evidentiary effects of such records from the material scope of application of the Regulation maintains the

provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States in the relations between the Member States party thereto».

[51] At Recital 4.

risk of limping relationships. This is an issue that concerns both EU and third States nationals[52].

While the portability of family status is more and more contingent in the European context, the action of the EU institutions has the potential to reach a global appeal. While focusing on improving the enjoyment of rights deriving from the EU citizenship, there is an opportunity to address the issue of circulation of public documents on civil status in a broader sense.

Indeed, the EU concern on this matter may derive not only from the willingness to enhance the right to of free movement of EU citizens: common rules for public documents on civil status would reinforce the coherence of the EU migration law. Moreover, there are the human rights considerations[53]. Indeed, contrary to the ECHR[54], the EU Charter does not contain a territorial jurisdiction clause: according to Art. 51(1), the provisions of the Charter apply to the EU institutions, as well as to Member States only when they are implementing EU law[55]. This means that any territorial criteria bear no relevance in the definition of the EU Charter's scope of application, which derives from the applicability of EU law[56]. The defining issue concerns the scope of application of EU competences, and not the territorial or extraterritorial action undertaken by an EU institution or by a Member State. The consequence is that any legislative instrument of the EU shall be interpreted in accordance with the EU Charter, when its scope of application has some influence on fundamental rights. The same is true as concerns the external action of the EU, when it interfaces with other international organizations.

In the Treaties, the EU external policy is complementary to the internal one. The first is necessary in order to develop the second and achieve the objectives: from this assumption, the principle of parallelism of competences arises. It is not by coincidence that Art. 21(1) TUE establishes that, in promoting its principles and values in the wider world, the EU shall «seek to develop relations and build partnerships with third countries, and international, regional or global organisations» and «promote multilateral solutions to common problems». The EU has, therefore, the power to promote and conclude international treaties[57].

[52] On the specific issues that surround third-country nationals that migrate in the EU without having at disposal identification documents or other civil status documents, see the contribution of F. JAULT-SESEKE, *Right to identity and undocumented migrants*, in this *Special issue*.

[53] See *supra*, para. 1.

[54] Art. 1 ECHR: «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention».

[55] On the topic see E. KASSOTI, R. WESSEL, *The EU's Duty to Respect Human Rights Abroad: the Extraterritorial Applicability of the EU Charter and Due Diligence Considerations*, in *CLEER Papers*, 2020, pp. 7-24.

[56] See Court of justice, judgment of 7 May 2013, case C-617/10, *Åklagaren* v *Hans Åkerberg Fransson*, EU:C:2013:105, para. 21.

[57] Art. 216 TFUE.

Within the field of judicial cooperation in civil matters, a EU's leading partner is the HCCH. The accession of the EU to the HCCH, which happened in April 2007[58], was a result of the exercise of EU external exclusive competences in the field of judicial cooperation in civil matters, according to Art. 216(1) TFEU (which is a codification of the ECJ's case law on implied external competences)[59] and transferred from the Member States as a direct effect of the adoption of instruments dealing with private and procedural international law[60]. Therefore, the EU started to participate in the negotiations on the Hague Conventions with third States, as a full member. Indeed, the participation to a global instrument may represent, in some cases, a strategic choice of the EU, which opposes to the creation of its own internal legal framework[61] and may be useful for the adoption of a global (instead of a EU) discipline. This is happening, for instance, with the 2019 Judgments Convention[62]: the Commission has proposed for the EU to join the treaty, in order to achieve clear rules as to the recognition and enforcement of foreign judgments[63]. The 1961 Apostille Convention itself represents a good example of a global discipline that has benefitted the EU judicial space: before the EU exercised its competences in the matter, the Convention eliminated a lot of administrative formalities and costs in the circulation of public documents, compared with the burdensome method of legalization.

Indeed, the potential for a concerted activity between the EU and the HCCH already exists in the specific context of circulation of family status, even though in the specific matter of parentage. Both organizations are now conducting parallel works on the private international law aspects of parent-child relationships. More specifically, the *Parentage/Surrogacy Project* of the HCCH is studying the feasibility of a general private international law instrument on legal parentage and a separate protocol on legal parentage

[58] See the Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law. The accession was possible following the entry into force, on 1 January 2007, of the amendments to the HCCH Statute which made it possible for certain regional economic integration organisations – and thus the EC – to become a member of the HCCH. On the topic see J.-J. KUIPERS, *The European Union and the Hague Conference on Private International Law – Forced Marriage or Fortunate Partnership?*, in H. DE WAELE, J.-J. KUIPERS (eds), *The European Union's Emerging International Identity*, Leiden, 2013, pp. 159-186; A. SCHULZ, *The Accession of the European Community to the Hague Conference on Private International Law*, in *International and Comparative Law Quarterly*, 2007, pp. 939-949.

[59] G. DE BAERE, K. GUTMAN, *The Impact of the European Union and the European Court of Justice on European Family Law*, in J.M. SCHERPE (ed), *Europen Family Law,* cit., pp. 5-48, at p. 23.

[60] On the topic P. FRANZINA, *The External Dimension of EU Private International Law after Opinion 1/13,* Antwerp, 2016. See also the Declaration of competence of the European Community specifying the matters in respect of which the competence has been transferred to it by its Member States, contained in Annex II to the Council Decision 2006/719/EC.

[61] G. DE BAERE, K. GUTMAN, *The Impact of the European* Union, cit., p. 27.

[62] Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, not yet in force.

[63] Proposal for a Council decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, COM(2021) 388 final of 16 July 2021.

established as a result of international surrogacy arrangements[64]. The European Commission has appointed a group of experts in order to be assisted in the creation of a legislative initiative on the mutual recognition of parenthood between Member States[65]. The proposal, which will also contain rules on the recognition of authentic instruments, will probably concern only intra-EU situations, where mutual trust already exists. On the other hand, it would be interesting for the EU and the HCCH to work together in order to address the issues surrounding the presentation of civil status documents. This concerted action between the EU and the HCCH could be integrated with the specialized expertise developed by the ICCS, which is a creator and promoter of innovative methods to facilitate the circulation and acceptance of civil status documents worldwide.

[64] More information are available at https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

[65] The updates on the legislative initiative are available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12878-Cross-border-family-situations-recognition-of-parenthood_en.

ABSTRACT: While the EU fosters and protects the right of free movement of its citizens, it is necessarily concerned by the reception of third-country nationals. Migration issues are among the EU competences in the area of freedom, security and justice. In both scenarios – *i.e.* intra-EU movements and immigration from outside the EU – there is a need to ensure the continuity of personal and family status: this represents a condition of effectiveness, as concerns the enjoyment of rights. With specific reference to third country nationals, the implementation of the European migration rules requires the resolution of civil status issues for which there is no common approach so far. However, the simplifications introduced by the EU Regulation 2016/1191 do not work for documents from third countries. The EU rules coexist with the fragmented (yet, in some cases, more advanced) regime contained in international conventions. However, this does not mean that the EU cannot have uniform rules to deal with such documents (compare with foreign judgments and the ratification of the 2019 Hague Convention). Common rules for public documents on civil status would reinforce the coherence of the EU migration law.

The need for a common legal framework is the focus of the present paper, which highlights the opportunity for the EU to act in synergy with the Hague Conference on Private International Law and the International Commission on Civil Status.

KEYWORDS: Public documents; EU Regulation 2016/1191; EU judicial cooperation in civil matters; third-country nationals; International Commission on Civil Status.