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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,

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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.

Transcription of foreign civil status documents of children of same-sex parents in Polish law

Małgorzata Balwicka-Szczyrba[*], Anna Sylwestrzak[**] and Dominik Damian Mielewczyk[***]

CONTENTS: 1. Introduction. – 2. Essence of transcription of civil status records. –3. Obligatory transcription and consequences of failure to transcribe. – 4. Refusal of transcription on grounds of public order. – 5. Directions of protection of the interests of the child of a same-sex couple in the sphere of civil status registration. Postulates *de lege lata* and *de lege ferenda*. – 6. Conclusions.

1. Introduction.

At present, the dynamics and evolution of social relations, as well as social and cultural differences of individual states, intensely influence the shape of legal regulations and the practice of law application. Additionally, the process of globalisation and increased social migration creates many new and fundamental legal problems of cross-border and international nature. Often these problems arise from family law regulations valid in a particular country. There is a growing number of hard cases, including those with a foreign element (going beyond one legal system), resulting from difficulties in mutual adjustment of state regulations or the scope of recognition of certain legal events and their extraterritorial effectiveness.

Differences in the view of legal regulations concerning family relations recognised in individual legislations are the source of many doubts concerning the admissibility of the transcription of foreign civil status records to the national register of civil status. This problem grows especially at the junction of legislations respecting the traditional family model and those promoting a liberalised model of family relations, including the so-called same-sex unions. On the one hand, transcription is of fundamental importance for the protection of rights relating to the identity of an individual, as well as for demonstrating the features which individualise a person. On the other hand, the transfer of a foreign civil act with a content that does not correspond to the principles of law of the state that did not issue the document carries the risk of disturbing the stable system of family relations in its legal order and the values represented in it.

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This paper will analyse the issue of admissibility of the transcription of foreign civil status documents of a child of same-sex parents who are Polish citizens to the Polish civil status register. The Polish law makes no distinction between the presence of two mothers or two fathers in a given configuration. However, in practice, transcription cases will mostly concern the situation of two mothers. The following will be presented: the meaning of transcription in Polish law and the consequences of its omission, the essence of the legal problems arising in the Polish legal system concerning the transcription of a foreign birth certificate of a child of same-sex parents who are Polish citizens. A review of the judicial and doctrinal positions on this issue will be made, and also such a solution will be proposed which, within the limits of the legal order in force, will realise the principle of the child's good as broadly as possible.

2. Essence of transcription of civil status records.

The civil status registration system in Poland is primarily regulated by the Law of 28 November 2014 – Law on Civil Status Records (hereinafter: c.s.r.)[1]. Civil status is, according to Art. 2(1) of the c.s.r., the legal situation of a person expressed by the characteristics that individualize him, shaped by natural events, legal actions, court decisions or decisions of the authorities, stated in a civil status record. On the other hand, a civil status record is an entry in the civil status register kept in the ICT system (Art. 5(1) of the c.s.r.). Civil status records have a declaratory character. They do not create a new reality in legal circulation, but only confirm certain events, being the sole evidence of the events they confirm (Art. 3 of the c.s.r.)[2]. Their inconsistency with the truth may be proved only in court proceedings.

It should be emphasised that the disposition of the referred Art. 3 c.s.r. also includes foreign civil status records, which is confirmed by the wording of Art. 1138(1) of the Act of 17 November 1964 – Code of Civil Procedure[3]. On its basis, foreign public documents have the same evidentiary value as Polish public documents. This position is generally accepted in doctrine, and it has also been established within the line of rulings of the Supreme Court, according to which a civil status record drafted abroad constitutes the sole evidence of the events stated therein, also when it has not been entered into Polish

[1] Dz.U. 2014, position 1741.

[2] See A. CZAJKOWSKA, *Commentary on Article 3*, in A. CZAJKOWSKA, I. BASIOR, D. SORBIAN (eds,), *Prawo o aktach stanu cywilnego z komentarzem. Przepisy wykonawcze i związkowe oraz wzory dokumentów*, Warsaw, 2015; on the specific features of a civil status record as qualified evidence see J. DOBKOWSKI, *Preponderancja aktów stanu cywilnego*, in *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, 2011, no. 2, pp. 15-33, available *online*.

[3] Dz.U. 1964, no. 43, position 296.

civil status books[4]. A non-transcribed foreign civil status document will therefore enjoy a special evidentiary value.

The transcription regulated by Arts. 104-107 of the c.s.r., together with additional mentions and footnotes, is one of the three key ways of disclosing in the Polish register information on events which occurred abroad, as defined by law. Art. 104(2) of the c.s.r. provides that transcription consists in a faithful and literal transfer of the content of a foreign civil status document (linguistically and formally), without any interference in the spelling of the names and surnames of the persons indicated therein. This is an expression of the Polish legislator's confidence in the findings of the foreign authority that has prepared the civil status record. The Polish head of a civil status office may not reassess the civil status of a person interested in making a transcription. The control of the content of a foreign civil status document is therefore carried out only on the basis and within the limits of legal norms defining a closed catalogue of grounds for refusal of transcription[5], and it may be expressed in the form of an administrative decision refusing transcription (Art. 2(6) of the c.s.r.).

The object of transcription may only be a foreign civil status document that is proof of an event and its registration (Art. 104(1) of the c.s.r.). However, the preconditions for transcription are: that the document is recognised in the state of issue as a civil status document, that it has the status of an official document, that it was issued by a competent authority and that there are no doubts as to its authenticity (Art. 104(3) of the c.s.r.). The legal nature of transcription is expressed, as accepted in doctrine, by its so-called reproductive character, which is limited only to reproducing a foreign civil status record in the Polish register. Transcription is not, therefore, the recognition of a legal relationship whose existence is confirmed by a foreign civil status document, nor is it the decision of the authority issuing such a document[6]. This makes it impossible to attribute to transcription a registration character, since it consists only in transposing, in its linguistic and formal aspect, a foreign civil status record into the official language applicable in Poland and a form of registering births, marriages and deaths[7]. The transcription does not therefore have direct legal (substantive) effects, and the circumstances arising from the foreign document are not covered by *res judicata*.

It is therefore important to underline that a Polish citizen concerned by a foreign civil status record may use both this record and the transcribed one, and that transcription is obligatory only in clearly defined cases (which will be discussed further below). So

[4] Cf. Supreme Court (seven judges), resolution of 20 November 2012, III CZP 58/12, OSNC 2013/5/55.

[5] M. WOJEWODA, *Transkrypcja aktu urodzenia dziecka, które zostało uznane za granicą*, in *Kwartalnik prawa prywatnego*, 2017, pp. 337-361, at p. 340.

[6] M. ZACHARIASIEWICZ, *Transkrypcja aktów urodzenia dzieci par jednopłciowych*, in *Studia prawno-ekonomiczne*, 2019, pp. 143-170.

[7] See together with the judgments cited therein: Supreme Court (seven judges), resolution of 20 November 2012, cit.

why should a foreign civil status record be transcribed if the civil status can be proven by a foreign record? The advisability of making such a transcription is expressed in a number of advantages for the person using a Polish document in Poland[8].

Firstly, the lack of a transcription makes it more difficult or even impossible to achieve certain legal effects when the law provides for an obligatory transcription (Art. 104(5) of the c.s.r.). This issue will be further discussed in the next point.

Secondly, it should be noted that the participants in legal transactions trust the content of a Polish document stating civil status, the form of which society has become accustomed to and naturally treats as reliable. A foreign document may sometimes arouse uncertainty as to its veracity, validity and evidentiary value, which in turn may translate into further inconvenience, e.g. in terms of timing, when dealing with a case requiring the establishment of civil status. The lack of necessity for the Polish authority to check the authenticity of the foreign record each time therefore also appears to be an advantage in favour of transcription.

Thirdly, the convenience of being able to obtain copies of the transcribed record in any civil status office should be highlighted[9]. This is particularly true if the document in one's possession has been lost or destroyed, and it is possible to obtain a new document if it has already been transcribed, in any Polish civil status office, whereas it is not possible to obtain a foreign document in this way, which puts a person residing in Poland at a disadvantage.

Fourthly, the transcribed document does not require translation into Polish by a sworn translator. At the same time, it is rightly pointed out by M. Zachariasiewicz[10], that this argument loses its significance due to the possibility of using multilingual abridged civil status records issued on the basis of the ICCS (International Commission of Civil Status) Convention (No. 16) drawn up in Vienna on 8 September 1976[11] and multilingual standard forms drawn up on the basis of Regulation (EU) 2016/1191[12].

Fifthly, transcription ensures the correspondence between the status revealed in the civil status register and the actual legal status. The appearance of an entry in the Polish civil status register as a result of transcription determines the possibility of carrying out certain actions in the field of civil law, especially those of a subsequent nature, such as

[8] In Poland, civil status documents take the form of copies of the civil status record (abridged or complete) and certificates on civil status and on the data entered or not entered in the civil status register (Art. 44 of the c.s.r.).

[9] See, together with the argument of M. WOJEWODA cited there: M. ZACHARIASIEWICZ, *Transkrypcja*, cit., pp. 148-149.

[10] M. ZACHARIASIEWICZ, *Transkrypcja*, cit., p. 149.

[11] Convention (No.16) on the issue of multilingual extracts from civil status records.

[12] 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. According to Art. 2(4) this Regulation does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State.

the entry of a supplementary note. The lack of transcription makes it necessary to rely only on foreign civil status records, the disclosure of which depends on the will of the party[13].

3. Obligatory transcription and consequences of failure to transcribe.

According to Art. 104(5) of the c.r.s. transcription is obligatory if a Polish citizen concerned by the foreign civil status document has a civil status record confirming previous events established on the territory of the Republic of Poland and requests the performance of civil status registration actions or applies for a Polish identity document or a PESEL number[14]. In these cases, a refusal to make a transcription of the birth certificate of a child whose parents are, according to the foreign birth certificate, persons of the same sex, has negative consequences for the child in the form of the impossibility or difficulty to carry out actions concerning the registration of civil status, obtaining a Polish identity document, assigning a PESEL number or issuing a passport. This results in a situation where a Polish citizen[15] cannot obtain documents confirming his/her Polish citizenship due to the lack of a Polish birth certificate, the reason for which lies in the fact that he/she has data concerning his/her parents which are not provided for in Polish law and which, according to the currently prevailing view (see the considerations *infra*, para. 4), constitute a basis for refusing the transcription. In turn, the lack of the mentioned documents or PESEL number translates into further inconvenience wherever it is necessary to prove the identity of the child. For example, we can mention the procedure of enrolling a child in the care institution (*kindergarten*, nursery) and school or travelling within the Schengen area requiring an identity card[16].

In the described situation there is in fact a collision of the child's interest in obtaining a Polish birth certificate with the aim to maintain the homogeneity and coherence of the Polish registration system. The lack of appropriate statutory solutions aimed at protecting the child's interest has been negatively assessed by some doctrine and judicature[17]. In fact, this phenomenon may be seen as a manifestation of discrimination against a certain category of children under Polish law, due to the life decisions taken by their parents (a homosexual couple). On the other side, among the supporters of sealing

[13] M. ZACHARIASIEWICZ, *Transkrypcja*, cit., p. 149.

[14] Universal Electronic System for Registration of the Population number (PESEL number) is the national identification number in Poland consisting of 11 digits and identifying solely one person.

[15] Polish citizenship is acquired in this case *ex lege* pursuant to Arts. 14-16 of the Act of 2 April 2009 on Polish Citizenship (Dz.U. 2012, position 161) in relation with Art. 34 ust 1 Konstytucji RP (Dz.U. 1997, nr 78, position 483).

[16] Voivodeship Administrative Court in Poznan, judgment of 5 April 2018, II SA/Po 1169/17, LEX no. 2478177.

[17] See, e.g. Supreme Administrative Court, judgment of 10 October 2018, II OSK 2552/16, LEX no. 2586953; M. ZACHARIASIEWICZ, *Transkrypcja*, cit., p. 152.

the Polish system of registration of civil status against the intrusion of structures unknown to the national law[18], arguments are raised pointing to alternative ways of protecting the interests of such children than transcription, among which the possibility of using a foreign civil status record in the Polish legal system is emphasised. The problem is, however, that the evidentiary value of a foreign birth certificate respected in Polish law (Art. 1138 of the Code of Civil Procedure) does not ensure sufficient protection to the child, making it difficult for him/her to participate in the legal system, and in some areas even depriving the possibility of realizing fundamental civil rights.

4. Refusal of transcription on grounds of public order.

In the light of current Polish regulations, and especially due to the lack of legal instruments in Polish law allowing the legalization of same-sex unions, the prevailing practice is to refuse to draw up a birth certificate of a child born of such a couple. This standpoint is predominant in judicature[19], only occasionally single dissenting opinions can be noted[20]. The position on the legitimacy of the refusal to transcribe the act also prevails in doctrine[21].

[18] See, e.g. B. CZECH, *Z rozważań nad orzecznictwem sądów dotyczącym Prawa o aktach stanu cywilnego. Wypowiedź na Konferencji 70 lat USC*, in *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, 2016, no. 2, pp. 67-69.

[19] See in particular Supreme Court (seven judges), resolution of 2 December 2019, II OPS 1/19, ONSAiWSA 2020/2/11; Supreme Administrative Court, judgments of 17 April 2019, II OSK 1330/17, LEX no. 2681568; 11 February 2020, II OSK 1330/17, LEX no. 3053191; Voivodship Administrative Court in Szczecin, judgment of 19 March 2020, II SA/Sz 1075/19, LEX no. 2956995; Supreme Administrative Court, judgment of 22 June 2021, II OSK 2608/19, LEX no. 3197834.

[20] Particulary the judgement of the Voivodeship Administrative Court in Poznan, judgment of 5 April 2018, cit.; Supreme Administrative Court, judgment of 10 October 2018, cit.

[21] I.a. M. WOJEWODA, *O przypadkach dokonanej transkrypcji aktów urodzenia dzieci jednopłciowych*, in *Problemy Prawa Prywatnego Międzynarodowego*, 2021, pp. 135-160; M. WOJEWODA, *Uznanie rozstrzygnięć organów państw obcych a przesłanki transkrypcji zagranicznych aktów stanu cywilnego*, in *Studia prawno-ekonomiczne*, 2018, p. 171 ff.; M. WOJEWODA, *Małżeństwa jednopłciowe i związki partnerskie w polskim rejestrze stanu cywilnego?*, in *Studia prawno-ekonomiczne*, 2017, pp. 146-147; J. GAJDA, *Transkrypcja zagranicznego aktu urodzenia dziecka, w którym jako rodzice zostały wpisane więcej niż dwie osoby*, in *Prawo i Więź*, summer 2020, no. 2, pp. 45-46; P. MOSTOWIK, *O żądaniu wpisu w polskim rejestrze stanu cywilnego zagranicznej fikcji prawnej pochodzenia dziecka od „rodziców jednopłciowych"*, in *Forum Prawnicze*, 2019, no. 3, pp. 24-27; P. MOSTOWIK, *Problem obywatelstwa dziecka prawdopodobnie pochodzącego od obywatela polskiego niebędącego mężem surrogate mother. Uwagi aprobujące wyroki NSA z 6 maja 2015 r. (II OSK 2372/13 I II OSK 2419/13)*, in *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2018, pp. 57-74; P. KASPRZYK, in P. KASPRZYK (ed.), *Podręcznik urzędnika stanu cywilnego, Obrót prawny z zagranicą w zakresie rejestracji stanu cywilnego*, Lublin, 2019, vol. 2, pp. 311-312. In contrast, however, that transcription should be allowed: G. HAJDUK, *Transkrypcja aktu urodzenia dziecka pary jednopłciowej*, in *Rocznik administracji publicznej*, 2021, no. 7, pp. 15-21; J. KARAKULSKI, *Problematyka dopuszczalności transkrypcji aktu urodzenia dziecka rodziców jednopłciowych – uwagi nakanwie najnowszego orzecznictwa Naczelnego Sądu Administracyjnego*, in *Przegląd Prawa Konstytucyjnego*, 2021, no. 2, pp. 387-391; G. KRAWIEC, *Transkrypcja zagranicznego aktu urodzenia dziecka osób tej samej płci pozostających w związku*, in *Studia Prawnicze. Rozprawy i Materiały*, 2019, no. 2, pp. 12-13; M. ZACHARIASIEWICZ, *Transkrypcja*, cit., pp. 157-168; M. ZACHARIASIEWICZ, *Nowa ustawa o prawie*

The legal basis for the refusal to transcribe a birth certificate of a child born of same-sex parents is the regulation of Art. 107(3) of the c.r.s. in relation with Art. 7 of the Act of 12 November 1965 – Private International Law[22]. The first of the abovementioned provisions sets out three grounds for the obligatory refusal to make a transcription by the head of the civil registry office, and the grounds for refusal with regard to the issues in question stem from point 3. In its light, such a necessity occurs in this case when the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland. The clause of compliance with the fundamental principles of public order is also expressed in Art. 7 of the Private International Law: it provides that foreign law shall not be applied if its application would have consequences contrary to the fundamental principles of the legal order of the Republic of Poland. The provision of Art. 7 of the Private International Law is used as a supplement to the regulation of the c.r.s., as it should be assumed that both regulations understand the phrase «fundamental principles of the public order of the Republic of Poland» in the same way. This conclusion results in particular from the function of both regulations.

The public order clause (German: *Vorbehaltsklausel*; French: *ordre public*) is a general clause[23]. It applies against foreign substantive law and not against conflict-of-law rules[24]. It should be pointed out that this construction should not be understood as an action against the legal norms of foreign law themselves, but against the legal effects of their application within the area where Polish law is in force. Since the transcription of foreign civil status records is based on trust in documents based on foreign legal norms[25], its refusal is justified by the impossibility of accepting such trust in every case. Consequently, the clause in question is a kind of fuse which protects the Polish legal order against the influence of constructions stemming from foreign law in a situation of their incompatibility with the Polish legal order and the principles stemming from it. It should be also explained that the compliance with Polish legal order should be understood in a broad way, as the compliance both with constitutional principles and principles governing particular fields of law, and especially civil, family, labour and procedural law[26]. In the case of the problem of the transcription of a foreign birth certificate stating same-sex parenthood, what is particularly highlighted is the incompatibility with the provisions of the Polish family law which precisely define the issues related to the child's origin, according to which the mother is the woman who gave birth to the child (Art. 61 of the

prywatnym międzynarodowym a małżeństwa i związki osób tej samej płci, in *Problemy Prawa Prywatnego Międzynarodowego*, 2012, no. 11, pp. 94-96.

[22] Dz.U. 1965, no. 46, position 290.

[23] See, e.g. E. PRZYŚLIWSKA, *Kolizyjna i procesowa klauzula porządku publicznego*, in *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, 2017, no. 1, p. 71.

[24] E. PRZYŚLIWSKA, *Kolizyjna*, cit., p. 71.

[25] J. GAJDA, *Klauzula porządku publicznego w prawie o aktach stanu cywilnego z 29 września 1986 r. oraz 28 listopada 2014 r.*, in *Administracja: Teoria. Dydaktyka. Praktyka*, 2015, no. 4, pp. 5-46, at p. 30.

[26] Compare with Supreme Court, judgement of 21 April 1978, IV CR 65/78, LEX no. 2280.

Act of 25 February 1964 – Family and Guardianship Code[27]) and the provisions concerning paternity always indicate a man in this role. Thus, the different sex of parents belongs to the essence of parenthood and it is also manifested on the grounds of other institutions, e.g. adoption, which can be carried out jointly only by persons of different sex. In addition, it is pointed out that the c.r.s. also uses the notions of father and mother in the sense accepted in Polish family law. In view of this, the birth certificate does not have a separate section for «parent», which would make it possible to include a parent of the same sex[28].

Analysing the function of the public order clause it is worth emphasising its guarantee character. Undoubtedly, it is an exceptional regulation which secures the Polish legal system in the case of contact with foreign regulations[29], guaranteeing the maintenance of coherence of legal solutions. The application of the indicated instrument allows for two types of actions. Firstly, it makes it possible to «impose» the application of Polish law. Secondly, it leads to exclusion of the application of regulations of foreign law due to the necessity of giving priority to the principles of Polish legal order[30]. Hence, refusal to apply foreign law is the primary function of the clause in question. It is the second of the indicated mechanisms that is applied with respect to the refusal to transcribe the birth certificate of a child of a same-sex couple.

In studies, doubts arise as to the scope of application of the clause in question, and in particular its application to certain legal institutions. Some authors assume that the legal construction in question is the ultimate means of resolving the most serious tensions occurring in a situation of interaction between different legal systems[31], as a result of which its application would be sporadic, exceptional. It is pointed out that the court must each time (*in concreto*) assess the legitimacy of invoking the public order clause, taking into account all circumstances of the case[32]. The perception was expressed, however, that in view of the collision of a foreign law institution with the fundamental principles of the legal order of the Republic of Poland the role of the clause in question cannot be overestimated. It has been pointed out, inter alia, that for the purposes of application of the public order clause, Art. 18 of the Constitution[33] and the resulting rule requiring that in Poland only a heterosexual union be treated as marriage should be taken into account[34].

[27] Dz.U. 1964, no. 9, position 59.

[28] Extensive argumentation on this point is contained in the judgement of the Voivodship Administrative Court in Gliwice, of 6 April 2016, II SA/Gl 1157/15, LEX nr 2035383.

[29] M. SOŚNIAK, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym*, Warsaw, 1961, p. 5 ff.

[30] M. ZACHARIASIEWICZ, *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori*, Warsaw, 2018, p. 1 ff.

[31] M. WOJEWODA, *Transkrypcja*, cit., p. 348 ff.

[32] *Ibidem*.

[33] The Constitution of the Republic of Poland of 2 April 1997; Dz.U. 1997, no. 78, position 483.

[34] In this way M. PAZDAN, *Nowa ustawa o prawie prywatnym międzynarodowym*, in *Państwo i Prawo*, 2011, no. 6, p. 28.

Similarly, it is argued that the public order clause expressed in Article 7 of the Private International Law is sufficient to block the possibility for persons who have not reached a certain age to marry and for the recognition of child marriages contracted in another country[35]. Consequently, it is assumed that basic institutions of family law, if differently shaped in foreign law, cannot be considered compatible with the Polish legal order and, applying the public order clause, should not have legal effect in Poland.

According to Art. 18 of the Constitution, marriage as a union between a man and a woman, family, maternity and parenthood remain under the protection and care of the Republic of Poland. It is worth noting, however, that the jurisprudence indicates that this provision does not prohibit nor prejudge the impossibility of legal regulation of same-sex unions, but emphasises the special protection of marriage as a union of a man and a woman. The fulfilment of this constitutional principle is provided by Polish statutory provisions. It follows that it is not so much a constitutional understanding of the institution of marriage, but rather a guarantee that the institution of marriage is subject to special protection and care by the state, but only on the assumption that it is a union between a man and a woman. The content of Art. 18 of the Constitution cannot constitute a self-imposed obstacle to the transcription of a foreign marriage certificate if the institution of marriage as a same-sex union was provided for in the domestic order. As indicated above, the provision of the Constitution in question does not prohibit the statutory regulation of same-sex unions. Nevertheless, the legislator has not chosen to provide such a regulation. Entering the applicants' marriage certificate in the Polish register of civil status would be incompatible with Art. (1)(1) of the Family and Guardianship Code[36].

5. Directions of protection of the interests of the child of a same-sex couple in the sphere of civil status registration. Postulates *de lege lata* and *de lege ferenda*.

The application of the public order clause as a basis for refusing the transcription of the civil status record of a child born of same-sex parents has important legal consequences that may threaten the interests of the child and infringe the principle of the protection of his or her welfare. It therefore appears that the practice currently adopted in Poland needs to be reviewed not only from the perspective of the public order clause, but more broadly, taking into account other principles of private law and family law, as well as in the light of the commitments made by the Polish State with respect to the protection of human rights. Such an extensive analysis makes it possible to indicate as the leading

[35] In this way E. KAMARAD, *Kolizyjnoprawne aspekty małżeństw dzieci*, in *Problemy Prawa Prywatnego Międzynarodowego*, 2019, pp. 77-107, at p. 106, available *online*.

[36] See, e.g. Supreme Administrative Court, judgment of 6 July 2022, II OSK 2376/19, LEX no. 3395450.

principle the protection of the child's welfare. It is expressed in Art. 72 of the Constitution, which emphasises that the Republic of Poland shall ensure the protection of the rights of the child and everyone has the right to demand from public authorities the protection of the child against violence, cruelty, exploitation and demoralisation. Further norms contained in Art. 72 of the Constitution provide for the child's right to care and assistance by public authorities in the event that he or she is deprived of parental care.

The principle of the welfare of the child has strong roots in international law. As early as in the Declaration on the Rights of the Child, adopted on 20 November 1959 by the General Assembly of the United Nations[37], it was indicated that «humanity owes the child the best it can give». This thought is continued in the Convention on the Rights of the Child adopted on 20 November 1989[38], which introduces in Art. 3 the so-called «best interests of the child» standard. Both the Constitution, as well as acts of a lower order, including in particular the Family and Guardianship Code, make it possible to reconstruct the principle of the good of the child[39]. At the same time, this principle is usually regarded as the most important one, which means that the good of the family and the interests of other persons must give way to the good of the child[40]. As a result, it should be assumed that the good of the child constitutes a kind of constitutional general clause, the reconstruction of which should be carried out by referring to the constitutional axiology and general system assumptions[41]. It is also stressed that the constitutional directive for the protection of the best interest of the child requires respecting it not only in the process of applying, but also in the process of lawmaking[42]. It should also be noted that the order to protect the good of the child constitutes the basic, overriding principle of the Polish system of family law, to which all regulations in the sphere of relations between parents and children, including legal mechanisms concerning filiation issues, are subordinated[43]. All this leads to the conclusion that it is now necessary to take *de lege lata* such a direction in interpreting the current norms which will ensure protection of the interest of children who are Polish citizens and who have a foreign birth certificate showing same-sex parenthood. It would be advisable to adopt a compromise solution and to reject a strictly formalistic approach sealing the Polish system of registering civil status in relation to legal relationships unknown to Polish law. This compromise may be achieved in several ways, and sample directions of solutions are presented below according to the criterion

[37] Available *online*.

[38] Available *online*.

[39] See more: M. BALWICKA-SZCZYRBA, *Konstytucyjne zasady prawa rodzinnego na tle rozważań o zasadach prawnych*, in A. GAJDA, K. GRAJEWSKI, A. RYTEL-WARZOCHA, P. UZIĘBŁO, M.M. WISZOWATY (eds.), *Konstytucjonalizm polski. Refleksje zokazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej profesora Andrzeja Szmyta*, Gdańsk-Sopot, 2020, p. 103 ff.

[40] In this way i.a. T. SOKOŁOWSKI, *Prawo rodzinne. Zarys wykładu*, Poznan, 2013, p. 13.

[41] Cf. Constitutional Tribunal, judgment of 28 April 2003, K 18/02, LEX no. 78052.

[42] L. GARLICKI, M. DERLATKA, in L. GARLICKI, M. ZUBIK (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw, 2016, pp. 780-788.

[43] See more M. BALWICKA-SZCZYRBA, *Konstytucyjne zasady*, cit., p. 103 ff.

of the degree of interference in the Polish system of registering civil status, starting with the least intrusive measures.

Firstly, following the current line of rulings by administrative courts[44], it may be stated that despite the inadmissibility of transcription of the birth certificate, it must be possible for a Polish citizen to obtain an identity document and a PESEL number, as a consequence of which there is an exemption from the obligatory transcription in the case under consideration[45]. The basis for applying for an identity document and a PESEL number would then have to be a foreign civil status record. It should be noted that this concept does not solve the existing problem, but only shifts it from the sphere of civil status registration, thus freed from facing the problem of transcription, to the sphere of population registration, where an analogous problem of admissibility of entering data unknown to Polish law will arise. It is also in conformity with the current line of case law of the Court of Justice of the EU, according to which in the case of a child, being a minor, 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: 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 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[46].

Secondly, acknowledging the obligatory and at the same time necessary transcription, one could propose that a foreign civil status record be transcribed only in the part admissible under Polish law, while the data inadmissible under the national system would be replaced by so-called «obscuring data», that is fictitious father's data entered into the birth record on the basis of Art. 61(2) of the Family and Guardianship Code. This concept, however, also has serious disadvantages: the fictitious father's data resulting from such a document could be misleading in legal transactions as to the child's real marital status; a contradiction between the content of the Polish birth certificate and the foreign certificate, which still retains evidentiary value, would also be undesirable.

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[44] See in particular Supreme Court (seven judges), resolution of 2 December 2019, cit.; Supreme Administrative Court, judgment of 17 April 2019, cit.; Supreme Administrative Court, judgment of 11 February 2020, cit.; Voivodship Administrative Court in Szczecin, judgment of 19 March 2020, II SA/Sz 1075/19; Supreme Administrative Court, judgment of 22 June 2021, cit.

[45] M. WOJEWODA, *Konstrukcje rodzinnopawne nieznane prawu polskiemu a krajowa rejestracja zdarzeń z zakresu stanu cywilnego*, in *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, 2020, no. 2, p. 86. A *de lege ferenda* proposal for the introduction of optional transcription in the case under consideration was put forward by P. MOSTOWIK, *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka od „rodziców jednopłciowych" na tle orzecznictwa sądów administracyjnych w 2018 r.*, Warsaw, 2019, pp. 37-38.

[46] See Court of Justice (Grand Chamber), judgment of 14 December 2021, case C-490/20, *V.M.A.* v *Stolichna obshtina, rayon "Pancharevo"*, EU:C:2021:1008; order of 24 June 2022, case C-2/21, *Rzecznik Praw Obywatelskich*, EU:C:2022:502.

Moreover, the obscuring data may, in Polish law, include only the father's data, not the mother's[47], which means that a fictitious man would be indicated in place of one of the women appearing on the foreign birth certificate as the «second parent»; however, this would not be possible if the foreign birth certificate indicates two men as the child's parents.

Thirdly, partial transcription of a foreign civil status record could consist in omitting inadmissible data during transcription and leaving these spaces blank. Such a birth record could fulfil its proper function in the market and the missing data could be demonstrated, if need be, by supplementary use of a foreign birth record.

Fourth and most far-reaching is the idea of a full transcription of the foreign birth certificate, which would reflect on the Polish birth certificate the content of the foreign certificate by including both single parents. Its weak point, however, would be to create in this way a proof which does not reflect the real marital status of the child, that one of the women entered on the certificate has the status of father, or that the man has the status of mother, since such a status is not provided for by the foreign birth certificate which, depending on the solutions adopted in the particular legal system, places one of these parents in an identical role (two mothers) or in the role of «the other parent»[48]. For this reason, this proposal must be rejected.

The review of possible solutions presented above together with the postulate of a child-friendly solution to the problem can, however, only be a temporary measure aimed at solving the problem until the introduction of optimal statutory solutions on this subject. A thorough amendment of the regulations in force concerning the admissibility of transcribing a foreign birth certificate of a child of a same-sex couple should specify in detail the scope of data entered in such a situation on the Polish civil status record and the status of these entries. Perhaps it would be appropriate in such a case to place data unknown to Polish law in a special field with an indication of the foreign legal system in which the data is recognised. This proposal is far-reaching and less invasive solutions could also prove effective, such as including the other unisex parent in the content of an additional note or a «note» created for this purpose and placed under the birth certificate. These data could then be included either in the content of a copy of the birth certificate, or only in the content of a separate certificate which would be issued together with the transcribed birth certificate and which does not contain legal figures unknown in Poland.

6. Conclusions.

[47] A child's descent from its father shall be considered as derived from its descent from its mother, in this way J. HABERKO, T. SOKOŁOWSKI, in H. DOLECKI, T. SOKOŁOWSKI (eds.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warsaw, 2013, p. 528.

[48] See factual situation in the judgement of the Voivodship Administrative Court in Gliwice, of 6 April 2016, cit.

The growing number of cases of requests for the transcription of a foreign birth certificate of a child indicating a same-sex couple as parents points to the growing number of persons who are Polish citizens and hold such a birth certificate, whose rights are not sufficiently protected under the current legal system. The conviction, currently dominant in practice, that transcription of such a birth certificate is inadmissible has been criticized in the doctrine and important arguments have been put forward, such as, among others, unequal treatment of Polish citizens. The far-reaching legal implications of the refusal of transcription in the child's legal sphere give rise to reflection on the need to ensure legal protection for the child at the level of Polish law.

On the one hand, it should be assumed that *de lege lata* positions refusing transcription of such an act find normative justification in view of the existing contradiction with a clause of the legal order in force in Poland. On the other hand, it would be advisable to consider and adopt a compromise solution, rejecting the strictly formalistic approach that seals the Polish system of registering civil status against family law relationships. This would not, however, mean the introduction into the Polish legal system of a new institution of same-sex parenthood, but only the recognition and confirmation that under a foreign civil status record a child has the status of a child descended from parents of the same sex. This compromise solution requires the principle of the good of the child, which is the fundamental principle of Polish family law, as well as Poland's obligations under international law, including the need to protect fundamental human rights.

The legal measures presented and structured in this paper which counteract the rigorous application of Art. 107(3) of the c.s.r. in the case of transcriptions of civil status records of children from same-sex unions constitute a proposal which requires further debate within the academic community, but they are a good starting point for the discussion on developing solutions to protect the interests of children from same-sex unions without excessive interference in traditional legal institutions shaped by Polish law, particularly marriage. Consequently, further academic discussion on this important practical issue is recommended.

ABSTRACT: In the Polish legal system marriage is a formal union of a man and a woman. Due to a different definition of marriage in some foreign legislations doubts arise as to the transcription of foreign civil status records in which spouses or same-sex parents are registered. Entry in the Polish register has far-reaching consequences, both public law and private law. Civil status records constitute the sole evidence of the events contained therein, and their incompatibility may be proven in court proceedings and sometimes by administrative action. Civil status records are intrinsically linked to personal and family law, and any refusal to transcribe them will have consequences in terms of the legal situation of the person concerned.

The study analyses the positions of jurisprudence and doctrine relating to the problem under examination. It was found that on the basis of applications for the transcription of birth certificates of children of same-sex parents, two disputable positions have developed in the jurisprudence. Public administration bodies and administrative courts generally refuse the transcription. However, 2018 marked a break in the previous line of rulings of the Supreme Administrative Court, which allowed for such a possibility. However, the reasoning raised in the justification of the court's decision attracted widespread criticism, which resulted in the lack of consolidation of this view.

The research carried out into the problem of the transcription of foreign civil status documents of children of same-sex parents under Polish law has shown that the Polish legal system is not adapted to the transcription of foreign civil status documents of children of same-sex parents.

In conclusion, it should be stated that in view of the noticeable conflict between the fundamental principles of the Polish legal system (including the public order clause) and the rights of the child (including personal rights), the lack of the possibility of making transcriptions of foreign civil status documents of children of same-sex parents unduly violates the principle of the welfare of the child. In particular, it results in a far-reaching diminution of the rights of the child, i.a. due to the impossibility of obtaining an identity card. This state of affairs requires urgent intervention either through a change in the direction of interpretation of the existing provisions of the Act on Civil Status Records, or through amendments to this Act.

KEYWORDS: Transcription; same-sex parents; child welfare; civil status records; hard case.

The circulation of the child's legal status in Italy: open issues

Matteo Caldironi*

CONTENTS: 1. Recognition of intentional parenting relationships: a transnational problem. – 2. The decision of the Constitutional Court of 9 March 2021, no. 33. – 3. The decision of the Constitutional Court of 9 March 2021, no. 32. – 4. The ordinance of the Supreme Court of 21 January 2022, no. 1842. – 5. The judgment of the Court of Justice of the European Union of 14 December 2021, case C-490/20. – 6. Some considerations.

1. Recognition of intentional parenting relationships: a transnational problem.

With the emergence of new techniques that allow conception in cases where it is impossible or extremely remote there are particularly differentiated approaches among the legal systems, even if we limit our analysis to those of the European Union. Italy is undoubtedly the example of a legislation[1] which is particularly diffident with respect to these techniques that are relegated to a mere «therapeutic» tool to «facilitate the solution of reproductive problems arising from human sterility and infertility»[2]. It is no coincidence that the legislature reserves access only to couples «of different sexes, married or cohabiting, of potentially fertile age, both living»[3]. This is also confirmed by the fact that from a subjective point of view these practices – and the issue is typically relevant in the specific case of heterologous fertilization[4] – have been deemed inadmissible for couples of homosexual women. This distinguishes the «physiological» infertility of the homosexual couple from the infertility (absolute and irreversible) of the heterosexual couple suffering from reproductive pathologies (in the same way as the «physiological» infertility of the single woman and the heterosexual couple in old age). Even according to the Constitutional Court «[t]here are clearly and ontologically distinct phenomena. The exclusion of female couples from ART is not, therefore, the source of any distortion and not even discrimination based on sexual orientation» but, as

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[1] Law of 19 February 2004, no. 40, Norme in materia di procreazione medicalmente assistita.

[2] Art. 1(1) of Law no. 40/2004.

[3] Art. 5 of Law no. 40/2004.

[4] The first one (heterologous fertilization) is a technique of artificial reproductive technology that consists in the implantation in the uterus of the biological mother – which coincides with the social one – of one or more embryos formed by gametes, in part or in whole, extraneous to the commissioning couple. In the first case we will have a partial heterologous fertilization as one of the two gametes (male or female) will belong to the couple while the other will come from a third donor alien to it. In the second case we will have a total heterologous fertilization as both gametes that form the embryo to be implanted in the uterus of the pregnant woman will come from donors outside the couple.

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mentioned, a choice to recognize the ART as a purely and exclusively therapeutic purpose. However, the case of surrogacy[5] is different: prohibited – and criminally sanctioned – by Art. 12(6) of Law no. 40/2004. In fact, in the declared intentions of the legislator of 2004 the use of procreation practices must respect conditions and modalities that ensure «the rights of all subjects involved, including the conceived». The Constitutional Judge is of the same opinion that, albeit in an *obiter dictum*, in the decision 18 December 2017, no. 272[6] has defined the practice of «uterus for rent», in its provision for gestation and the subsequent transfer by contract of the born to the commissioning couple, as an «intolerable» offense of the dignity of women that «undermines the depths of human relations». The aforementioned judgment no. 221/2019[7] recalls how this prohibition is considered by the case law expressive of a principle of public order. According to this interpretation, it is not permissible for a woman to undertake and carry a pregnancy to term on behalf of others: in fact, the need to guarantee and protect the dignity of women comes into play in this case, as will be clarified shortly.

The main problem, however, is represented by the lawfulness of this practice in other countries where heterosexual or homosexual couples often go to realize their dream of parenthood, with the result that often there have been questions about the recognition in Italy of administrative or jurisdictional measures that recognize the parenthood of the parent (only) of intention. This problem would directly affect the legal status of the child. As a matter of fact, in some legal systems the child would be guaranteed in their relations with both parents, while in others (as in the case of Italy), they would not have full recognition of their relationship with the intended parent due to the existence of limits preventing transcription. The minor would then see his/her status change with the change of the legislation that he would «meet» in the exercise of his/her right to free movement between the different States, guaranteed by EU law.

Recently, the issue has been the subject of two pronouncements of the Constitutional Court and an ordinance of the Court of Cassation which, among the various issues addressed, have deepened the various existing possibilities – but also suggested solutions that can be implemented in the near future – to stem these phenomena of the downgrading of the legal status of the child, which deserve to be analyzed in more detail.

2. The decision of the Constitutional Court of 9 March 2021, no. 33.

[5] Surrogacy refers to all those cases in which a woman carries out an artificially induced pregnancy on behalf of another woman, who, after the birth, will assume the legal (and of course social) role of mother, with a consequent separation between motherhood and gestation. The absolute prohibition of this practice is inserted, as anticipated, in an organic Law of 2004, which regulates and represses a whole series of conducts related to artificial procreation.

[6] Available *online*.

[7] Constitutional Court, decision of 23 October 2019, no. 221.

With ordinance of 29 April 2020, no. 8325, the first civil section of the Court of Cassation raised a question of constitutional legitimacy with reference to the rules on the recognition of the child born (abroad) through the procedure of «surrogacy»[8]. In particular, there were doubts as to the compatibility with Arts. 2, 3, 30, 31, 117(1) of the Constitution – the latter in relation to Art. 8 of the European Convention on Human Rights, to Arts. 2, 3, 7, 8, 9 and 18 of the Convention on the Rights of the Child[9], and Art. 24 of the Charter of Fundamental Rights of the European Union – of Art. 12(6) of Law no. 40/2004, of Art. 64(1)(g) of Law of 31 May 1995, no. 218 and Art. 18 of Presidential Decree of 3 November 2000, no. 396 insofar as they do not allow, according to the current interpretation of the «living law» (United Civil Sections, decision of 8 May 2019, no. 12193), «that it can be recognized and declared enforceable, for contrast with public order, the foreign judicial measure relating to the inclusion in the act of civil status of a child procreated with the methods of gestation for others (otherwise known as "surrogacy") of the so-called non-biological intended parent»[10].

The contrast with European legislation would be insuperable in light of the above-mentioned opinion of 10 April 2019, of the *Grande Chambre* of the European Court of Human Rights (the so-called *Mennesson* case), in which it recognized that in the case of recourse to surrogacy techniques abroad, the State of origin must recognize the filiation relationship in order to protect the best interests of the child, even if such technique is prohibited by national laws. As to the instrument that can be used, the Court reiterates that individual States enjoy wide margins of discretion – both the transcription of the certificate and adoption procedures by the non-biological parent are explicitly considered equivalent – but warns that adoption proceedings can be considered an instrument that respects Art. 8 of the Convention only if there is effective recognition of the filiation bond, and the procedure is rapid and does not expose the child to a prolonged situation of uncertainty.

[8] The case that gave rise to the judgment concerned a child born in Canada to a woman who had implanted an embryo formed with the gametes of an anonymous donor and a man of Italian citizenship married in Canada – by a deed later transcribed in Italy in the register of civil unions – to another man, also of Italian citizenship, with whom he had shared the parental project. At the time of the child's birth, the Canadian authorities had drawn up a birth certificate indicating only the first parent as the parent, while neither the so-called intended parent nor the surrogate mother who had given birth to the child (nor the egg donor) were mentioned. Subsequently, the Supreme Court of British Columbia ruled that both plaintiffs should be considered parents of the child and ordered the corresponding rectification of the birth certificate in Canada. The two men then asked the Italian registrar to rectify the child's birth certificate in Italy, based on the decision of the Supreme Court of British Columbia. Following the refusal of this request, they asked the Court of Appeal of Venice to recognize the Canadian measure in Italy pursuant to Art. 67 of Law no. 218/1995. In 2018 the Court of Appeal of Venice had accepted the appeal, recognizing the effectiveness of the measure in Italy. However, the *Avvocatura dello Stato* appealed to the Court of Cassation in the interest of the Ministry of the Interior and the Mayor of the municipality where the original birth certificate of the minor had been transcribed.

[9] The New York Convention of 20 November 1989, ratified and made executive by Law of 27 May 1991, no. 176.

[10] In the operative part of Court of Cassation, ordinance no. 8325/2020 (translation mine).

In substance, the questions of constitutionality which the Constitutional Court has been called to analyze concern the civil status of children born through the practice of surrogacy (prohibited in the Italian legal system by Art. 12(6) of Law no. 40/2004), and more specifically the possibility to transcribe the birth certificate of the child procreated through such a procedure in which not only the name of the biological parent (*i.e.* the parent who provided their own gametes) appears, but also the name of the so-called «social» parent (Art. 65 of Law no. 218/1995), who has shared the parental project although not participating biologically in procreation.

Therefore, the Constitutional Court is called to provide an answer to the question whether what has been established by the United Civil Sections in the exercise of their nomophilaptic function is compatible with the rights of the child enshrined in the constitutional and supranational rules invoked by the judge *a quo*.

The Court, at the beginning, in its decision no. 33/2021[11], recognizes that the prohibition of surrogate motherhood has been correctly qualified by the jurisprudence of legitimacy as a principle of public order[12] (and therefore hostile to the recognition of the foreign measure in the domestic system), as placed to protect fundamental values, including the human dignity of the pregnant woman. In fact, the practice of surrogacy «intolerably offends the dignity of women and deeply undermines human relations»[13]. In addition, surrogacy agreements entail a risk of exploitation of the vulnerability of women in socially and economically disadvantaged situations; situations that, if they exist, would heavily influence their decision to undertake the path of a pregnancy in the sole interest of third parties to whom the child must be delivered immediately after birth. In addition, it should be noted that these concerns have also been expressed by the European

[11] Decision of 9 March 2021, no. 33.

[12] On the limit of public order in relation to issues concerning filiation-parenting relationships see at least: C. TRIPODINA, *C'era una volta l'ordine pubblico. L'assottigliamento del concetto di "ordine pubblico internazionale" come varco per la realizzazione dell'"incoercibile diritto" di diventare genitori (ovvero, di microscopi e di telescopi)*, in S. NICCOLAI, E. OLIVITO (eds.), *Maternità filiazione genitorialità. I nodi della maternità surrogata in una prospettiva costituzionale*, Napoli, 2017, pp. 119-129; F. ANGELINI, *Il divieto di maternità surrogata a fini commerciali come limite di ordine pubblico e strumento di tutela della relazione materna: storia di un percorso giurisprudenziale irragionevolmente interrotto*, *ivi*, pp. 31-53; J. LONG, *Di madre non ce n'è una sola, ma di utero sì. Alcune riflessioni sul ruolo dell'ordine pubblico internazionale nelle fattispecie di surrogazione di maternità*, *ivi*, pp. 145-159; O. FERACI, *Ordine pubblico e riconoscimento in Italia dello "status" di figlio "nato da due madri" all'estero: considerazioni critiche sulla sentenza della Corte di Cassazione n. 19599/2016*, in *Rivista di diritto internazionale*, 2017, n. 1, pp. 169-181, spec. p. 171 ff.; S. TONOLO, *Ordine pubblico internazionale e atti di nascita stranieri in caso di gravidanza per altre*, in *www.articolo29.it*, 31 October 2018, available *online*; A. SASSI, S. STEFANELLI, *Ordine pubblico differenziato e diritto allo stato di figlio nella g.p.a.*, in *www.articolo29.it*, 21 September 2018, available *online*; F. ANGELINI, *L'ordine pubblico come strumento di compatibilità costituzionale o di legalità internazionale? Le S.U. della Corte di cassazione fanno punto sull'ordine pubblico internazionale e sul divieto di surrogazione di maternità. Riflessioni intorno alla sentenza n. 12193 del 2019 e non solo*, in *Rivista AIC*, 2020, no. 2, pp. 185-211, available *online*.

[13] Constitutional Court, decision no. 272/2017, cit. (4.2. *Considerato in diritto*) (translation mine).

Parliament, which has expressly condemned «any form of surrogacy for commercial purposes»[14].

While recognizing all this, the Court identifies the main focus of the issue in the interests of the child born through surrogacy in his/her relationship with the couple which has from the beginning shared the path that led to its conception and birth in the territory of a State where surrogacy is not contrary to the law; and who has then brought the child to Italy, to then take care of him/her on a daily basis. The principle emphasized by the Constitutional Judge is that in all decisions concerning minors falling within the competence of public authorities, primary importance must be given to safeguarding the «best interests» or «intérêt supérieur» of the child[15]. In fact, in decisions concerning the child, «the best solution "concretely" for the child's interest must always be sought, that is, the one that best guarantees, especially from the moral point of view, the best "care of the person"».

And there is no doubt that the interest of a child cared for since birth by a couple that has shared the decision to bring them into the world is to obtain legal recognition of the ties that already unite them to both members of the couple. Therefore, the child's interest in legal recognition of these ties is unquestionable, for all the purposes that are relevant to the child's life[16]; but also, and even more importantly, in order to be identified by law as a member of that family or nucleus of affection, made up of all the people who are actually part of it.

Precisely for these reasons, the well-established jurisprudence of the European Court of Human Rights affirms the need, on the basis of Art. 8 ECHR[17], that children born through surrogacy, even in States that prohibit the use of such practices, obtain legal

[14] Resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009 INI) (para. 82).

[15] Constitutional Court, decision no. 102/2020. On this subject see L. VINCENZO, L'*evoluzione gurisprudenziale del "best interests of the child" tra Corte costituzionale e Corte europea dei diritti dell'uomo,* in *I Diritti dell'uomo: cronache e battaglie*, 2014, no. 2, pp. 343-362.

[16] From caring for his health, to his schooling, to protecting his property interests and his own inheritance rights.

[17] Entitled «Right to Respect for Private and Family Life» and which states: «1. Everyone has the right to respect for his or her private and family life, home and correspondence. 2. There shall be no interference by a public authority with the exercise of such right unless such interference is provided for by law and constitutes a measure which, in a democratic society, is necessary for national security, public safety, the economic well-being of the country, the defense of order and the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others».

recognition of the *lien de filiation* with both[18] the members of the couple that wanted their birth and then actually took care of him/her[19].

However, according to the Constitutional Court, the interest of the child cannot be considered to automatically override any other counter-interest at stake[20].

Its «pre-eminence» indicates its importance, and its special «weight» in any balancing[21]; but also with respect to the interest of the child, it must be remembered that all «[t]he fundamental rights protected by the Constitution are in a relationship of mutual integration and it is therefore not possible to identify one of them that has the absolute prevalence over others»[22].

The interests of the child must then be balanced, in the light of the criterion of proportionality, with the legitimate purpose pursued by the system to discourage the use of surrogate motherhood, criminally sanctioned by the legislature. The United Civil Sections of the Court of Cassation are responsible for this purpose, when they deny the recognition of a foreign court order, in the part where it gives the status of parent to the member of the couple who participated in surrogate motherhood, without providing his/her gametes.

On the other hand, the Constitutional Court has acknowledged that the interests of the child can be balanced with the legitimate aim of discouraging recourse to surrogacy. It has also pointed out that the European Court of Human Rights itself does not impose the automatic recognition of any foreign judicial measures recognizing dual parenthood on the members of the couple who have resorted to surrogacy abroad. In such a case, however, it will be necessary to ensure the protection of the child's interests in the

[18] Constitutional Court, decision no. 33/2021, para. 5.4. *Considerato in diritto*: «Neither the interest of the child could be considered satisfied by the recognition of the relationship of filiation with only the "biological" parent, as happened in the case which gave rise to the judgment *a quo*, in which the original Canadian birth certificate, which designated as parent only P. F., had been transcribed in the Italian civil status registers. Where, in fact, the child lives and grows up within a nucleus composed of a couple of two persons who have not only shared and implemented the project of his conception, but have then continuously taken care of him, exercising in fact joint parental responsibility, it is clear that he will have a specific interest in the legal recognition of his relationship with both, and not only with the parent who has provided his gametes for the purpose of surrogacy» (translation mine).

[19] European Court of Human Rights, judgment of 26 June 2014, application no. 65192/11, *Mennesson* v *France*, para. 100; judgment of 16 July 2020, application no. 11288/18, *D.* v *France*, para. 64.

[20] The literature on the subject of «balancing the rights» is endless, but limiting our analysis to the case of medically assisted procreation see at least: S. FABIANELLI, F. MINNI, *Diritti e scienza medica: procreazione medicalmente assistita*, in A. MORRONE (ed.), *Il diritto costituzionale nella giurisprudenza*, Padova, 2020, pp. 200-214 which focus in detail on decisions nos. 151/2009, 162/2014, 96/2015, 221/2019; and even more specifically on the problem of the *status filiationis* in case of surrogacy see: A. CHIUSOLO, F. MINNI, *Maternità surrogata e* status filiationis: *quale bilanciamento tra interesse del minore e tutela dell'identità genetica?*, in A. MORRONE (ed.), *Il diritto costituzionale nella giurisprudenza,* cit., pp. 215-222 who examine Constitutional Court, decisions nos. 272/2017 and 237/2019.

[21] On this point see L. LENTI, *Note critiche in tema di interesse del minore*, in *Rivista di diritto civile*, 2016, no. 1, pp. 86-111, and E. LAMARQUE, *Prima i bambini. Il principio del* best interests of the child *nella prospettiva costituzionale*, Milano, 2016, p. 77 ff.

[22] Constitutional Court, judgment of 9 May 2013, no. 85 (translation mine).

recognition of his/her legal relationship also with the «intended» parent «through an effective and speedy adoption procedure, which recognizes the fullness of the filial bond between the adopter and the adoptee when the correspondence with the child's interests has been ascertained in concrete terms».

In this regard, the Court has pointed out that recourse to adoption in special cases[23], which has already been considered practicable by the Supreme Court, «constitutes a form of protection of the child's interests that is certainly significant, but still not fully adequate to the standard of constitutional and supranational principles»[24]. Adoption in special cases (so-called «non-legitimating adoption») does not, in fact, attribute parenthood to the adopter. Moreover, this form of adoption is still subject to the consent of the «biological» parent, which may also be lacking in the event of a relationship crisis. In conclusion, the legislator shall have to take charge of a discipline that ensures full protection of the child's interests, in a manner that is more in keeping with the peculiarities of the situation, which are quite different from those of «non-legitimating» adoption.

3. The decision of the Constitutional Court of 9 March 2021, no. 32.

It is precisely with decision no. 32/2021[25] that the Constitutional Court deepens its analysis of the institution of adoption in particular cases. According to the Padua's Tribunal, Arts. 8-9 of Law no. 40/2004 and 250 of the Civil Code do not allow the child born through heterologous fertilization, carried out by a same-sex couple[26], the attribution of the status of recognized child also by the intended mother, where there are no conditions to proceed to adoption in special cases even though the interest of the child has been judicially ascertained[27].

The interests of the child would be left unprotected by the lack of the consent of the biological-legal parent, which is an insuperable condition for adoption in special cases. Thus, there would be an unjustified disparity of treatment with respect to those born from heterosexual couples' (in deference to the conditions set forth in Law no. 40/2004, which permit their recognition), and with respect to those born from same-sex couples', who can have access to adoption in special cases by virtue of the biological mother's consent. According to the referring Court's view, in this case, the children born «would be destined forever to a status of children with only one parent, not recognizable by the other person who has intentionally contributed to the procreative project. They would find themselves in a legal situation inferior to that of all other children (including those born of incestuous

[23] Provided for by Art. 44(1)(d) of Law no. 184/1983.
[24] Constitutional Court, decision no. 33/2021, par. 5.8. *Considerato in diritto* (translation mine).
[25] Decision of 9 March 2021, no. 32.
[26] In the present case, two women.
[27] Therefore, in this case, the problem of the contrast between surrogacy and public order did not arise, nor the problem of balancing the rights of the child and the public need to contrast surrogacy.

relationships), for the sole reason of the sexual orientation of the persons who shared the choice to procreate through recourse to the above-mentioned techniques»[28].

In the present case, both mothers exercised parental functions jointly for a sufficiently long period of time to create a community of affection and care with their daughters. However, the biological mother's decision to sever such a bond with the intentional mother has also severed the bond between the latter and her daughters, making evident a gap in protection. In fact, even in the presence of an effective filial relationship, consolidated in the practice of daily life with the same intentional mother, no instrument can be used to enforce the rights of the children – such as maintenance, care, education, succession, but also the continuity and comfort of shared habits – with the intentional mother.

This issue reveals in a tangible manner the insufficiency of recourse to adoption in particular cases, which is «impracticable precisely in the most delicate situations for the well-being of the child, such as, undoubtedly, the crisis of the couple and the denial of consent by the biological/legal parent»[29]. So, it is clear that those born as a result of heterologous fertilization practiced by two women are in a worse condition than all other children, only because of the sexual orientation of the people who have put in place the procreative project, being destined to remain hinged in the relationship with a single parent[30].

The Constitutional Court, also in this case, considers an injury to the legal sphere of the child incompatible with the constitutional provisions. Nevertheless, it considers that it cannot intervene directly with a declaration of unconstitutionality, since no solution is imposed as constitutionally obligatory, but, on the contrary, there would seem to be a wide range of possible options, all compatible with the Constitution.

4. The ordinance of the Supreme Court of 21 January 2022, no. 1842.

With the interlocutory ordinance of 21 January 2022, no. 1842, the First Civil Section of the Court of Cassation has questioned the need for a new ruling of the United Civil Sections following the decision of the Constitutional Court, since the balance between the protection of the child and the limits of public order in the recognition of filiation relationships with the intentional parent with particular regard to surrogacy[31].

[28] Constitutional Court, decision no. 32/2021, para. 1. *Considerato in diritto* (translation mine).

[29] *Ivi*, para. 2.4.1.3. *Considerato in diritto* (translation mine).

[30] The same Court recognizes that a similar «*capitis deminutio* perpetual and irremediable», affects the right to formal recognition of their *status filiationis* in a manner substantially similar to what happened in the past for the children born from incestuous relationships (see on this point Constitutional Court, decision of 28 November 2002, no. 494).

[31] The United Civil Sections, decision of 8 May 2019, no. 12193.

In order to identify possible solutions adequate to respond to the lack of protection highlighted by the Constitutional Judge, the First Section begins its reasoning by focusing its analysis on the institutions of the deliberation of foreign judgments and the transcription of civil status documents. It points out that the deliberation, of course, does not transpose the surrogacy agreement into domestic law (nor does it legitimize this practice in Italy) but, rather, «the act of assumption of parental responsibility by the person who has decided to be involved, by giving his consent, in the decision of his partner to use the technique of medically assisted procreation in question»[32].

It is not a question of a claimed right to parenthood, but only of the minor's interest to see the recognition of that bundle of duties of both parents who have shared the procreative project. Only in this way would it be possible to give that essential continuity to the status of the child – and to the related rights – already recognized in the system where he/she was born, without questioning the illegality of the practice of surrogacy in our country.

The Court identifies, however, a critical issue of the existing instruments to achieve the recognition of filiation (*i.e.* transcription and deliberation): it is the (tendentially) automatic character that these instruments have gradually acquired «as a result of a greater internationalization of both economic and personal relationships and the increased mutuality of recognition that state systems are gradually increasing»[33], while a sensitive issue such as the one under consideration would require a «case by case» assessment. The assessment of compatibility with public order must therefore not be made in the abstract, but – albeit in the light of general criteria – with reference to individual concrete cases. This assessment must be guided by the criteria of reasonableness and proportionality between the constitutional values in potential conflict, without an *a priori* definition of the prevalence of one interest over the other (although «not disregarding the principle reiterated by the Constitutional Court of the pre-eminence of the interests of the child declined in the direction of the constant search for the best solution in practice to be preferred»[34]).

The most important of the values protected by the criminal prohibition of surrogacy identified by constitutional and legitimacy jurisprudence is essentially the dignity of the pregnant woman (followed by the preservation of the institution of adoption). In the first place, it is at least plausible that the woman who agrees to carry a pregnancy to term for others is in a condition of subjection and that her dignity is not impaired unless such a choice has been free, conscious, revocable until the birth of the child and independent of economic compensation. In case of lack of such guarantees in the country where the surrogacy takes place it is likely to assume that the dignity of the woman is not respected,

[32] Court of Cassation, Sec. I, ord. no. 1842/2022 (translation mine).
[33] *Ibidem* (translation mine).
[34] *Ibidem* (translation mine).

and therefore the protection of this value in our system prevents the deliberation and the transcription of the act of recognition of the filiation relationship with the intended parent. Of course, in a perspective of evaluation of the specifics of each case, it is important to always find a solution that respects the interests of the child. If, on the contrary, these conditions were present, an *a priori* denial of the recognition of the foreign measure certifying the *status filiationis* would seem illegitimate, since it is not necessary to protect the dignity of the pregnant woman already guaranteed by the foreign law.

In a nutshell, the First Section asks whether it is possible to entrust to the individual judge invested with the request for deliberation the assessment of the conflict between the interest in the recognition of parenthood and the limits of international public order. This assessment is based on the criteria of relevance, proportionality and reasonableness stated by the Constitutional Court in the search for the solution better protecting the interests of the child. More specifically, the question is whether the criteria of free and informed consent, not determined by the financial situation of the woman, the revocability of consent until the birth of the child, as well as the need for a genetic contribution to procreation by one of the two parents[35], can be considered valid guidelines for the decision of the judge in cases submitted to his examination.

But there is more: the Court of Cassation wonders whether «it derives also from the law of the European Union a limit to the possibility of not recognizing the *status filiationis* acquired abroad by a minor Italian citizen born from the gestation for others legally practiced in the State of birth insofar as such disallowance leads to the loss of the status and limits his freedom of movement and expression of his family ties in the territory of the Union»[36].

Also, in the perspective of the law of the European Union, the interest of the minor in the protection of his/her inviolable rights to personal identity and private and family life takes on greater importance with reference to the specific importance in the European Union law[37] of the preservation of personal statuses and freedom of movement and residence and the close correlation of these principles with the expression of family life as the Court of Justice of the European Union recently affirmed[38].

5. The judgment of the Court of Justice of the European Union of 14 December 2021, case C-490/20.

[35] To avoid possible circumvention of the institution of adoption.

[36] Court of Cassation, Sec. I, ord. no. 1842/2022 (translation mine).

[37] Art. 4(2) TEU; Arts. 20-21 TFEU; Arts. 7, 24 and 25 of the Charter of Fundamental Rights of the Union.

[38] Court of Justice (Grand Chamber), judgment of 14 December 2021, case C-490/20, *VMA* v *Stolichna obshtina, rayon Pancharevo*, EU:C:2021:1008.

In its judgment, delivered in Grand Chamber, the Court interpreted Art. 4(2) TEU, Arts. 20-21 TFEU, Arts. 7, 24 and 25 Charter of Fundamental Rights of the Union, as meaning that, in the case of a child EU citizen, whose birth certificate was issued by the competent authorities of the host Member State designates two persons as their parents, the Member State of their citizenship, is obliged: a) to issue them with an identity card or passport without requiring the prior issue of a birth certificate by its national authorities; b) to recognize, like any other Member State, the document issued by the host Member State allowing the child to exercise, with each parent, his/her right to move and reside freely within the territory of the Member States (thus going beyond the explicit recognition of the parental relationship with both parents)[39].

In order to reach that conclusion, the Court recalls first of all that, to enable nationals of the Member States to exercise their right to move and reside freely within the territory of the Member States, which is conferred on every citizen of the Union by Art. 21(1) TFEU, Directive 2004/38[40] requires the Member States, in accordance with their

[39] The case involved: V.M.A., a Bulgarian citizen, and K.D.K. have resided in Spain since 2015 and married in 2018. Their daughter, S.D.K.A., was born in 2019 in Spain. The birth certificate of the daughter, issued by the Spanish authorities, mentions the two mothers as her parents.

V.M.A. requested the Sofia City Hall to issue her a birth certificate for S.D.K.A., since such a certificate issued by the Bulgarian authorities was necessary in order to obtain a Bulgarian identity document. In support of her application, V.M.A. submitted a legalized and notarized translation into Bulgarian language of the extract from the Spanish civil status register concerning the birth certificate of S.D.K.A.

The Municipality of Sofia invited V.M.A. to provide evidence regarding the filiation of S.D.K.A., in relation to the identity of his biological mother. In fact, the model birth certificate in force in Bulgaria provides only one box for the «mother», and another for the «father», and only one name can appear in each of these boxes.

Since V.M.A. considered that she was not obliged to provide the requested information, the Sofia Municipality refused to issue the birth certificate in view of the lack of information regarding the identity of the biological mother of the child concerned and in view of the fact that the mentioning of two female parents in a birth certificate was contrary to Bulgarian public order, which does not authorize marriage between two persons of the same sex.

V.M.A. appealed against this rejection decision before the *Administrativen sad Sofia-grad* (Administrative Court of Sofia, Bulgaria), the referring court.

The latter asks whether the refusal by the Bulgarian authorities to register the birth of a Bulgarian national, which took place in another Member State and was attested by a birth certificate designating two mothers, issued in the latter Member State, infringes the rights conferred on that national by Arts. 20-21 TFEU and Arts. 7, 24 and 45 of the Charter of Fundamental Rights of the European Union. Indeed, such a refusal could make it more difficult to issue a Bulgarian identity document and, consequently, hinder the exercise by the child of his right to freedom of movement and thus the full enjoyment of his rights as a citizen of the Union.

This court has therefore decided to ask the Court about the interpretation of Art. 4(2) TEU, Arts. 20-21 TFEU and Arts. 7, 24 and 45 of the Charter. In essence, he asks whether those provisions require a Member State to issue a birth certificate, for the purpose of obtaining an identity document, for a child who is a national of that Member State, whose birth in another Member State is attested by a birth certificate drawn up by the authorities of that other Member State in accordance with its national law, and which designates, as the child's mother, a national of the first of those Member States and his wife, without specifying which of the two women gave birth to the child.

[40] Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC,

legislation, to issue to their nationals an identity card or passport indicating their nationality.

Therefore, since in the present case the child had Bulgarian citizenship, the Bulgarian authorities were obliged to issue her with a Bulgarian identity card or passport, indicating her surname as it results from the birth certificate issued by the Spanish authorities (where the ART took place), regardless of the issuance of a new birth certificate.

That document, alone or in combination with a document issued by the host Member State, must enable the minor to exercise his/her right to free movement with each parent (in this case, with each of their two mothers) whose parental status has been established by the host Member State during a stay in accordance with Directive 2004/38. The rights conferred on nationals of the Member States by Art. 21(1) TFEU include the right to lead a normal family life both in the host Member State and in the Member State of which they are nationals, on their return to that Member State, and to benefit from the presence there of their family members at their side. Since the Spanish authorities have legally established the existence of a filial relationship, biological or legal, between the minor and their two parents, as attested by the birth certificate issued for the minor, both of them, as parents of a Union citizen who is a minor and for whom they have actual custody, must therefore be recognized by all Member States, pursuant to Art. 21 TFEU and Directive 2004/38, as having the right to accompany the latter in the exercise of their rights.

It follows that Member States are obliged to recognize this filiation relationship in order to allow the child to exercise, together with each of their two parents, his/her right to free movement[41].

6. Some considerations.

What emerges is that the legal status of the child must necessarily have a minimum recognition in all Member States in order to grants the rights guaranteed by EU law. With reference to freedom of movement and residence, the child must have his/her parental relationship recognized with those who have already been recognized as parents by another Member State, regardless of the existence of national public order limits existing in each State. In fact, the Court has stated[42] that the concept of «public order», as a justification for a derogation from a fundamental freedom, must be understood in a

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.

[41] A national measure capable of hindering the exercise of the free movement of persons could only be justified if it complied with the fundamental rights enshrined in the Charter.

[42] Court of Justice (Grand Chamber), judgment of 5 June 2018, case C-673/16, *Coman and Others*, EU:C:2018:385, para. 44.

restrictive sense, and therefore its scope cannot be determined unilaterally by each Member State without the control of the institutions of the Union. As Advocate General Kokott also pointed out[43], this does not violate the national identity or threaten the public order of that Member State, since such an obligation (of recognition) does not require the Member State of which the child concerned is a national to provide in its national law for same-sex parenthood or to recognize, for purposes other than the exercise of the rights which that child derives from Union law, the filial relationship between that child and the persons indicated as their parents in the birth certificate issued by the authorities of the host Member State. Thus, it seems that relationships resulting from parental projects based not (only) on biological or genetic ties are to be considered existing and «valid», even if only for the purposes of EU law.

However, although this extension of protection can be seen as positive, it does not seem sufficient to affirm that, as of today, full and effective protection (*i.e.: homogeneous*) for minors is effectively guaranteed throughout the territory of the EU. In fact, there are still many areas outside the scope of direct application of EU law in which the phenomenon of *downgrading* is still present. This applies in particular to the whole area of family law, which has always been considered the exclusive competence of the individual Member States.

Perhaps the best tools to guarantee the legal status of those born through ART could be the classic tools of international law, namely the negotiation at the multilateral level of conventions that approximate the legislation of states on this matter[44].

It is worth noting, however, that on the level of European law seems to exist an instrument abstractly suitable to respond to this end, (albeit with the inevitable adjustments of the case): the «Regulation (EU) 2016/1191 promoting the free movement of citizens by simplifying the requirements for the presentation of certain public documents in the European Union». Through the regulation, one could in fact hypothesize the creation of a common European civil status framework, thus guaranteeing a legal status for all citizens, including children born from ART, with equal guarantees with respect to all parental relationships already recognized by (at least) one Member State[45]. In this way, there would be a potential positive impact not only on the freedom of movement of minors, but also on the enjoyment of their fundamental rights, responding to all those critical issues that still remain in the current legal framework. This could represent an appropriate opportunity to reinforce the principles and values of the European Union, especially on particularly sensitive issues that deserve a response that is as homogeneous as possible, at least within the European Union.

[43] Advocate General Kokott, opinion delivered on 15 April 2021, case C-490/20, paras. 150-151.

[44] Thus, see also Court of Cassation, Sec. I, ordinance no. 1842/2022.

[45] Of course, this remains only a preliminary suggestion, which of course cannot be developed and deepened here. But rather one that arose precisely from the discussion at the conference «*Identities on the move – Documents cross borders*» where this work was discussed.

ABSTRACT: The essay aims to deepen the theme of the circulation of the legal status of minors, with reference to those conceived using ART (artificial reproductive technologies). It will focus on the prejudice to the rights of minors and the downgrading of their status caused by the lack of homogeneous recognition of the phenomena of social parenthood in EU countries. The analysis will start with two pronouncements of the Italian Constitutional Court (nos. 32 and 33 of 2021) that have dealt with the recognition of the parental relationship with the intentional parents in two cases of ART carried out abroad, where the practices are prohibited in our country. The first case involved the practice of heterologous fertilization carried out by a female couple and the second involved surrogacy. Among the many issues addressed, it is particularly interesting that it was found impossible to recognize the foreign provision of the filiation relationship due to the existence of public order obstacles presented by the criminal prohibition of surrogacy in Italy. However, also due to the lack of other adequate instruments of recognition under domestic law, the Court finds a void of protection that, even if «intolerable», must be resolved by the national legislator. In other words, the Constitutional judge notes that the «best interest of the child» cannot be automatically prejudiced by the other interests at stake, but the most appropriate balance is left to the exercise of legislative discretion.

It will then be shown how an attempt has been made at a European level to respond to the same problems. In its recent judgment (14 December 2021) the Court of Justice ruled that Member States (MS) are required to recognize the filiation relationship with both parents (even if the parental relationship with the intended parent is not recognized by the MS) at least to allow the child to exercise, together with each of their two parents, their right to free movement. On the other hand, both parents must have a document authorizing them to travel with that child. Indeed, while it is true that the status of persons falls within the competence of the MS, they are free to provide or not, in their national law, for same-sex marriage and social parenthood. However, in exercising this competence, each Member State must respect Union law and the provisions of the Treaty relating to freedom of movement and residence for citizens of the Union, recognizing, to this end, the status of persons established in another Member State in accordance with the law of that State.

In conclusion, the paper will show how Regulation (EU) 2016/1191 can eventually hypothesize an alternative instrument such as common European civil status framework to recognize a «unique» legal status that thus best protects the best interest of the child in a broader context.

KEYWORDS: *Status filiationis*; best interest of the child; downgrading; Italian Constitutional case law; social parenthood.

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

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

1. Less bureaucracy for citizens: promoting free movement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final of 14 October 2009. As is well known, with Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession, instead of relying on the mutual recognition of national certificates of inheritance, the EU decided to create a completely new instrument by directly regulating its content and effects in all Member States, without the need for any recognition and acceptance procedure, without any grounds for refusal (including for public policy) and without the need for legalisation or an apostille (Art. 74). The introduction of uniform rules for identifying the authority competent to issue the certificate and the preparation of a standard form justify the legitimate expectations

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

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

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

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

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

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

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

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

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

[15] For example, Regulation (EC) 2201/2003, cit. (Art. 52); Regulation (EC) 4/2009, cit. (Art. 65); Regulation (EU) 650/2012, cit. (Art. 74); Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, recast (Art. 61) exempt from legalisation. In general, see J. FITCHEN, *The Private International Law of Authentic Instruments*, London, 2020. On the circulation of authentic instruments in succession matters, see D. DAMASCELLI, *La «circulation» au sein de l'espace judiciaire européen des actes authentiques en matière successorale*, in *Revue critique de droit international privé*, 2013, pp. 425-432; J. FITCHEN, «*Recognition*», *acceptance and enforcement of authentic instruments in the Succession Regulation*, in *Journal of Private International Law*, 2012, pp. 323-357; M. KOHLER, M. BUSCHBAUM, *La «reconnaissance» des actes authentiques prévue pour les successions transfrontalières*, in *Revue critique de droit international privé*, 2010, pp. 629-651.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[23] See fn. 15.

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

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

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

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

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

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

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

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

[28] Proposal, cit., para 3.2.

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

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

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

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

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

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

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

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

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

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

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

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

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

[34] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. A new EU functional personal identity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Possible future developments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Short introduction.

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

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[1] Establishing the European Coal and Steel Community.

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

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

[4] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

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

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

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

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

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

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

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

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

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

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

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

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

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[16] M. FONT I MAS, *La libera circolazione degli atti pubblici in materia civile: un passo avanti nello spazio giudiziario europeo*, in *Freedom, Security & Justice: European Legal Studies*, 2017, no. 1, pp. 104-126, available *online*.

[17] *Ibidem.*

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

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

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

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

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

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

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

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

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

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

3. Romania's perception of the Regulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[38] *Ivi*, par. 56.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[46] Available *online*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Conclusions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

La circolazione dello *status* dei minori attraverso le «frontiere» d'Europa: intersezioni tra diritto dell'Unione e diritto internazionale privato alla luce della sentenza *Pancharevo*

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SOMMARIO: 1. Introduzione. – 2. La libertà di circolazione nell'UE: un'identità costituzionale europea in materia di famiglia? – 2.1. L'approccio della sentenza *Pancharevo* alla libera circolazione della famiglia. – 3. Circolazione dello *status* del minore e diritto dell'Unione europea: la dimensione internazional-privatistica della sentenza *Pancharevo*. – 4. Genitorialità *same-sex* e atto di nascita dall'estero: è cambiato qualcosa dopo la sentenza *Pancharevo*? – 5. Come tutelare i nati da maternità surrogata … anche quando non saranno più minori?

1. Introduzione.

Il progressivo incremento della circolazione delle persone attraverso le frontiere intraeuropee comporta una serie di conseguenze con cui l'Unione deve fare certamente i conti. La risposta europea si colloca sul piano normativo, tanto nella prospettiva materiale quanto sul piano della cooperazione giudiziaria civile (ossia nel quadro delle disposizioni uniformi di diritto internazionale privato dell'UE che coordinano le situazioni e i procedimenti con implicazioni transfrontaliere), e anche sul piano delle *policy* europee.

Così, anche agli Stati membri, nelle materie di competenza concorrente o esclusiva, è richiesto di «gestire» l'ingresso delle persone nel proprio ordinamento e, con loro, delle rispettive situazioni personali e familiari. Di conseguenza, occorre che i professionisti (magistrati, avvocati, ufficiali dello stato civile, notai, ma non solo) che si imbattano in questo movimento transfrontaliero siano preparati a gestirne gli effetti nello Stato membro d'arrivo (o di transito).

Le persone fisiche, invero, circolano con un «bagaglio» che si compone anche dei rispettivi *status*; questi, a loro volta, viaggiano attraverso «veicoli» che possono assumere diverse sembianze (es. provvedimenti giurisdizionali o atti pubblici).

La Corte di giustizia dell'Unione, dal canto suo, è chiamata a fornire indicazioni interpretative uniformi circa il riflesso sovranazionale di «nuovi» procedimenti e, dunque

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dei rispettivi «prodotti» rilevanti ai fini della circolazione degli *status*, quali ad esempio la negoziazione assistita dinanzi all'ufficiale di stato civile (e il relativo accordo negoziato), sconosciuta a molti Stati membri[1].

In questo quadro si colloca il riconoscimento dello *status* di figlio nato da tecniche di fecondazione assistita ovvero da tecniche di procreazione che potrebbero essere non contemplate o addirittura vietate dallo Stato membro richiesto.

Con sentenza 14 dicembre 2021 (di seguito «*Pancharevo*»)[2], per la prima volta, la Corte di giustizia ha affrontato un caso relativo alla certificazione di nascita di una minore, cittadina dell'Unione, indicata – in Spagna – come figlia di due madri, che le autorità bulgare rifiutavano di identificare come tale. La sentenza ha chiarito, tra le altre, il significato delle disposizioni dei Trattati concernenti la cittadinanza dell'Unione e la libertà di circolazione (artt. 20 e 21 TFUE), nonché degli articoli della Carta dei diritti fondamentali dell'Unione europea che sanciscono il diritto al rispetto della vita privata e familiare e i diritti dei minori (artt. 7 e 24).

La domanda di interpretazione pregiudiziale, nella specie, era stata proposta nell'ambito di una controversia tra una cittadina bulgara e un distretto del Comune di Sofia, in merito al diniego di quest'ultimo di rilasciare un atto di nascita della figlia della donna e di sua moglie, cittadina britannica. Dal 2015 la coppia risiedeva in Spagna, dove, nel 2018, era nata la figlia: l'atto di nascita rilasciato dalle autorità spagnole menzionava entrambe le donne come madri.

Il giudice dinanzi a cui la donna impugnava la decisione del Comune di Sofia, ritenendo necessario trovare un equilibrio, da un lato, tra l'identità nazionale della Repubblica di Bulgaria e, dall'altro, gli interessi della minore, chiedeva alla Corte di giustizia se il rifiuto delle autorità bulgare di registrare la nascita di un cittadino bulgaro (cittadinanza acquisita *iure sanguinis*, come previsto dalla Costituzione bulgara), avvenuta in un altro Stato membro e attestata da un atto di nascita che indica due madri, rilasciato dalle autorità competenti di quest'ultimo Stato membro, violi i diritti conferiti a detta cittadina dagli artt. 20 e 21 TFUE, nonché dagli artt. 7, 24 e 45 della Carta. Nonostante tale rifiuto non avrebbe alcun impatto giuridico sulla cittadinanza bulgara della minore (e, dunque, sulla sua cittadinanza dell'Unione), le complicazioni nel rilascio di un documento d'identità bulgaro potrebbero ostacolarne l'esercizio del diritto alla libera circolazione e quindi il pieno godimento dei suoi diritti di cittadina europea.

Il giudice amministrativo chiedeva inoltre se l'obbligo eventualmente imposto alle autorità bulgare di menzionare in tale atto due madri come genitori pregiudichi l'ordine pubblico della Repubblica di Bulgaria, che non prevede il matrimonio tra persone dello stesso sesso. Infine, qualora la Corte giunga alla conclusione che il diritto dell'Unione

[1] V. ad es. conclusioni dell'Avv. gen. Collins, presentate del 5 maggio 2022, causa C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht* c. *TB.*, EU:C:2022:357.

[2] Corte di giustizia, sentenza del 14 dicembre 2021, causa C-490/20, *Pancharevo*, EU:C:2021:1008.

esige che entrambe le madri della minore in questione siano menzionate nell'atto di nascita emesso dalle autorità bulgare, il giudice del rinvio si chiedeva come debba essere attuato tale obbligo, non potendo egli sostituire il modello di atto di nascita figurante nei modelli di atti di stato civile in vigore a livello nazionale.

La decisione della Corte suscita riflessioni sul piano del diritto materiale dell'Unione, del diritto internazionale privato, nonché nella prospettiva dei professionisti che operano in prima linea, come gli ufficiali di stato civile. Il caso all'attenzione della Corte suscita nondimeno alcune considerazioni intorno al ruolo dei notai, che sia pure «a valle» del riconoscimento degli *status*, sono chiamati a dialogare con le situazioni familiari che si creino e da cui discendano situazioni giuridiche rilevanti.

2. La libertà di circolazione nell'UE: un'identità costituzionale europea in materia di famiglia?

Dal punto di vista del diritto materiale dell'Unione europea la sentenza *Pancharevo*, pur esaminando una fattispecie certamente nuova rispetto alle precedenti pronunce, si inserisce in un tracciato almeno in parte prevedibile della giurisprudenza UE in materia di cittadinanza europea in relazione alle conseguenze di quest'ultima sulla libera circolazione delle persone e sui loro rapporti personali e familiari. Infatti, gli orientamenti giurisprudenziali che si sono sviluppati in relazione all'interpretazione delle disposizioni del Trattato (oggi artt. 18-21 TFUE) risultano caratterizzati da sviluppi particolarmente fecondi proprio con riferimento alla posizione dei minori, poiché, fin dalla risalente sentenza *Chen*, la Corte di giustizia ha riconosciuto che i diritti propri dei cittadini europei ben potevano spettare anche a bambini in tenera età[3].

Ora, tale indirizzo della Corte di giustizia – a cui la sentenza *Pancharevo* contribuisce – può essere letto nel senso di condurre a tratteggiare, seppur non organicamente, un'identità costituzionale europea in materia familiare, la quale, peraltro, proprio perché collegata necessariamente all'esercizio di una libertà di circolazione attribuita ai soli cittadini europei, potrebbe non prestarsi a trovare analogo impiego nelle fattispecie in cui tale elemento non ricorra. In tale prospettiva possono individuarsi tre distinte tecniche utilizzate dalla giurisprudenza per muovere nella direzione indicata.

Sotto un primo profilo, si rende necessario garantire l'effettività dei diritti di circolazione e soggiorno nel territorio dell'Unione, di cui i minori beneficiano, a titolo autonomo, in ragione del possesso della cittadinanza europea. A tal fine è stata affermata la necessità di considerare quali restrizioni alle libertà di circolazione le disposizioni o prassi nazionali che siano idonee ad ostacolare concretamente l'esercizio di tali diritti da parte del minore, creandogli seri inconvenienti rispetto alle condizioni del soggiorno e della circolazione in Stati membri diversi da quello di cittadinanza, con particolare

[3] Corte di giustizia, sentenza del 19 ottobre 2004, causa C-200/02, *Chen*, EU:C:2004:639.

riferimento agli atti e ai documenti necessari, come accade in materia di cognome del minore medesimo[4]. D'altronde, proprio per superare tali rischi e sulla base dell'art. 21, par. 2, TFUE, il legislatore europeo ha adottato il regolamento (UE) 2016/1191[5], che mira a favorire la circolazione dei cittadini europei attraverso la semplificazione dei requisiti per la presentazione in uno Stato membro di documenti pubblici rilasciati in un altro Stato membro: il meccanismo di cooperazione amministrativa così istituito mira appunto ad evitare che i cittadini europei (compresi, naturalmente, i minori) incorrano in restrizioni alla libera circolazione per le difficoltà connesse alla presentazione dei documenti pubblici.

Siffatte restrizioni, secondo uno schema ormai consolidato nella giurisprudenza della Corte di giustizia, risultano accettabili solo a condizione che le relative disposizioni siano finalizzate a garantire esigenze imperative, siano necessarie e proporzionate allo scopo perseguito e non si pongano in contrasto con la tutela dei diritti fondamentali: proprio su quest'ultimo elemento la Corte tende a porre di recente una particolare enfasi, nel caso di minori, richiamandosi non solo all'art. 24 della Carta dei diritti fondamentali[6], ma anche alla Convenzione sui diritti dell'infanzia e dell'adolescenza, che deve ritenersi dalla prima richiamata[7]. In questa prima prospettiva, l'impatto delle libertà di circolazione e soggiorno riguarda la sfera giuridica del minore in quanto tale, senza che sia necessario prendere in considerazione i legami familiari dello stesso.

Peraltro, e sotto un secondo profilo, le garanzie che il diritto dell'Unione ricollega ai diritti di circolazione e soggiorno dei cittadini europei producono riflessi non soltanto sulla dimensione personale, ma anche sui rapporti familiari degli stessi. Infatti, come previsto dalla direttiva 2004/38/CE[8], la sfera dei soggetti legittimati a beneficiare di diritti di soggiorno e circolazione comprende anche, in via derivata dalla posizione del cittadino europeo, i soggetti che intrattengono un rapporto familiare con quest'ultimo: alcuni di tali rapporti sono oggetto di un'espressa definizione nell'art. 2, punto 2, della direttiva, mentre gli altri sono richiamati in via generale nell'art. 3, par. 2, che menziona «ogni altro familiare».

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[4] Da ultimo, Corte di giustizia, sentenza del 14 ottobre 2008, causa C-353/06, *Grunkin e Paul*, EU:C:2008:559.

[5] Regolamento (UE) 2016/1191 del Parlamento europeo e del Consiglio del 6 luglio 2016 che promuove la libera circolazione dei cittadini semplificando i requisiti per la presentazione di alcuni documenti pubblici nell'Unione europea e che modifica il regolamento (UE) n. 1024/2012.

[6] Su tale disposizione, v., in particolare, R. LAMONT, *Article 24: The Rights of the Child*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (edited by), *The EU Charter of Fundamental Rights. A Commentary*, Oxford-Portand, 2014, pp. 663-692.

[7] Sulla rilevanza di tale Convenzione, v., di recente, Corte di giustizia, sentenza dell'11 marzo 2021, causa C-112/20, *M.A.*, EU:C:2021:197, punto 37.

[8] Direttiva 2004/38/CE del Parlamento europeo e del Consiglio, del 29 aprile 2004, relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri, che modifica il regolamento (CEE) n. 1612/68 ed abroga le direttive 64/221/CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE e 93/96/CEE.

Questo quadro normativo determina una prima conseguenza nel senso che, salva l'esistenza di un espresso rinvio al contenuto della legislazione nazionale nelle norme della direttiva, le nozioni usate in queste ultime debbono essere intese quali nozioni autonome in coerenza con una tecnica interpretativa ampiamente usata dalla Corte di giustizia. D'altra parte, con specifico riferimento alla direttiva 2004/38[9], la Corte ha altresì chiarito la necessità di un'interpretazione delle relative disposizioni in senso estensivo, in quanto esse risultano funzionali all'attuazione della libera circolazione delle persone[10].

Pertanto, come già avvenuto nella sentenza *Coman*[11], attraverso l'interpretazione delle norme della direttiva si produce un effetto di armonizzazione degli istituti giuridici sottesi ai rapporti familiari dalla stessa presi in considerazione: così, in quel caso la Corte di giustizia ha ritenuto che dovesse procedersi a un'interpretazione autonoma della nozione di «coniuge» e che quest'ultima dovesse includere senza alcuna distinzione i coniugi appartenenti a coppie di sesso diverso o dello stesso sesso. Sebbene la Corte si sia preoccupata di delimitare tale equiparazione all'ambito di applicazione della direttiva 2004/38, è agevole comprendere che l'uso di nozioni uniformi di diritto di famiglia all'interno dell'Unione è destinata ad avere ripercussioni a raggio ben più ampio, anche per il fatto che, come già avvenuto in altri ambiti[12], le norme UE sulla libera circolazione conducono a veicolare i modelli normativi nazionali ritenuti più favorevoli agli interessi delle persone coinvolte[13].

Nell'ipotesi in cui ad essere titolare della cittadinanza europea sia un minore[14], dev'essere aggiunto un terzo ordine di considerazioni. Infatti, occorre tener conto che le disposizioni della direttiva possono risultare di per sé inidonee a conferire diritti ai genitori cittadini di Stati terzi (ai quali non si applicano, d'altronde, *ex se* le disposizioni del Trattato[15]), in quanto l'art. 3, par. 1, della direttiva può far sorgere diritti derivati solo a favore degli ascendenti che siano a carico del cittadino dell'Unione[16]. Al contrario, la

[9] Direttiva 2004/38/CE, cit.

[10] In generale, v. Corte di giustizia, sentenza del 10 luglio 2014, causa C-244/13, *Ogierakhi*, EU:C:2014:2068, punto 40, e Corte di giustizia del 16 gennaio 2014, causa C-423/12, *Reyes*, EU:C:2014:16, punto 23.

[11] Corte di giustizia, sentenza del 5 giugno 2018, causa C-673/16, *Coman*, EU:C:2018:385.

[12] V., ad esempio, in materia di diritto di stabilimento, Corte di giustizia, sentenza del 9 marzo 1999, causa C-212/97, *Centros*, EU:C:1999:126.

[13] Sul possibile ruolo del diritto dell'Unione rispetto alla circolazione dei modelli familiari, v. G. DE BAERE, K. GUTMAN, *The impact of the European Union and the European Court of Justice on European family law*, in J. SCHERPE (edited by), *European family law*, vol. I, Cheltenham, 2016, pp. 5-47.

[14] Per un approccio parzialmente diverso nell'ipotesi in cui il minore fosse il cittadino di uno Stato terzo, posto sotto tutela di due cittadini europei secondo il regime della *kafala*, Corte di giustizia, sentenza del 26 marzo 2019, causa C-129/18, *SM*, EU:C:2019:248.

[15] Con riferimento al principio di non discriminazione in base alla nazionalità, cfr. D. MARTIN, *Article 18 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (edited by), *The EU Treaties and the Charter of Fundamental Rights*, Oxford, 2019, pp. 413-423, specialmente p. 415.

[16] Corte di giustizia, sentenza del 10 ottobre 2013, causa C-86/12, *Alokpa*, EU:C:2013:645, punto 25.

situazione che normalmente si verifica nel caso dei minori cittadini dell'Unione e che rende inapplicabile la direttiva è che essi sono a carico dei genitori cittadini di Stati terzi.

In tale contesto la Corte di giustizia ha allora riconosciuto la necessità di attribuire un autonomo diritto di soggiorno nel territorio dell'Unione in favore del genitore, cittadino di uno Stato terzo, che abbia la custodia effettiva del minore[17] e si faccia carico del mantenimento dello stesso[18], al fine di evitare che il minore possa essere privato del contenuto essenziale dei diritti connessi alla cittadinanza, venendo costretto a lasciare il territorio dell'Unione in conseguenza della cessazione del soggiorno del genitore. Tale diritto del genitore – che la Corte di giustizia, almeno in astratto, mostra di voler confinare a «situazioni molto particolari» – non solo ha carattere derivato rispetto ai diritti del minore fondati sul Trattato, ma soprattutto è qualificato come destinato a garantire la realizzazione dell'interesse superiore del minore, da ritenersi preminente rispetto a ogni considerazione della posizione del genitore. Per questa ragione, questo diritto derivato può incontrare un limite in considerazioni di tipo pubblicistico (come la presenza di precedenti penali del genitore interessato[19] o il carattere irregolare del soggiorno dello stesso[20]) solo sulla base di una valutazione svolta caso per caso, che garantisca una ponderazione rispetto all'interesse superiore del minore.

Ma la stessa logica di esame casistico viene in sostanza applicata dalla giurisprudenza anche alla qualificazione e alla valutazione dei rapporti familiari dei minori, per i quali non si guarda necessariamente al solo aspetto formale (diversamente da quanto accade per il diritto derivato di un maggiore di età[21]). Infatti, la Corte di giustizia mostra di non attribuire rilevanza esclusiva o quantomeno preponderante all'esistenza di una decisione di affidamento esclusivo o condiviso del minore, ma piuttosto alla concreta dipendenza del minore da uno dei genitori, da valutare alla luce dell'insieme delle circostanze di ogni fattispecie[22].

Coerentemente, la Corte ha anche escluso che possa avere rilevanza decisiva l'esistenza di un legame di natura biologica tra il minore e il cittadino di uno Stato terzo che richiede il diritto al soggiorno, poiché questo non è da solo sufficiente[23], ma potrebbe

[17] Corte di giustizia, sentenze del 13 settembre 2016, causa C-165/14, *Rendón Marin*, EU:C:2016:675, punto 78, e del 30 giugno 2016, causa C-115/15, *NA*, EU:C:2016:487, punto 80.

[18] Corte di giustizia, sentenza dell'8 marzo 2011, causa C-34/09, *Ruiz Zambrano*, EU:C:2011:124, punto 43.

[19] Sentenza *Rendón Marin*, cit., punto 62; Corte di giustizia, sentenza del 13 settembre 2016, causa C-304/14, *CS*, EU:C:2016:674, punto 46.

[20] Sentenza *M.A.*, cit., punto 41.

[21] V., ad esempio, con riferimento al soggiorno del coniuge in caso di divorzio tenuto conto dell'espresso riferimento nell'art. 13 della direttiva, Corte di giustizia, sentenza del 16 luglio 2015, causa C-218/14, *Singh*, EU:C:2015:476.

[22] Corte di giustizia, sentenza del 10 maggio 2017, causa C-133/15, *Chavez-Vilchez*, EU:C:2017:354, punto 71.

[23] Corte di giustizia, sentenza dell'8 maggio 2018, causa C-82/16, *K.A.*, EU:C:2018:308, punto 75.

non risultare neppure necessario, come accade all'interno delle famiglie c.d. ricostituite[24]. In proposito, interpretando l'art. 7 della Carta dei diritti fondamentali alla luce della giurisprudenza della Corte europea dei diritti dell'uomo[25], la Corte di giustizia si richiama a una nozione ampia di «vita familiare», che tiene conto non solo dei legami giuridici del cittadino, ma anche di legami di fatto aventi carattere di stabilità[26], con la conseguenza che il fenomeno della libera circolazione appare sempre meno diretto a riguardare i singoli individui e sempre più idoneo a coinvolgere la famiglia nel suo complesso.

2.1. L'approccio della sentenza *Pancharevo* alla libera circolazione della famiglia.

Ora, dal punto di vista del diritto materiale del diritto dell'Unione europea, la sentenza *Pancharevo* si muove chiaramente nello stesso solco.

Anche qui, anzitutto, la premessa dell'intero ragionamento della Corte risiede nell'affermazione secondo cui la cittadinanza dell'Unione è destinata ad essere lo *status* fondamentale dei cittadini degli Stati membri. Peraltro, il caso di specie presenta una peculiarità rispetto a quelli precedentemente esaminati dalla Corte, poiché per la prima volta la sussistenza stessa dello *status* di cittadino europeo non poteva considerarsi incontestata, poiché dipendeva proprio dal riconoscimento del rapporto familiare (filiazione da maternità surrogata) che veniva in questione.

In proposito, la Corte è stata indotta a muovere il suo *iter* argomentativo dalla menzionata premessa per il fatto che l'ordinanza di rinvio aveva esplicitamente affermato la cittadinanza bulgara della minore: circostanza, questa, sulla quale la stessa Corte mostra tuttavia di nutrire dubbi[27], evidentemente in considerazione del fatto che, secondo il ben noto modello del *circulus inextricabilis*, la cittadinanza, ai sensi della legislazione bulgara, poteva dipendere solo dall'esistenza di un rapporto di filiazione. È pur vero che, in un diverso passaggio della sentenza[28], la Corte si riferisce espressamente all'obbligo di riconoscere un rapporto di filiazione legalmente accertato in altro Stato membro, ma tale obbligo viene in effetti circoscritto nella sua portata allo specifico fine di consentire l'applicazione delle norme UE sulla libera circolazione (e dunque potrebbe non avere rilevanza decisiva ai fini dell'attribuzione della cittadinanza nazionale).

Partendo da questa premessa, la sentenza *Pancharevo* mostra di dare seguito a tutte e tre le tecniche sopra esaminate con riguardo all'incidenza della cittadinanza europea e

[24] Corte di giustizia, sentenza del 6 dicembre 2012, cause riunite C-356/11 e C-357/11, *O. e S.*, EU:C:2012:776.

[25] V., ad esempio, sentenza *SM*, cit., punto 66.

[26] Tra le altre, Corte di giustizia, sentenza del 12 luglio 2018, causa C-89/17, *Banger*, EU:C:2018:570, punti 28-29.

[27] Cfr. sentenza *Pancharevo*, cit., punti 67, 68.

[28] Sentenza *Pancharevo*, cit., punto 49.

dei connessi diritti di circolazione e soggiorno sui rapporti familiari, così favorendo la ricostruzione di un'identità costituzionale europea in materia familiare.

Per un primo verso, la sentenza, ponendosi in linea di continuità con il caso *Grunkin e Paul*[29], si concentra sui possibili ostacoli alla libera circolazione derivanti dal provvedimento nazionale contestato nel caso di specie (mancato rilascio dell'atto di nascita necessario per l'emissione del documento di identità). Sotto tale profilo, la necessità del rilascio di un documento di identità, espressamente prevista dall'art. 4, par. 3, della direttiva e comprensibilmente funzionale all'esercizio della libera circolazione, appare ineludibile per il minore cittadino europeo: in proposito, è da ritenere che la Corte di giustizia abbia, sia pur solo implicitamente, considerato tale norma come dotata di effetti diretti, anche in virtù del suo collegamento con l'art. 21 TFUE, e che da ciò abbia fatto derivare la necessità di disapplicare le norme nazionali che imponevano il previo rilascio di un nuovo atto di nascita ai sensi della legislazione bulgara.

Ora, questa indicazione – che attiene alla dimensione individuale della libera circolazione – avrebbe potuto di per sé condurre a una risposta utile per il procedimento nazionale, poiché la titolarità della cittadinanza europea avrebbe imposto comunque il rilascio di un documento di identità per la minore, a prescindere da ogni considerazione relativa al rapporto di filiazione. Ciononostante, la Corte, in tal senso chiaramente sollecitata dal giudice del rinvio, ha ritenuto necessario prendere posizione anche sul riconoscimento di tale rapporto e, conseguentemente, sulla dimensione familiare della libera circolazione, probabilmente sul sottinteso presupposto che una delle madri è cittadina di uno Stato terzo (quale deve ormai considerarsi il Regno Unito) e che dunque per essa può configurarsi un diritto di circolazione e soggiorno nel territorio dell'Unione in via derivata da quello del minore (anche se tale indicazione rimane sullo sfondo, probabilmente perché in questo caso il diritto di soggiorno del genitore cittadino di Stato terzo non viene espressamente contestato, tanto che la Corte non ritiene necessario riferirsi alla necessità di non privare il minore del nucleo essenziale dei diritti afferenti alla cittadinanza europea).

In questa prospettiva la sentenza *Pancharevo* mostra di voler confermare, pur in un diverso contesto (nel quale viene messo in discussione proprio il rapporto intercorrente tra il minore cittadino e gli adulti che con esso intrattengono una vita familiare), gli argomenti già utilizzati nella precedente giurisprudenza. In particolare, la Corte non solo richiama il concetto di «custodia effettiva» e il principio dell'interesse superiore del minore, ma soprattutto si riferisce a una nozione di «vita familiare» che appare esplicitamente ispirata al concetto di famiglia *de facto* elaborato dalla Corte europea dei diritti dell'uomo[30]: ciò che, da un lato, incide sulla portata della libera circolazione

[29] Sentenza *Grunkin e Paul*, cit.

[30] V., tra le altre, Corte europea dei diritti dell'uomo, sentenza del 28 settembre 2007, ricorso n. 76240/01, *Wagner e J.M.W.L.* c. *Lussemburgo*, punto 117.

individuando in senso ampio i legami che possono far sorgere diritti in via derivata in favore dei familiari del minore cittadino dell'Unione, e, dall'altro, prefigura un concetto «europeo» di famiglia, svincolato dagli schemi normativi nazionali.

Ma nell'ultima parte della sentenza, laddove la Corte giunge ad esaminare l'ipotesi in cui la minore dovesse considerarsi priva della cittadinanza europea, si profila il ricorso all'ulteriore strumento impiegato nella giurisprudenza relativa all'art. 21 TFUE e alla direttiva 2004/38/CE, e precisamente la possibile armonizzazione di taluni istituti familiari menzionati nella direttiva. In proposito, la pronuncia indica espressamente che la nozione di «discendente» di cui all'art. 2, punto 2, della direttiva è idonea a contemplare anche l'ipotesi di un minore il cui atto di nascita rilasciato dalle autorità di uno Stato membro designi come genitori due persone dello stesso sesso, una delle quali sia cittadina dell'Unione: si tratta evidentemente di una nozione che, sempre entro l'ambito di applicazione della direttiva e per le finalità da questa stabilite, si sovrappone alle possibili diverse nozioni proprie degli ordinamenti nazionali, che debbono dunque flettersi nella misura in cui ciò si renda necessario garantire l'effettività dei diritti attribuiti ai cittadini europei dall'art. 21 TFUE.

3. Circolazione dello *status* del minore e diritto dell'Unione europea: la dimensione internazional-privatistica della sentenza *Pancharevo*.

Se osservata in una prospettiva giuridica ampia, di natura politico-costituzionale, la sentenza *Pancharevo* enuncia una soluzione indubbiamente significativa per il diritto dell'Unione Europea, segnando un apprezzabile avanzamento nella tutela sovranazionale dei diritti fondamentali rispetto agli Stati membri che presentano normative interne sfavorevoli alle persone dello stesso sesso e al riconoscimento delle loro relazioni familiari. Da questo punto di vista, la decisione riveste un'importanza fondamentale avendo offerto alla Corte di giustizia l'occasione di pronunciarsi, per la prima volta, sulla questione della circolazione nello spazio giudiziario europeo dello *status filiationis* di una persona di minore età, nata in uno Stato membro attraverso una tecnica procreativa non consentita nello Stato membro del riconoscimento e nel quadro di un progetto di genitorialità omoparentale parimenti non ammesso in tale Stato. In assenza di norme internazionali volte a regolare la circolazione di tali *status* familiari e a fronte della diversità delle risposte internazional-privatistiche offerte dai singoli ordinamenti nazionali al riguardo, la sentenza si colloca comunque nel solco dell'attivismo giuridico europeo proteso alla protezione delle famiglie LGBTIQ. Tale sforzo dovrebbe in particolare tradursi a breve nell'adozione di una proposta di regolamento volta a garantire il riconoscimento reciproco della genitorialità tra Stati membri, alla luce del principio

«chi è genitore in un Paese, è genitore in tutti i Paesi»[31]. L'esigenza di norme uniformi sul tema è del resto confermata dal crescente numero di contenziosi legati al mancato riconoscimento del rapporto genitoriale costituito all'estero in favore di persone dello stesso sesso sia a livello nazionale, dinanzi alle autorità giudiziarie degli Stati membri, sia a livello europeo, dinanzi alla Corte di giustizia[32] e soprattutto alla Corte europea dei diritti dell'uomo[33]. In generale, la sentenza segna un avanzamento, sia pure limitato, nella tutela delle famiglie omoparentali, in quegli Stati membri che, come la Bulgaria, sono caratterizzati da un assetto valoriale marcatamente ostile rispetto a situazioni familiari diverse da quella tradizionale. Per gli Stati membri, invece, come l'Italia, ove l'apertura del sistema internazional-privatistico nazionale, in contesti come quello del caso di specie, risulta già garantita dallo sviluppo giurisprudenziale interno, la sentenza *Pancharevo* risulta ininfluente, rimanendo assorbita dal riconoscimento «pieno» garantito dalle norme domestiche di diritto internazionale privato[34]. Nel caso di specie, pertanto, il diritto dell'Unione non potrà garantire alla minore interessata né in Bulgaria né negli altri Stati membri diversi da quello di nascita diritti ulteriori rispetto alla libertà di entrare e soggiornare liberamente con entrambe le madri nel territorio nazionale.

Tuttavia, se osservata attraverso una lente puramente internazional-privastica, la sentenza *Pancharevo* non appare né sorprendente né tantomeno dirompente per gli schemi funzionali e assiologici del diritto internazionale privato degli Stati membri.

Non è sorprendente perché, rispetto alla classica dinamica relazionale tra il diritto dell'Unione europea e il diritto internazionale privato nel settore del riconoscimento degli *status* familiari, essa offre una soluzione tutto sommato prevedibile, da ultimo preconizzata dalla sentenza *Coman*[35]. La pronuncia in esame si pone infatti in linea di continuità con la tendenza della Corte di giustizia tesa a ricavare dagli obblighi imposti dal diritto dell'Unione l'obbligo per gli Stati membri di garantire la continuità transnazionale delle situazioni legittimamente costituite in uno Stato membro al fine di assicurare l'effettività dei diritti di circolazione e soggiorno dei cittadini dell'Unione. Ciò

[31] L'adozione della proposta è prevista nel terzo trimestre del 2022. Al momento della redazione del presente contributo, la procedura è giunta al termine della fase preliminare della consultazione pubblica dei soggetti interessati. Tale iniziativa si colloca nel quadro della Strategia per l'uguaglianza delle persone LGBTIQ 2020-2025 (COM(2020) 698 final del 12 novembre 2020).

[32] Cfr. Corte di giustizia, ordinanza del 24 giugno 2022, causa C-2/21, *Rzecznik Praw Obywatelskich*, EU:C:2022:502.

[33] Sono numerosi i casi pendenti dinanzi alla Corte di Strasburgo per il mancato riconoscimento di certificati di nascita stranieri rilasciati in favore di minori nati all'estero tramite fecondazione eterologa da coppie femminili dello stesso sesso: Corte europea dei diritti dell'uomo, sentenza del 2 agosto 2016, ricorso n. 46808/16, *R.F. e altri* c. *Germania*; Corte europea dei diritti dell'uomo, sentenza del 3 gennaio 2019, ricorso n. 1928/19, *S.W. e altri* c. *Austria*; Corte europea dei diritti dell'uomo, sentenza del 16 giugno 2015, ricorso n. 30806/15, *A.D.-K. e altri* c. *Polonia*.

[34] Corte di cassazione (sez. civ. I), sentenza del 30 settembre 2016, n. 19599, nonché Corte di cassazione (sez. civ. I), sentenza del 15 giugno 2017, n. 14878 e più di recente Corte di cassazione (sez. civ. I), sentenza del 23 agosto 2021, n. 23319.

[35] Cfr. Sentenza *Coman*, cit., relativa al riconoscimento dello *status* di coniuge nell'ambito di una coppia dello stesso sesso.

avviene impedendo allo Stato membro richiesto di invocare le proprie norme interne, ivi comprese quelle di diritto internazionale privato, salvo nei casi in cui l'applicazione del diritto nazionale sia giustificata da ragioni imperative di interesse generale[36].

Nonostante l'apparente forzatura che la soluzione raggiunta dalla Corte di giustizia pare preconizzare, la sentenza in esame non segna neppure una rottura per il diritto internazionale privato degli Stati membri, atteso che essa non disinnesca gli ordinari dispositivi del diritto internazionale privato nazionale. Essa più semplicemente chiarisce quali effetti, sul piano esclusivo del diritto europeo, debbano prodursi in uno Stato membro allorché una domanda di riconoscimento di uno *status* familiare legittimamente costituito in un altro Stato membro sia negata in forza delle norme di diritto internazionale privato statali. La sentenza precisa in particolare che quando il rapporto parentale di specie incorporato in un documento di nascita sia stato rilasciato *legittimamente* dalle autorità di uno Stato membro, ossia conformemente alla normativa locale applicabile al rapporto, (1) e il rapporto concerna una situazione transfrontaliera ricadente nel campo di applicazione del diritto dell'Unione Europea (quali le norme sulla libera circolazione delle cittadini europei) (2), il diritto dell'Unione è destinato a prevalere sulle norme di diritto internazionale privato nazionali ma solo ai fini del diritto sovranazionale, favorendo così la continuità dello *status* parentale. Ciò non comporta dunque il superamento delle norme di diritto internazionale privato dello Stato membro del riconoscimento: si tratta pertanto di un primato parziale e chirurgico del diritto dell'Unione Europea che non si spinge fino a interferire con lo spazio ordinariamente rimesso al diritto internazionale privato nazionale, il quale a sua volta tende a essere, per sua natura, a essere materialmente orientato a preservare le scelte di politica legislativa sovrana dell'ordinamento di appartenenza. Infatti, in forza della sentenza *Pancharevo*, le autorità bulgare nel caso di specie sono soltanto obbligate a rilasciare un documento di identità utile alla circolazione e al soggiorno della minore, quale condizione imposta dalla direttiva sulla circolazione dei cittadini europei, senza contemporaneamente essere tenute a rilasciare a tale effetto un nuovo atto di nascita. In tal senso, l'interazione tra il diritto dell'Unione Europea e il diritto internazionale privato non si irrigidisce in un primato assoluto del primo sul secondo, essendo del resto preclusa un'indebita ingerenza del diritto dell'Unione nella competenza statale in materia e in generale nella definizione del suo assetto valoriale interno. Tale esito peraltro è in linea con i limiti enunciati dalla disciplina europea esistente in tema circolazione dei documenti pubblici stranieri. L'art. 2, par. 4, del regolamento (UE) 2016/1191 del 6 luglio 2016[37], infatti, volto a promuovere la libera circolazione dei cittadini semplificando i requisiti per la presentazione di alcuni

[36] Sentenza *Grunkin e Paul*, cit.; Corte di giustizia, sentenza dell' 8 giugno 2017, causa C-541/15, *Freitag*, EU:C:2017:432, e in precedenza Corte di giustizia, sentenza del 2 ottobre 2003, causa C-148/02, *Garcia Avello*, EU:C:2003:539, nonché sentenza *Coman*, cit.

[37] Regolamento (UE) 2016/1191 del 6 luglio 2016, cit.

documenti pubblici nell'Unione, tra cui gli atti di nascita, dispone che le sue norme rilevano solo sul piano del valore probatorio dei documenti interessati, senza disciplinare anche la questione del riconoscimento degli effetti giuridici relativi al contenuto degli stessi. Nel caso di specie, peraltro il regolamento viene meramente evocato nell'apertura delle conclusioni dell'avvocato generale Kokott[38] e non risulta essere stato applicato nel caso di specie: dal punto 17 delle conclusioni dell'avvocato generale si apprende infatti che, a fronte della domanda presentata dalla madre bulgara della minore la ricorrente aveva presentato «una traduzione in lingua bulgara, legalizzata e autenticata, dell'estratto del registro dello stato civile di Barcellona (Spagna), relativo al certificato di nascita del minore».

Il riconoscimento stabilito dalla sentenza *Pancharevo* non investe quindi il riconoscimento degli *effetti diversi dalla libertà di circolazione e soggiorno* del minore, i quali sono e restano connessi alla dimensione internazional-privatistica del riconoscimento dello *status*. Essi rimangono impermeabili a una tale incidenza, potendo essere mutati solo da sviluppi normativi o giurisprudenziali interni all'ordinamento nazionale in rilievo. La sentenza *Pancharevo* stabilisce quindi un ben più ridotto e modesto *riconoscimento funzionalmente orientato*, volto a garantire la piena applicazione del diritto dell'Unione in uno spazio ricadente nel suo campo di applicazione[39]: «tale obbligo [di riconoscere il rapporto di filiazione tra tale minore e ciascuna di queste due persone nell'ambito dell'esercizio, da parte del medesimo, dei suoi diritti a titolo dell'art. 21 TFUE e degli atti di diritto derivato ai medesimi connessi] non impone allo Stato membro […] di riconoscere, a fini diversi dall'esercizio dei diritti che a tale minore derivano dal diritto dell'Unione, il rapporto di filiazione tra tale minore e le persone indicate come genitori di quest'ultimo nell'atto di nascita emesso dalle autorità dello Stato membro ospitante»[40].

Un tale esito è raggiunto dalla Corte di giustizia sia attraverso la valorizzazione del principio del riconoscimento automatico per l'esercizio della libertà di circolazione e soggiorno dei cittadini dell'Unione sia attraverso la promozione dei diritti umani protetti dalla Carta dei diritti fondamentali dell'Unione Europea, i quali consentono alla Corte di neutralizzare gli ostacoli frapposti a tale circolazione dalla normativa dello Stato membro del riconoscimento[41]. Con riguardo al primo aspetto sopra enunciato, la decisione rigetta, sia pure implicitamente, l'idea che il principio del riconoscimento automatico (o dello Stato membro di origine) possa essere assimilato alle tecniche internazional-privatistiche di coordinamento tra gli ordinamenti giuridici degli Stati membri e conferma piuttosto la posizione espressa da una certa dottrina secondo cui il principio del riconoscimento

[38] Avvocato generale Kokott, conclusioni del 15 aprile 2021, causa C-490/20, *Pancharevo*, EU:C:2021:296, punto II, A, 1.

[39] Cfr. sentenza *Pancharevo*, punti 49, 52, 56 e 57.

[40] Cfr sentenza *Pancharevo*, punto 57; corsivo aggiunto.

[41] Cfr. sentenza *Pancharevo*, punti 58-65.

automatico, anche quando applicato alla circolazione intraeuropea degli *status* personali o familiari, opera come «eccezione» tesa a neutralizzare l'operatività delle norme di diritto internazionale privato dello Stato membro richiesto allorquando la loro applicazione condurrebbe a un esito incompatibile con la realizzazione delle libertà di circolazione garantite dal diritto dell'Unione Europea[42]. Tale lettura corrobora l'idea che la sentenza *Pancharevo* non possa essere letta come l'affermazione della c.d. *méthode de la reconnaissance* nell'ambito della circolazione intraeuropea dei documenti pubblici stranieri, *rectius* dei certificati di nascita[43]. In effetti la Corte di giustizia si limita ad assumere nel caso di specie la legittimità dello *status filiationis* creato in Spagna ai soli fini di giustificare la prevalenza del diritto dell'Unione[44] senza effettuare valutazioni di tipo internazional-privatistico sulla possibile rilevanza, per le norme di conflitto bulgare, della legittimità giuridica del rapporto di specie. Da un passaggio delle conclusioni dell'avvocato generale Kokott (punto 61) si evince che la legittima costituzione del rapporto di filiazione *de quo* discende dall'applicazione del diritto materiale spagnolo, che consente di stabilire la filiazione in favore della moglie della madre biologica di un/una minore nato/a in Spagna dalla suddetta coppia. Tale normativa risulta infatti essere la legge competente a disciplinare la fattispecie, in quanto designata dalle norme di diritto internazionale privato spagnole dettate in tema di filiazione, secondo le quali il rapporto di filiazione è regolato dalla legge del luogo di residenza abituale del minore.

Tuttavia, l'esito così ridimensionato e chiarito della decisione in esame lascia spazio a taluni spazi di incertezza applicativa con riguardo alla delimitazione del campo di applicazione del principio da essa enunciato. Si tratta cioè di capire a quali situazioni intraeuropee diverse da quelle poste all'origine del caso di specie (coinvolgente, come visto, una coppia *same-sex* femminile, con almeno una madre in possesso della cittadinanza dell'Unione, rispetto alla quale il figlio/la figlia nasca in uno Stato membro diverso da quello di origine di una madre ove sia stata praticata la fecondazione eterologa e ove sia successivamente nato il/la minore) possa essere applicata la soluzione del riconoscimento funzionalmente orientato sopra enunciata.

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[42] M. FALLON, J. MEEUSEN, *Private International Law in the European Union and the Exception of Mutual Recognition,* in *Yearbook of Private International Law*, 2002, pp. 37-66, spec. p. 50; nonché L. TOMASI, *La tutela degli* status *familiari nel diritto dell'Unione europea, tra mercato interno e spazio di libertà, sicurezza e giustizia*, Padova, 2007, pp. 104 e 245.

[43] Tale orientamento, com'è noto, stabilisce che lo *status* familiare o personale è produttivo di effetti giuridici nello Stato richiesto ogni volta che esso sia stato validamente creato all'estero conformemente alla legge ivi applicabile senza alcun riguardo alla legge designata dalle norme di conflitto dello Stato richiesto. Cfr. P. LAGARDE (sous la direction de), *La reconnaissance des situations en droit international privé*, Paris, 2013; P. MAYER, *Les méthodes de la reconnaissance en droit international privé*, in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, Paris, 2005, pp. 547-573; P. LAGARDE, *La méthode de la reconnaissance est-elle l'avenir du droit international privé?*, in *Recueil des cours*, vol. 371, 2014, p. 40.

[44] «È pacifico che, nel procedimento principale, le autorità spagnole hanno accertato legalmente l'esistenza di un rapporto di filiazione, biologica o giuridica, tra S.D.K.A. e i suoi due genitori, V.M.A. e K.D.K.»: cit. sentenza *Pancharevo*, punto 48; corsivo aggiunto.

La questione non pare affatto irrilevante alla luce della molteplicità di tecniche di procreazione assistita praticabili nei diversi ordinamenti giuridici nonché delle circostanze concrete relative all'assetto familiare di volta in volta in rilievo. Non vi è dubbio, al riguardo, che il principio enunciato dalla sentenza *Pancharevo* possa valere solo per fattispecie che abbiano rilevanza per il diritto dell'Unione, in quanto ricadenti nel suo campo di applicazione. Ciò che può verificarsi allorquando risultino pregiudicati o a rischio i diritti riconosciuti e tutelati dall'ordinamento giuridico dell'Unione, quali in particolare quelli concernenti la libertà di circolazione e soggiorno delle persone nel territorio europeo.

Appaiono a tale riguardo pacifiche due ipotesi. La prima ove i genitori dello stesso sesso abbiano una o più cittadinanze di Stati membri ma siano residenti in uno Stato membro diverso da quello di origine ove nasce il figlio/la figlia tramite il ricorso a *PMA* (fecondazione eterologa): è questo il caso oggetto della recente ordinanza della Corte di giustizia nel caso *Rzecznik Praw Obywatelskich*[45] che ha esteso il principio *Pancharevo* anche a una minore nata in Spagna tramite fecondazione eterologa da coppia femminile dello stesso sesso, formata da una cittadina irlandese e una cittadina polacca, regolarmente sposate in Irlanda. Nel caso di specie era stata richiesta alle autorità polacche la trascrizione del certificato di nascita della minore rilasciato dalle autorità spagnole. La trascrizione era stata tuttavia negata per contrarietà ai principi fondamentali dell'ordinamento polacco. La seconda ipotesi, certamente interessata dal principio del riconoscimento funzionalmente orientato, è poi la situazione in cui una coppia dello stesso sesso avente una cittadinanza comune di uno Stato membro sia residente in uno Stato membro diverso da quello di appartenenza ove altresì nasca il figlio/la figlia tramite PMA ivi praticata. Tale affermazione non implica tuttavia che tutte le situazioni familiari in cui venga in rilievo la cittadinanza europea ricadano automaticamente nel campo di applicazione del diritto europeo e possano quindi beneficiare dell'obbligo di riconoscimento enunciato dalla sentenza *Pancharevo*. Né può ritenersi immediato inferire dalla sentenza che il riconoscimento funzionalmente orientato possa essere invocato rispetto a minori nati all'estero da tecniche di procreazione medicalmente assistita diverse da quelle del caso di specie, quale in particolare la maternità surrogata, rispetto alla quale l'esigenza delle autorità dello Stato membro del riconoscimento di tutelare i valori identitari del proprio assetto ordinamentale (quale la dignità umana, anche talora costituzionalmente protetta) potrebbe essere elevata a legittima causa di restrizione delle libertà di circolazione stabilite dal diritto dell'Unione nella forma di ragione imperativa di interesse generale.

Basti pensare in proposito all'ipotesi in cui il minore sia nato in uno Stato membro tramite maternità surrogata da genitori dello stesso sesso (verosimilmente maschile), o da

[45] Corte di giustizia, ordinanza del 24 giugno 2022, causa C-2/21, *Rzecznik Praw Obywatelskich*, EU:C:2022:502.

coppia eterosessuale, aventi cittadinanza di un diverso Stato membro e la famiglia risieda nello Stato membro di nascita. Sebbene tale ipotesi sia difficilmente realizzabile a livello intraeuropeo, per il diffuso rigetto di tale pratica negli ordinamenti europei, pare improbabile che il principio *Pancharevo* possa contribuire al superamento del disvalore insito nella gestazione per altri, equiparando, nell'ottica della libertà di circolazione e soggiorno di un cittadino europeo quest'ultima tecnica alla fecondazione eterologa. A questo riguardo nella prospettiva dell'ordinamento giuridico italiano, sarà utile valutare l'orientamento che le Sezioni Unite della Cassazione civile intenderanno adottare rispetto al recente quesito posto con ordinanza interlocutoria della prima sezione civile della Suprema Corte 1842/2022 attinente alla manifesta inadeguatezza dell'attuale diritto vivente in materia di diniego di riconoscimento di *status* familiare nei confronti del genitore meramente intenzionale di un minore nato all'estero da maternità surrogata[46]. In particolare, occorrerà verificare se, al fine di superare la soluzione di un diniego aprioristico e generalizzato di riconoscimento del genitore intenzionale, potranno essere presi in considerazione, come suggerito dall'ordinanza interlocutoria, alcuni fattori concreti quali la valutazione della legislazione straniera e della condizione effettiva della madre surrogata, l'esigenza di un collegamento biologico con il nato nonché l'assenza di un comportamento fraudolento dei genitori intenzionali. In una prospettiva puramente europea, al contrario, si tratterebbe in alternativa di qualificare tale contrasto quale ostacolo alla libera circolazione delle persone provando che esso sia basato su considerazioni oggettive e sia proporzionato all'obiettivo legittimamente perseguito dalla normativa nazionale[47].

Quel che è certo è che le situazioni, ben più numerose, in cui una coppia residente in uno Stato membro e cittadina di tale Stato, per superare il divieto di maternità surrogata imposto dal proprio ordinamento, si rechi in uno Stato terzo per concludere, conformemente alla normativa locale, un accordo di maternità surrogata e, dopo la nascita del/della figlio/a in tale Stato, ritorni nello Stato membro di origine chiedendo il riconoscimento dello *status* parentale non potrà beneficiare del principio *Pancharevo*, trattandosi di situazione puramente interna, irrilevante come tale per il diritto dell'Unione.

Resta invece più controversa l'ipotesi in cui il certificato di nascita rilasciato dalle autorità di uno Stato terzo in favore del figlio di una coppia omoparentale (o eterosessuale), a seguito del ricorso alla maternità surrogata ivi praticata sia già stato riconosciuto nello Stato membro di origine di uno dei coniugi e se ne chieda il riconoscimento ai fini della circolazione e del soggiorno del minore con ciascun genitore nell'altro Stato membro di cittadinanza dei genitori. In tale ipotesi occorrerebbe infatti

[46] Corte di cassazione (sez. civ. I), ordinanza del 21 gennaio 2022, n. 1842.

[47] Cfr. sentenze *Grunkin e Paul*, cit., punto 29; Corte di giustizia, sentenza del 22 dicembre 2010, causa C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806, punto 81 e Corte di giustizia, sentenza del 12 maggio 2011, causa C-391/09, *Runevič-Vardyn*, EU:C:2011:291, punto 83.

verificare se l'accertamento compiuto dalle autorità dello Stato membro richiesto in sede di trascrizione del certificato di nascita straniero possa essere ritenuto equivalente all'accertamento, sempre di natura pubblica compiuto dalle autorità competenti dello Stato di nascita in sede di costituzione dello *status filiationis*.

4. Genitorialità *same-sex* e atto di nascita dall'estero: è cambiato qualcosa dopo la sentenza *Pancharevo*?

La massima della sentenza *Pancharevo* è contenuta nel dispositivo finale della sentenza stessa: «(…) nel caso di un minore, cittadino dell'Unione il cui atto di nascita rilasciato dalle autorità competenti dello Stato membro ospitante designi come suoi genitori due persone dello stesso sesso, lo Stato membro di cui tale minore è cittadino è tenuto, da un lato, a rilasciargli una carta d'identità o un passaporto, senza esigere la previa emissione di un atto di nascita da parte delle sue autorità nazionali e, dall'altro, a riconoscere, come ogni altro Stato membro, il documento promanante dallo Stato membro ospitante che consente a detto minore di esercitare, con ciascuna di tali due persone, il proprio diritto di circolare e di soggiornare liberamente nel territorio degli Stati membri».

Nonostante la grande rilevanza e risonanza che è stata data a questa sentenza, come è stato detto, resta tuttavia il dubbio dell'incidenza che possa avere sul riconoscimento nell'ordinamento italiano della filiazione da genitori dello stesso sesso, in particolare se possa comportare l'obbligo per l'ufficiale dello stato civile di procedere alla trascrizione dell'atto di nascita contenente l'indicazione della doppia genitorialità *same-sex*. In realtà, la sentenza si preoccupa di garantire il rilascio al minore della carta di identità o passaporto con l'indicazione dei genitori, così da consentire al minore di circolare e soggiornare liberamente negli Stati membri con i genitori indicati nel documento di identità valido per l'espatrio: tutto questo deve avvenire senza che sia necessaria la preventiva trascrizione dell'atto di nascita, in sostanza senza richiedere necessariamente che venga prima effettuato il riconoscimento della filiazione formatasi in altro Stato, tramite la trascrizione dell'atto di nascita. In tal senso, la decisione della Corte di giustizia non tocca né modifica le competenze dell'ufficiale dello stato civile nel momento in cui riceve un atto di nascita dall'estero contenente l'indicazione della genitorialità *same-sex*, in quanto non ne impone la trascrizione al fine di ottenere il riconoscimento del rapporto di filiazione già instauratosi in altro Stato, limitandosi a prevedere che il minore sia messo in condizione di circolare liberamente, tramite il rilascio del documento di identità o passaporto, accompagnato da quelli che sono indicati nell'atto di nascita come genitori, senza disporre altri obblighi allo Stato di cittadinanza del minore.

A ben vedere, la giurisprudenza interna è stata sicuramente più incisiva su tale specifica problematica, anche se non ancora decisiva fino in fondo, tanto che il tema è

ancora aperto. Si deve necessariamente ricordare la famosa sentenza delle Sezioni Unite dell'8 maggio 2019 n. 12193[48], destinata a porre un punto fermo nella definizione di ordine pubblico che viene ampliata in maniera importante. In sintesi, le Sezioni Unite «… ritengono che contrasti con l'ordine pubblico il riconoscimento del provvedimento giurisdizionale straniero con cui sia stato accertato il rapporto di filiazione tra un minore nato all'estero mediante il ricorso alla maternità surrogata ed il genitore d'intenzione munito della cittadinanza italiana», trovando esso «ostacolo nel divieto della surrogazione di maternità previsto dall'art. 12, comma 6, L. n. 40 del 2004, qualificabile come principio di ordine pubblico…». Tale situazione, il richiamo alla maternità surrogata, differenzia in maniera sostanziale la posizione delle coppie dello stesso sesso: quelle formate da donne, nelle quali la gravidanza viene portata avanti per la coppia stessa e non per altri, dovrebbe o potrebbe risultare conforme alle disposizioni del nostro ordinamento, almeno secondo l'indicazione che era contenuta nella sentenza della Cassazione, sez. civ. I, n. 19599 del 30 settembre 2016[49] che viene confermata anche dalle Sezioni Unite, mentre le coppie formate da uomini troverebbero ostacolo insormontabile nel fatto che con uno di essi non potrebbe sussistere alcun legame genetico con la donna che avesse portato avanti la gravidanza, risultando sussistente in questo caso quell'ipotesi di maternità surrogata che viene considerata contraria all'ordine pubblico.

In sostanza, anche nel caso della coppia dello stesso sesso maschile, non è in discussione il figlio genetico di uno dei genitori, quello che nell'atto di nascita viene indicato come padre, che ha fornito il seme per la fecondazione dell'ovulo, a prescindere dal fatto che la madre consenta o meno di essere nominata (e sicuramente non verrà nominata, per accordo con il padre): questa indicazione era stata già riconosciuta come conforme al nostro ordinamento ed il relativo atto di nascita era già stato trascritto, mentre oggetto del contendere era risultata l'indicazione del secondo padre che l'ordinamento straniero aveva riconosciuto come tale e che, proprio a seguito della decisione delle Sezioni Unite, non potrà essere riconosciuto, lasciando aperta solamente l'ipotesi dell'adozione di minore in casi particolari, ai sensi dell'art. 44 della legge 184/1983[50]. In sostanza, nell'atto di nascita formato all'estero, l'indicazione solamente del padre (o di un padre), a prescindere dall'esistenza o meno dell'altro genitore e dal sesso di tale altro genitore, non risulta in contrasto non solo con le norme inderogabili di ordine pubblico, ma in generale con il nostro ordinamento, tanto che si può procedere alla trascrizione, come solitamente avviene ed è avvenuto, ed al riconoscimento del rapporto di filiazione così formato. Tuttavia, anche il richiamo all'adozione di minore in casi particolari, prevista come possibilità per tutelare comunque il minore e garantire il mantenimento del legame giuridico formatosi all'estero, non sembra poter soddisfare quella coppia che si

[48] Corte di cassazione (SS. UU.), sentenza dell'8 maggio 2019, n. 12193.
[49] Corte di cassazione (sez. civ. I), sentenza 19599/2016, cit.
[50] Legge 4 maggio 1983, n. 184, Disciplina dell'adozione e dell'affidamento dei minori.

era rivolta all'estero per ottenere un figlio anche attraverso procedure di gestazione per altri, soprattutto tenendo presente che «Tale adozione è ben altra cosa rispetto alla dichiarazione di genitorialità che invece corrisponde perfettamente all'adozione «piena» (riservata nel nostro ordinamento alle coppie eterosessuali coniugate): si scioglie ogni legame con la famiglia di origine; il minore entra a tutti gli effetti in quella dei genitori come se fosse nato entro il loro matrimonio; l'adottato costituisce un rapporto legale con tutti gli altri membri della famiglia; l'adozione è irrevocabile; tutti elementi estranei all'adozione in casi particolari, assimilabile invece a quella di maggiorenni»[51].

Particolarmente rilevante l'intervento della Corte costituzionale con la sentenza n. 33 del 9 marzo 2021: esamina i dubbi di legittimità costituzionale sollevati dalla Corte di Cassazione, sez. civ. I, dell'insieme delle disposizioni che non consentono, secondo l'interpretazione attuale del diritto vivente, che possa essere riconosciuto il provvedimento giudiziario straniero relativo all'inserimento nell'atto di stato civile di un rapporto di filiazione conseguente a maternità surrogata. Tale decisione si conclude con l'esortazione al legislatore ad intervenire «Di fronte al ventaglio delle opzioni possibili, tutte compatibili con la Costituzione e tutte implicanti interventi su materie di grande complessità sistematica, questa Corte non può, allo stato, che arrestarsi, e cedere doverosamente il passo alla discrezionalità del legislatore, nella ormai indifferibile individuazione delle soluzioni in grado di porre rimedio all'attuale situazione di insufficiente tutela degli interessi del minore»[52].

Viene riconosciuta l'esistenza di un vuoto normativo, richiamato dalla Corte di Cassazione, sez. civ. I, nella richiamata ordinanza 21 gennaio 2022, n. 1842, con la quale sono stati rimessi gli atti al Primo Presidente per l'eventuale assegnazione alle Sezioni Unite, per un riesame della decisione della sentenza 12193/2019, fornendo il proprio contributo per una «rivalutazione degli strumenti normativi esistenti (delibazione e trascrizione) per verificare se in questa materia e per effetto del divieto penale della surrogazione di maternità sussista un insuperabile ostacolo alla loro utilizzazione derivante dalla natura di ordine pubblico del divieto penale», al fine di verificare la possibilità di superare quel vuoto normativo in via interpretativa, così da garantire adeguata tutela all'interesse superiore del minore. Dunque, dalla sentenza delle Sezioni Unite del maggio 2019, dove il superiore interesse del minore era stato in parte sacrificato alla contrarietà all'ordine pubblico derivante dalla maternità surrogata, si torna a dare prevalenza alla necessità di tutela del minore tanto che la Prima Sezione della Cassazione chiede alle Sezioni Unite di rivedere il concetto di ordine pubblico elaborato nella sentenza 12193/2019[53].

[51] M. DOGLIOTTI, *Le Sezioni Unite condannano i due padri e assolvono le due madri*, in *Famiglia e Diritto*, 2019, pp. 653-686.

[52] Corte costituzionale, sentenza del 9 marzo 2021, n. 33.

[53] Corte di cassazione (SS. UU.), sentenza 12193/2019, cit.

In realtà, la Corte di Cassazione, sez. civ. I, era già intervenuta con sentenza n. 23319 del 23 agosto 2021, con la quale aveva confermato la legittimità del riconoscimento del rapporto di filiazione formatosi all'estero, da genitori dello stesso sesso, a seguito della trascrizione del relativo atto di nascita a cura dell'ufficiale dello stato civile. La Corte, dopo avere affermato che «(…) può ritenersi che, al di fuori delle ipotesi in cui opera il divieto della surrogazione di maternità, l'insussistenza di un legame genetico o biologico con il minore nato all'estero non impedisca il riconoscimento del rapporto di filiazione con un cittadino italiano che abbia prestato il proprio consenso all'utilizzazione di tecniche di procreazione medicalmente assistita non consentite dal nostro ordinamento», aveva precisato che «In proposito, va ribadito che la nozione di ordine pubblico rilevante ai fini del riconoscimento dell'efficacia degli atti e dei provvedimenti stranieri è più ristretta di quella rilevante nell'ordinamento interno, corrispondente al complesso dei principi informatori dei singoli istituti, quali si desumono dalle norme imperative che li disciplinano: non può quindi ravvisarsi alcuna contraddizione tra il riconoscimento del rapporto di filiazione risultante dall'atto di nascita formato all'estero e l'esclusione di quello derivante dal riconoscimento effettuato in Italia, la cui efficacia dev'essere valutata alla stregua della disciplina vigente nel nostro ordinamento; è noto d'altronde che il riconoscimento dell'atto straniero non fa venir meno l'estraneità dello stesso all'ordinamento italiano, il quale si limita a consentire la produzione dei relativi effetti, così come previsti e regolati dall'ordinamento di provenienza, nei limiti in cui la relativa disciplina risulti compatibile con i principi di ordine pubblico internazionale (cfr. Corte di cassazione, sez. I civ., 22/04/2020, n. 8029)»[54].

Con riferimento alla trascrizione dell'atto di nascita formato all'estero, è rilevante la successiva decisione del Tribunale di Milano del 23 settembre 2021 relativa ad un rapporto di filiazione, creato negli Stati Uniti, tra genitori di sesso maschile e due gemelli: l'atto di nascita di ciascuno recava le generalità di entrambi gli uomini. La richiesta di trascrizione degli atti di nascita veniva respinta dall'ufficiale dello stato civile invocando la sentenza delle Sezioni Unite della Cassazione 12193/2019, in quanto la fattispecie in esame corrispondeva esattamente a quella affrontata dalle Sezioni Unite e, pertanto, veniva richiamata la contrarietà all'ordine pubblico riportata nella suddetta sentenza. In realtà, proprio in applicazione di quella sentenza, l'ufficiale dello stato civile avrebbe dovuto effettuare una trascrizione parziale, trascrivendo cioè l'atto di nascita, con le generalità complete del minore come riportate nell'atto, indicando il primo genitore ed omettendo le indicazioni del genitore d'intenzione, dandone comunicazione al medesimo: in tal modo, in ogni caso, il minore avrebbe avuto il proprio atto di nascita trascritto, la propria identità sarebbe stata rispettata, il genitore d'intenzione avrebbe avuto la possibilità di scegliere tra impugnare il rifiuto parziale e l'omissione dei propri dati come

[54] Corte di cassazione (sez. civ. I), sentenza 23319/201, cit.

genitore, con ricorso in Tribunale, ai sensi dell'art. 95 del d.P.R. 396/2000[55], oppure avviare una richiesta di adozione ai sensi dell'art. 44 della legge 184/1983[56], secondo la soluzione suggerita dalle Sezioni Unite. In ogni caso, la trascrizione parziale avrebbe fornito una tutela al minore, anche se non quella sperata dai genitori, consentendo la registrazione del minore non solamente tramite la trascrizione dell'atto di nascita, la anche attraverso la registrazione anagrafica, così da poter esercitare tutti i diritti conseguenti: la scelta dell'ufficiale dello stato civile di rifiutare la trascrizione dell'intero atto di nascita, impone necessariamente ai genitori a chiedere l'intervento del Tribunale per ottenere il riconoscimento della filiazione così come avvenuta all'estero.

Il Tribunale di Milano ricostruisce l'evoluzione giurisprudenziale della materia muovendo dalla sentenza delle Sezioni Unite del 2019 e ricorda che «la CEDU ha affermato il diritto del bambino nato a mezzo di maternità surrogata al rispetto della vita privata ai sensi dell'art. 8 della Convenzione, sicché l'ordinamento nazionale deve prevedere la possibilità di riconoscere una relazione genitore-figlio con il genitore [*la madre - NdR*] cd. Intenzionale»[57], ed afferma che tale principio deve trovare applicazione anche nel caso specifico dei due padri, in nome del superiore interesse del minore e del diritto a salvaguardare la relazioni con entrambi. Viene poi richiamata la sentenza 33/2021 della Corte costituzionale che ha ricordato che la soluzione alla richiesta di tutela del minore non può essere l'adozione *ex* art. 44 legge 184/1983, in quanto non risulta una misura adeguata ai principi costituzionali e sovranazionali applicabili al caso, sollecitando l'intervento del legislatore: il Tribunale di Milano ritiene di non poter attendere un intervento legislativo e che la tutela dei minori resti, in tal modo, sospesa a tempo indeterminato, affermando che le sentenze della Corte costituzionale 32/2021[58] e 33/2021[59], abbiano in realtà confutato la sentenza 12193/2019 delle Sezioni Unite, facendo emergere un vuoto normativo che, fino a quando non interverrà una specifica normativa, dovrà essere colmato dai giudici di merito, valutando la migliore soluzione a tutela dei minori «incolpevoli» nei confronti di coloro che hanno contribuito alla loro nascita. Il Tribunale, pertanto, ritiene che nel caso specifico, «sulla scorta dei rilievi sollevati dalla Corte Costituzionale nella sentenza n. 33/2021, una interpretazione costituzionalmente orientata dell'art. 8 l. n. 40/2004[60] possa consentire, in assenza dell'auspicato intervento del legislatore, la trascrizione dell'atto di nascita originario dei minori e nella loro integrità, con indicazione di entrambi i ricorrenti quali genitori, poiché nel caso di specie può essere escluso, sulla scorta della documentazione in atti che vi sia

[55] Decreto del Presidente Della Repubblica 3 novembre 2000, n. 396, Regolamento per la revisione e la semplificazione dell'ordinamento dello stato civile, a norma dell'articolo 2, comma 12, della legge 15 maggio 1997, n. 127.

[56] Legge 184/1983, cit.

[57] Tribunale di Milano (sez. civ. VIII), decreto del 23 settembre 2021.

[58] Corte costituzionale, sentenza del 9 marzo 2021, n. 32.

[59] Corte costituzionale, sentenza del 9 marzo 2021, n. 33.

[60] Legge 19 febbraio 2004, n. 40, norme in materia di procreazione medicalmente assistita.

stata una concreta lesione della dignità della gestante che possa prevalere sulla tutela dei diritti dei nati e deve essere invece tutelato l'interesse dei minori che dalla nascita sono inserito nel nucleo familiare dei ricorrenti a fruire del diritto pieno (allo stato non altrimenti assicurabile se non con la trascrizione dell'atto di nascita) di essere "mantenuti, istruiti, educati ed assistiti moralmente"», e conseguentemente, dopo aver riconosciuto illegittimo il rifiuto dell'ufficiale dello stato civile, ordina al medesimo di trascrivere gli atti di nascita dei minori con l'indicazione di entrambi i genitori. Si comprende facilmente come si tratti di una decisione fortemente innovativa che deroga il concetto di contrarietà all'ordine pubblico della specifica fattispecie definito nel 2019 dalle Sezioni Unite della Cassazione, interpretando in senso contrario a tale decisione quello che neanche la Corte costituzionale aveva dichiarato illegittimo.

In tale situazione certamente non semplice, come può operare l'ufficiale di stato civile? In proposito, desta perplessità l'affermazione contenuta nella decisione del Tribunale di Milano (ma non solo, si rinviene anche in altre sentenze sulla stessa tematica) che dichiara «illegittimo» il rifiuto dell'ufficiale di stato civile di trascrivere l'atto di nascita da genitori dello stesso sesso o di registrarne la nascita o il riconoscimento in Italia: si tratta di un'affermazione particolarmente grave, che può avere conseguenze rilevanti per l'ufficiale dello stato civile e denota soprattutto la scarsa conoscenza delle funzioni e del ruolo dell'ufficiale dello stato civile e, ancora di più, dei limiti normativi che incontra nello svolgimento della propria attività, che non possono certamente essere derogati. L'ufficiale di stato civile svolge una funzione amministrativa priva di discrezionalità, vincolata dalle norme di legge, e perfino dalle circolari ministeriali, come ricordano espressamente anche le Sezioni Unite nella sentenza 12193/2019 in un passo che richiameremo più avanti: deve solamente applicare le normative vigenti, registrare gli atti di stato civile secondo le formule appositamente emanate dal Ministero dell'Interno, seguire le istruzioni del Ministero diffuse con le circolari. Il compito dell'ufficiale dello stato civile non è quello di interpretare le norme vigenti, né di tenere conto delle diverse interpretazioni sostenute dagli avvocati di parte, né disapplicare specifiche disposizioni dando risalto al superiore interesse del minore, principio invocato anche dalle due recenti sentenze ma non al punto da dichiarare l'illegittimità costituzionale di norme che non lo rispettino adeguatamente. Non si può certamente pretendere che l'ufficiale di stato civile possa tenere un comportamento diverso da quello previsto dalle norme che lo riguardano, su una fattispecie nella quale dal 30 settembre 2016 ad oggi la giurisprudenza, a qualsiasi livello, ha sostenuto tesi diverse e contrastanti. Ovviamente, nulla vieta che il giudice possa liberamente decidere, invocando qualsiasi interpretazione costituzionalmente orientata, ma un conto è che lo faccia l'autorità giudiziaria, come rientra nelle proprie competenze, altra cosa è che si richieda di farlo all'ufficiale di stato civile, il quale si vede attribuito un rifiuto «illegittimo» solamente

per aver svolto il ruolo e le funzioni di sua spettanza, senza superare i limiti normativi che disciplinano il proprio operato.

In ogni caso, negli atti e documentazione proveniente dall'estero, l'ufficiale dello stato civile dovrà verificare che non sussista contrarietà all'ordine pubblico, come richiesto dall'art. 18 del d.P.R. 396/2000[61] e, poiché risulterà un rapporto di filiazione da genitori dello stesso sesso, dovrà verificare che tale contrasto con l'ordine pubblico non derivi da maternità surrogata, secondo la definizione di ordine pubblico data dalla Cassazione Sezioni Unite con la sentenza 12193/2019, cioè «costituita dal fatto che una donna presta il proprio corpo (ed eventualmente gli ovuli necessari al concepimento) al solo fine di aiutare un'altra persona o una coppia sterile a realizzare il proprio desiderio di avere un figlio, assumendo l'obbligo di provvedere alla gestazione ed al parto per conto della stessa, ed impegnandosi a consegnarle il nascituro»[62].

Occorre infine tenere conto del fatto che l'ufficiale dello stato civile è obbligato ad uniformarsi alle istruzioni che vengono impartite dal Ministero dell'interno (art. 9 d.P.R. 396/2000) il quale, pur non emanando alcuna circolare in proposito, tuttavia ha risposto a quesiti che sono stati presentati dagli uffici comunali, in maniera molto netta e chiara, sostenendo che in caso di trascrizione di atto di nascita dall'estero da genitori dello stesso sesso, l'ufficiale dello stato civile, esclusa ipotesi di maternità surrogata, potrà riportare solamente il genitore con il quale sussista legame genetico o biologico, omettendo i dati dell'altro genitore, cosiddetto d'intenzione, il quale potrà impugnare il rifiuto in tal senso dell'ufficiale dello stato civile con ricorso ai sensi dell'art. 95 del d.P.R. 396/2000, oppure agire per l'adozione di minori in casi particolari ai sensi dell'art. 44 del d.P.R. 396/2000. Tale posizione, espressa nelle risposte ai quesiti subito dopo la sentenza delle Sezioni Unite 12193/2019, è sempre rimasta tale, in quanto la posizione ministeriale, in assenza di normativa, non può risentire degli orientamenti diversi e spesso contrastanti della giurisprudenza: a conferma e difesa di tale indirizzo, il Ministero si è spesso costituito in giudizio tramite l'Avvocatura dello Stato, nelle controversie relative alla filiazione da genitori dello stesso sesso.

Risulta evidente quanto sia difficile la posizione degli ufficiali di stato civile, vincolati da un orientamento ministeriale che rispecchia la posizione delle Sezioni Unite, ed esposti alle richieste degli interessati, alle contestazioni degli avvocati di parte, alle decisioni contrastanti dell'autorità giudiziaria.

5. Come tutelare i nati da maternità surrogata … anche quando non saranno più minori?

[61] D.P.R. 396/2000, cit.

[62] Corte di cassazione (SS.UU.), sentenza 12193/2019, cit.

Nel panorama così dettagliato, relativo a questioni aperte e implicazioni derivanti dal riconoscimento nello Stato richiesto dello *status filiationis* creato all'estero, in cui si intrecciano considerazioni di diritto dell'UE, di diritto internazionale privato e nella prospettiva dell'esercizio delle funzioni dell'ufficiale di stato civile, può essere interessante riflettere intorno a questioni relative al «dopo» il riconoscimento. Nello specifico, si possono immaginare casi nei quali la qualità di figlio (e di genitore) potrà essere rivendicata da chi e per chi non è più minore, ma già adulto o anche defunto e l'azione che, in questo frangente, può esercitare il notaio.

L'esempio più immediato nell'attività del notaio è certo quello del caso di eredità: venendo a mancare il genitore «intenzionale», potrà il figlio, che abbia a lungo convissuto con lui in contesto familiare, ma non abbia ottenuto la trascrizione dell'atto di nascita, rivendicarne l'eredità? E potrebbe accadere anche il contrario, nel caso venisse a mancare il figlio, titolare di un proprio patrimonio, lasciando il genitore «intenzionale» in concorso con altri eventuali eredi. Le combinazioni possono essere numerosissime, coinvolgendo anche fratelli e sorelle e loro discendenti, senza escludere, in ipotesi, i genitori biologici.

Considerando di non poter fare applicazione in questi casi dei principi derivati dalla migliore protezione del minore, l'argomento destinato ad emergere e, come detto, già fatto oggetto di valutazione in relazione all'art. 8 CEDU, dovrà essere quello della valorizzazione della preesistente e protratta vita familiare.

Difficile immaginare che, di fronte ad una convivenza familiare duratura, derivante da un progetto genitoriale condiviso e rispettato, in ipotesi documentato con un atto di nascita rilasciato da uno Stato estero, ancorché non trascritto (o la cui trascrizione sia stata negata) in Italia, chi risulta come figlio possa venire escluso dall'eredità del genitore, ovvero – per altro verso – possa dirsi estraneo agli obblighi di assistenza previsti dalla nostra legge a carico dei figli e a favore dei genitori.

La stessa nostra Corte di cassazione, in un'ipotesi che presenta non poca somiglianza a quelle che si possono immaginare nella nostra materia, ha ritenuto che la differenza di età prevista dalla legge tra adottante e adottato, di cui all'art. 291 c.c., potesse essere derogata in un caso in cui tra gli interessati si era stabilita da tempo e fin dall'infanzia dell'adottanda una stabile relazione familiare (Cassazione 7667/2020)[63].

Più difficile, probabilmente, il caso nel quale la convivenza familiare sia venuta a cessare e non sussista più al momento della apertura della successione. L'ipotesi appare analoga a quella presa in considerazione dalla sentenza della Corte costituzionale 32/2021[64], caso nel quale la madre «intenzionale» chiedeva che le minori nate dalla sua partner in seguito al loro comune progetto genitoriale venissero riconosciute anche come figlie proprie, ancorché la convivenza tra le due donne fosse cessata. Sul punto il tribunale adito, ritenendo di non poter provvedere, attesa la giurisprudenza delle Sezioni unite sul

[63] Corte di cassazione (sez. civ. I), sentenza del 3 aprile 2020, n. 7667.
[64] Corte costituzionale, sentenza n. 32/2021, cit.

punto del limite costituito dall'ordine pubblico, ha rimesso alla Corte una serie di questioni di costituzionalità ritenute da questa tutte inammissibili, non restando alla Corte stessa – come già accennato – che di fare appello al legislatore per un pronto intervento nella materia.

Appello che non si può che condividere, urgente per far fronte ai numerosi casi di fronte ai quali nessun giudice ha potuto adeguatamente provvedere e indispensabile anche per affrontare i casi che sicuramente sorgeranno, e non solo nei confronti di minori.

ABSTRACT: The paper moves from the judgment issued by the Court of Justice of the European Union in the *Pancharevo* case to reflect on the repercussions, in the context of the intra-EU circulation of the status of children created abroad, on the level of substantive European Union Law, and of Private International Law, as well as in the practical perspective of those professionals, such as the registrar and notary, are closely engaged with the recognition of personal and family status, and its respective implications, in the requested Member State.

KEYWORDS: Children; status; cross-border movement of people; registrar; notary.

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

Marco Gerbaudo*

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

1. Introduction.

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

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

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[1] Treaty Establishing the European Economic Community 1957, Art. 48.

[2] Treaty Establishing the European Community (TEC) (Maastricht consolidated version) 1992, Art. 8b.

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

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

[5] Treaty on the Functioning of the European Union (TFEU) (Lisbon consolidated version) 2012, Art. 21; Charter of Fundamental Rights of the European Union 2000, Srt. 45; Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Citizens Directive). The only condition posed to Union citizens' freedom of movement is

exclusively by secondary law, inasmuch it cannot qualify as a constitutional freedom, but instead as a set of «mobility rights»[6].

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

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

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

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

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

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

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

[7] All the Regulations analysed below in the next paragraphs are all good examples on the inclusion of the AFSJ in the objectives listed in the Preambles.

[8] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (Public Documents Regulation) (*emphasis* added).

[9] Art. 2(3)(a) of Regulation 2016/1191.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] European Migration Network (EMN), Glossary, *Migration and Home Affairs (European Commission)*, available *online*.

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

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

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

3. Uniformisation of visas.

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

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

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

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

[23] For more information, see: European Commission, Migration and Home Affairs, Document security, available *online*.

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

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

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

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

[24] K. HAILBRONNER, D. THYM, *EU Immigration and Asylum Law: A Commentary*, Munich, 2016, pp. 272-273.

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

[26] Treaty on European Union (Maastricht text) 1992, Art. 100c(3).

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

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

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

[30] Art. 5 of Regulation 1683/95/EC.

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

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

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

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

[31] Regulation 1683/95/EC, recital.

[32] *Ibidem*.

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

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

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

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

[37] Such data are not stored physically on the visa sticker, but they are collected in the VIS upon the granting of a visa.

[38] Art. 3 of Regulation (EC) No 767/2008.

the puzzle of provisions enforcing the general securitisation approach adopted by the EU on migration management, a key element of the EU digitalised external borders[39].

4. Uniformisation of residence permits.

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

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

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

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

[39] G. GLOUFTSIOS, *Engineering Digitised Borders: Designing and Managing the Visa Information System*, Singapore, 2021.

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

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

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

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

[44] Recital 1 of Regulation 1030/2002.

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

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

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

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

[45] Art. 1 of Regulation 1030/2002.

[46] Short-stay visas are covered by the Visa Format Regulation, while long-stay visas are left under national competence.

[47] Recital 15 of Regulation 1030/2002.

[48] Ar. 8 of Regulation 1030/2002.

[49] The insertion of the photograph is also regulated by Art. 9 of Regulation 1030/2002.

[50] Recital 6 of Regulation 1030/2002.

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

[52] Art. 1(4) of Regulation 380/2008.

[53] Thessaloniki European Council 19 and 20 June 2003.

[54] See *supra*, para. 2.

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

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

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

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

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

[55] New Arts. 1(1) and 4a of Regulation 1030/2002.

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

[57] D. HOUDEAU, *Second Wave of Biometric ID-Documents in Europe*, cit.

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

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

public documents prescribed by the Public Documents Regulation. The uniformisation of visa and residence permit formats preceded any other form of regulation in the field of migration management, especially concerning intra-EU mobility rights. As such, all secondary legislation on legal migration is tributary to this first legal exercise. The journey leading to the adoption of Regulation 2016/1991 is rather different.

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

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

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

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

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

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

[61] Art. 2(1) of Regulation 2016/1191.

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

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

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

[62] The Visa Format Regulation references the internal market, as the AFSJ had yet to be introduced.

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

[64] Art. 21 TFEU (Lisbon consolidated version).

[65] Art. 2 of Regulation 2016/1191. *Emphasis* added.

[66] Recitals 30 and 33 and Arts. 23(2) and 26 Regulation 2016/1191.

[67] Chapter IV («Requests for information and administrative cooperation») of Regulation 2016/1191.

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

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

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

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

[68] Art. 14 of Regulation 2016/1191.

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

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

[71] Art. 79(5) TFEU (Lisbon consolidated version).

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

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

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

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

[73] 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.

[74] Art. 2 of Regulation 2016/1191.

[75] Recital 5 of Regulation 2016/1191.

[76] Chapter III of Regulation 2016/1191.

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

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

6. Conclusions.

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

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

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

[77] Art. 6(2) of Regulation 2016/1191.

[78] S. SCHLAUß, *The EU Regulation on Public Documents*, in *ERA Forum*, 2020, pp. 117-128.

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

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

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

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

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

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

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

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

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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?

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[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.

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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».

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[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.

Right to identity and undocumented migrants

Fabienne Jault-Seseke*

CONTENTS: 1. Introduction. – 2. Context. – 2.1. Current situation. – 2.2. Reasons for the phenomenon. – 2.3. Loss or destruction of the documents in migration cases. – 3. Ways to prevent the lack of documents. – 3.1. Compulsory birth registration. – 3.2. Limiting the risk of fraud by improving civil status services. – 3.2.1. Making civil status services compulsory and facilitating their operation. – 3.2.2. Development aid. – 3.2.3. The use of digital tools. – 3.2.4. Biometric identity. – 4. Compensation for the lack of documents. – 4.1. The case of unaccompanied minors. – 4.2. The case of refugees need for new civil status documents. – 4.2.1. The UNHCR's profile global registration system. – 4.2.2. The reconstitution of civil status documents. – 5. Final remarks.

1. Introduction.

By focusing on the circulation of public documents, one is likely to forget that the individual often has no documents. Whatever the cause, the situation of people without documents needs to be addressed.

Firstly, it is necessary to clarify what is meant by the term «undocumented» in this report. The term is polysemous. Often it refers to people who are staying illegally on the territory of the host country, i.e. without a residence permit. This is not the meaning that will be used here. We focus on issues of civil status and therefore, by «undocumented» migrants, we mean people who are without valid civil status documents or (it could be discussed) without identity documents.

The causes of this mere situation are various: lack of birth registration, lack of recognition, loss of documents during the migration process, individual's desire to erase his or her traces.

This situation is not in line with the fundamental right to a legal identity, as enshrined in Art. 6 of the Universal Declaration on Human Rights[1] and Art. 16 of the International Covenant on Civil and Political Rights[2]. In accordance with these texts, «being documented» is a prerequisite for exercising all other rights. Therefore, the lack of documentation must be fought to enable everyone to be recognised as a person before the law. In this way, the UN's Sustainable Development Goals for 2030 include «ensuring

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[1] According to this provision of the Universal Declaration of Human Rights of 10 December 1948, «[e]veryone has the right to recognition everywhere as a person before the law».

[2] According to this provision of the International Covenant on Civil and Political Rights of 16 December 1966, «[e]veryone shall have the right to recognition everywhere as a person before the law».

legal identity for all, including through birth registration»[3]. A number of texts translates this objective. Consideration must always be given to limiting the number of undocumented persons. Not having documents poses specific difficulties when dealing with the situation of migrants. For example, the Global Compact on Refugees (para. 82) sees civil and birth registration as a major tool for protection[4].

Significant efforts have already been made at various levels. There should be continued. Moreover, whatever the cause of lack of documents, the possibility of reconstituting civil status should be considered. It already exists in some Member States and should inspire the European legislator in order to guarantee the right to identity. The subject is very broad and the sole aim of this article is to draw attention to the difficulties encountered by migrants in the field of civil status and to suggest that the European Union should engage in the search for common solutions.

2. Context.

2.1. Current situation.

Today, one in four children under the age of 5 are not registered at birth, according to UNICEF data. And even when they are registered, they may not have proof of registration. An estimated 237 million children under 5 years old worldwide are currently without a birth certificate.

Even where documents exist, their effectiveness is often questioned. Not being able to prove the validity of a document is tantamount to not proving one's civil status and identity and therefore to not having an identity[5].

Different challenges should be addressed. We will focus on fraud and on the competent authority.

Fraud is often presumed, which leads to the refusal to recognise documents. Some elements of comparative law help to understand the difficulties.

In France, Art. 47 of the civil code states that «[f]ull faith must be given to acts of civil status of French persons and of aliens made in a foreign country and drawn up in the forms in use in that country, unless other records or documents retained, external

[3] See Sustainable Development Goals – Target 16.9.

[4] Global Compact for Refugees affirmed by the UN General Assembly on 18 December 2018. See also the Global Compact for Migration: objective 4, para. 20 commits «to fulfil the right of all individuals to a legal identity by providing all (…) nationals with proof of nationality and relevant documentation, allowing national and local authorities to ascertain a migrant's legal identity» and «to ensure (…) that migrants are issued adequate documentation and civil registry documents, such as birth, marriage and death certificates, at all stages of migration, as a means to empower migrants to effectively exercise their human rights».

[5] More in detail, see S. DEN HAESE, *Crossing borders: proving your personal status, Interactions between Private International Law and Human Rights Law*, Ghent, 2021.

evidence, or elements drawn from the act itself establish, after all useful verifications if necessary, that the act is irregular, forged, or that the facts declared therein do not square with the truth». Under the guise of recognising the probative value of documents drawn up abroad, it allows them to be set aside quite easily[6]. Moreover, this provision emphasises indirectly on legalization, a process whose usefulness remains to be demonstrated[7].

In Belgium, on one hand, Art. 34 of the *code consulaire* focuses also on legalization and allows the Belgian authorities to investigate the regularity and content of the act; on the other hand, Art. 27 of the *Code de droit international privé* which makes the recognition of the act subject to conflict of laws reasoning. This reasoning would often lead to a foreign law which is very difficult to apply by the different authorities concerned. In a nutshell, due to fear of fraud, the obstacles to the rapid circulation of documents are extremely numerous.

In the Netherlands, a presumption of fraud was even introduced between 1996 and 2006 for documents originating from certain States. The Dutch Council of State put an end to this derogatory procedure.

Such examples could be multiplied. Document verification procedures are very often time-consuming. During the whole procedure, the person concerned cannot assert these rights. This situation is aggravated by the fact that the authorities responsible for checking these documents are very diverse. They do not necessarily have the knowledge to carry out the check effectively. However, the right to good administration as enshrined in Art. 41 of EU Charter of Fundamental Rights should be guaranteed[8].

2.2. Reasons for the phenomenon.

Many people do not have any documents. Sometimes they never had. Sometimes they no more have it. Even where valid documents have existed, they may have been lost or destroyed. These are not uncommon in migration situations. So, the reasons for being undocumented are various.

Here is a list, with illustrations. This list does not intend to be exhaustive.

Lack of birth registration:

[6] See for example F. JAULT-SESEKE, *Nationalité et fraude en matière d'état civil*, in E. RALSER, J. KNETSCH (direction), *La nationalité française dans l'Océan indien*, Paris, 2017, pp. 227-241.

[7] D. PRADINES, T. JANICOT, *Légaliser, est-ce déjà prouver?*, in *Actualité juridique du droit administratif*, 2022, pp. 1503-1508.

[8] Comp. European Court of Human Rights, judgments of 10 July 2014, application no 52701/09, application no 2260/10, application no 19113/09, and application no 23851/10; see also P. KLÖTGEN, S. CORNELOUP, L. D'AVOUT, *Nationalité. Condition des étrangers*, in *Revue critique de droit international privé*, 2015, pp. 355-388, at p. 373.

- cost/usefulness: host States are «obsessed» with dates and documents when in many countries of origin, people do not need identity documents for their daily life. Many people do not know their date of birth. Many vital events do not involve public authority[9]. In many countries, civil status services are still to be organized[10];

- cultural barriers (Roma, etc.);

- discrimination organized by the law;

- gender discrimination[11]: in some countries it is fathers or another male family member who are assigned the legal responsibility of registering a child's birth. If the father does not register the birth, the child may go unregistered. In others, doctors, midwives, or tribal chiefs who attend a child's birth are prioritized over the mother in the list of community members who have the right to register the birth. In addition, there are countries where a mother's legal right to register her child's birth depends on her ability to prove that the child was born in wedlock;

- discrimination on the basis of nationality: in the Republic of Korea (RoK), the current system does not allow for birth registration of children born in the RoK when both parents have foreign nationality(ies). Instead, parents with foreign nationality(ies) are expected to register the birth of their children at the embassies of their nationality(ies). This situation constitutes a challenge for some population, notably refugees and asylum-seekers, as well as undocumented migrants, and other groups of migrants who may be unwilling to approach their embassies, for protection related reasons, or those who are unable to register their children's birth or are faced with practical obstacles that prevent them from doing so, including gaps in the legislation of their countries of origin or lack of their countries' embassy in the RoK;

- fear;

- ethnic discrimination: in Rwanda, during the genocide in 1994, birth certificates were used to identify the ethnic origins of children and adults for extermination;

- war: in Eritrea, registers were used to identify young people who were likely to be forcibly recruited into the army;

- technical obstacles;

- distance from registration offices-

Lack of recognition:

- lack of reliability of civil registration systems in States of origin;

[9] See S. CORNELOUP, J. VERHELLEN, *Providing legal identity for all – A means to empower migrants to exercice their rights*, in R. MICHAELS, V. RUIZ ABOU-NIGM, H. VAN LOON (eds), in *SDG 2030 and Private International Law*, *Intersentia*, 2020.

[10] See further, ORGANISATION INTERNATIONALE DE LA FRANCOPHONIE, *Deuxième guide pratique, Pour la consolidation de l'état civil dans l'espace francophone: enjeux et perspectives pour les acteurs de la Francophonie*, 2022.

[11] See the UNHCR press release of 7 July 2021.

- fraud or fear of fraud[12];

- insufficient cooperation between States of origin and Host State. Host states are at a loss and may tend to look suspiciously at foreign acts. They are reduced to tinkering[13].

2.3. Loss or destruction of the documents in migration cases.

Again, the causes are diverse. The loss of documents can be explained by the conditions under which the persons concerned left their country of origin, by the need to entrust them to the authorities of transit countries, or even to smugglers. The destruction of documents, on the other hand, is due to the desire not to leave any trace in order to avoid persecution by the authorities of the country one is trying to flee. It may also be a way of circumventing the application of the rules of the host countries which the person concerned considers unfavourable, either because he or she is of age and seeks to take advantage of the rules intended to protect minors, or because he or she does not wish to be sent back to the country through which he or she entered the Union (application of the Dublin Regulation).

These developments do not claim to be exhaustive. They are nevertheless sufficient to demonstrate the need for solutions to protect the right to identity.

3. Ways to prevent the lack of document.

3.1. Compulsory birth registration.

Birth registration by national authorities establishes the existence of a person under the law and lays the foundation for the safeguarding of a person's human rights throughout their life, including access to education, health care, work, banking, social security, as well as registering the births of their own children. Birth registration is also key to reducing the risk of statelessness. While birth registration does not by itself confer nationality, it does constitute important proof of where a child was born and who the child's parents are, thus providing key information to assert the child's right to nationality based on place of birth (*jus soli*) or of descent (*jus sanguinis*).

[12] See Note on the compatibility with the ECHR of legislative and regulatory measures taking by States to combat with respect to civil status in the Study of the International Commission of Civil Status, 2000, p. 38.

[13] For example, see the practices of the French consulate in Senegal: in the absence of cooperation, the French consulate has established a database to assess the plausibility of the act (see the intervention of L. FICHOT at the seminar *La preuve de l'état des personnes*, organized by the *Centre de droit de la famille de l'Université Jean Moulin - Lyon 3* and the *Cour de cassation*, held at the French Supreme Court on 17 March 2022).

Birth registration is a fundamental right, recognised by Art. 24, para. 2, of the International Covenant on Civil and Political Rights and Art. 7 of the Convention on the Rights of the Child[14].

UNHCR and UNICEF are working together to promote birth registration. They showed that States as diverse as Guinea, South Sudan, and Mozambique have taken steps to reform civil registration laws, affording equal rights to women for birth registration. They also jointly lead the «Coalition on Every Child's Right to a Nationality», established to address statelessness among children as part of the «#IBelong Campaign to End Statelessness»[15].

In the Republic of Korea (see above), UNHCR has been actively involved to implement universal birth registration for children born to parents with foreign nationalities («Universal Birth Registration Network of the Republic of Korea»). UNHCR was involved in a draft legislation on birth registration and the Ministry of Justice announced its plan to propose a new Law that would allow birth registration for children born to parents with foreign nationality(ies)[16].

Some regional Organisations are also deeply involved in favour of birth registration. For example, in 2008, Organisation of American States (OAS) adopted an Universal Civil Identity Program in the Americas (PUICA). This program entrusts the General Secretariat of the OAS to assist Member States in their efforts to achieve universality and accessibility of the civil registry and comply with the goal of universal birth registration by 2015.

Several levers can be used to combat the lack of birth registration. UN agencies, Regional Organisations, NGOs[17] can raise awareness of the population and of the governments on the issue of civil status; dialogue to overcome cultural barriers. in the context of humanitarian operations, they can register children and beyond that help to establish proof of civil status. It is important to rely on medical structures where they exist. Several reports emphasise the essential links between civil registers and the health sector: maternity wards (for birth declarations by maternity wards or midwives who travel to the communities), and medical services for children under 5. It is suggested that birth declarations be coupled with vaccination campaigns, in the hope that the armed conflict will not lead to the suspension of these campaigns. It is also necessary to involve civil society, religious and community authorities, especially to overcome cultural barriers.

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

[15] See the website: https://www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/.

[16] See UNHCR, Compilation of good practices on Engaging with Human Rights Systems, February 2022.

[17] For example, see the role played by *Plan international*, specifically its report Innovations in Birth Registration, 2017.

Birth registration is important. It is not enough[18]. Other vital events have to be registered. Moreover, the registration is not an end. It should lead to the issuance of a valid document which can be easily recognized in a State that is not the one that issued it, namely in case of migration in the transit States and in the host State.

3.2. Limiting the risk of fraud by improving civil status services.

3.2.1. Making civil status services compulsory and facilitating their operation.

The United Nations have since early 1950s developed an international set of standards and recommendations on establishing, maintaining and operating national civil registration systems[19]. The «United Nations Legal Identity Agenda», launched in May 2019[20], refers to the holistic approach to civil registration of all vital events, production of vital statistics, the establishment and maintenance of population registers and identity management apparatus from birth to death, and requires full interoperability between these functions in a simultaneous manner, according to international standards and recommendations and in compliance with the human rights of all people concerned, including the right to privacy. All United Nations Member States should adopt and implement this agenda as a systematic and perpetual mechanism for ensuring legal identity for all. The United Nations have also highlighted «good practices» for the registration, for instance by developing mobile units that travel to regions far from capital cities.

Refugees are in a special situation. For the UNHCR, births should be systematically recorded within the national civil registry in accordance with relevant legal requirements. UNHCR insists that's its own registration of births (see below) does not replace the official record made by the authorities in the country of birth. In other words, the issuance of identity documents for refugees is the primary responsibility of the government of the host state[21]. Identity documents issued by national authorities ensure that the identity and status of refugees are formally recognized in the country of asylum, facilitating access to rights, protection, services and opportunities afforded to them as refugees. If needed, UNHCR can provide technical and/or material support to enable the government to issue identity documents for refugees. A partnership between UNHCR and the host State can

[18] UNICEF reports on the large gap between the number of children whose births are reported as registered and those who actually have a birth certificate.

[19] UNITED NATIONS, Department of Economic and Social Affairs, Statistic Division, Principles and Recommendations for a Vital Statistics System, Revision 3, Statistical Papers, Series M No. 19/Rev.3, New York, 2014.

[20] See https://unstats.un.org/legal-identity-agenda/.

[21] Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 convention and the 1967 protocol relating to the status of refugees, reissued Geneva, February 2019.

lead to joint registration but the government is the main responsible actor. Only where there is no agreement from the government to use its logo should identity cards be issued with just UNHCR's logo. In addition, host governments should register the vital events of refugees and asylum-seekers occurring on its territory and issue the related documentation.

3.2.2. Development aid.

The EU has multiplied actions to develop civil status services in countries where they are lacking[22]. These actions should be continued with greater emphasis on the need for child protection – currently the EU Trust Fund for Africa is mainly used to stop irregular migration and to conclude agreements with countries of origin for the return of their nationals[23] - and without necessarily favouring so-called stable countries.

France has recently adopted a Roadmap for international action in the field of civil status (2021-2027) which highlights three objectives: increasing international and European mobilisation in favour of civil status and legal identity; reinforcing the consideration of civil status in French public development aid; raising awareness on the issues of civil status and birth registration[24].

To meet their objectives, these different programs consider technological developments.

3.2.3. The use of digital tools.

The use of innovative technologies is part of the solution to fight the lack of document. This can be quite simple. For instance, the use of mobile phones can be sufficient to transmit birth declarations. Various experiments have already been made. Let's take a few of the many examples:

- mobile phone technology has been first used in emergencies: in Indonesia, during the aftermath of the tsunami, the NGO *Plan International* used this technology to capture birth notification data electronically and to transmit them to a central database using POIMAPPER software. Using this technology, staff could visit a household, enter

[22] Following the Valetta Summit of 2015, where the EU decided to cooperate with countries of origin of migrants to address the absence of identification documents, several African countries contracted, with the help of the EU Trust Fund for Africa, with private or semi-public security companies in order to set up biometric-based identification systems and documents.

[23] See S. CORNELOUP, J. VERHELLEN, cited above, quoting also the business of Civipol in Senegal which aimed to strengthen the civil registration system and create a biometric national identity register.

[24] See https://www.diplomatie.gouv.fr/IMG/pdf/feuille-de-route_etat-civil_2021_cle0b1cb5.pdf.

coordinates, obtain required data and a photograph and upload the information onto a central website[25];

- the startup iCivil Africa develops iCivil™, in order to enable African States to set up civil status registers. SMS declaration leading automatically to the issuance of verifiable authentic acts, from a bubble bracelet of identification/digital self-identification of newborns (an unbreakable interphase link provided by the bubble code). SMS messages are encrypted to transmit information quickly without moving. The SMS is received instantly on the server of the national registry office, which automatically leads to the drafting of a birth certificate that will be ready to be printed and signed by the competent authority. Authentic and verifiable birth certificates are obtained on presentation of the bracelet (token), given on the day of delivery. Any civil status center in the country will be able to consult, print and deliver the extracts on request. The authorities, security forces and administrations will also be able to check the authenticity of any civil status document in circulation, instantly online. The control is done on the dedicated governmental web portal (Experimentation underway in Burkina Faso). The contractual model iCivil is based on a licensing agreement with the government.

Innovative technology allows to compensate for the absence of civil status services but also to replace paper (for a better preservation of information, for a greater speed of operations, for a reduction in costs, to allow declarations/consultations to be carried out at a distance, etc.).

There is a need for the establishment of a legal framework providing the necessary guarantees, in order to cover the three stages: declaration of the birth, registration, and the issue of a birth certificate. Dematerialisation also has an interest in improving the delivery of copies and extracts, which often takes a long time, during which the child is deprived of proof of his or her civil status[26].

3.2.4. Biometric identity.

Biometrics refer to technologies for the physical or biological recognition of individuals, based on different data that are «unique». These data are various: the most widely used are fingerprints and genetic fingerprints; today they are joined by facial photography or iris capture; tomorrow it will be blood pressure or ear shape, before the relevance of other data will be revealed.

The use of biometrics to facilitate authentication (checking the accuracy of claimed identity) and identification (determining identity by comparing biometric data with those in databases) of foreigners is already common. Files processing biometric data, more or

[25] PLAN INTERNATIONAL, *Birth registration in emergencies: a review of best practices in humanitarian action*, 2014, p. 33, available *online*.

[26] See G. PALAO, *Challenges to the codification of cross-border dimension of the digitalization of civil status records and registers*, in this *Special issue*.

less specific to third country nationals, have multiplied. While the use of biometrics may in some ways appear to be a miracle solution, its reliability is not indisputable (complicated fingerprinting for the youngest, the oldest, the disabled, or even impossible for people who regularly use corrosive products, alteration of the reliability of the data linked to the ageing of the body; in addition, there is the risk of computer security).

The solution must be surrounded by guarantees. Too often legal identity using biometrics is addressed through the lens of security and identity control[27].

4. Compensation for the lack of documents.

The need to address the lack of documentation is based not only on practical considerations but also on the fight against human trafficking and on the preservation of fundamental rights, be it the right to identity or the best interests of the child.

Undocumented children are deprived of their fundamental rights: without a birth certificate, a child is at greater risk of statelessness and exclusion from essential services including health care and education. Undocumented children on the move raise overarching difficulties. Often the host State emphasizes the need to control immigration. With the UNICEF, it should be recalled that children on the move are children first. The issue of unaccompanied minors is a sensitive one. The situation of refugees regarding their right to identity should also be considered.

4.1. The case of unaccompanied minors.

Doubts may exist regarding the age of unaccompanied minors seeking protection in host countries. Fraud is often alleged to the detriment of the best interests of the child.

Many States have specific age assessment procedures. They are various. Some are based on interviews with the child. Still often, medical examinations and bone tests are done.

Regarding the best interests of the child (and according to EU asylum law), minority should be presumed when it is not possible to determine the child's age with sufficient certainty. This solution often remains theoretical. In practice, authorities conclude easily that the child is over the age of majority.

The principle of giving the benefit of the doubt to the child should be implemented.

There are some positive evolutions. For example, in France, Art. 388 of the civil Code states that the findings of bone X-ray examinations for age determination purposes, in the absence of valid identity documents, which must specify the margin of error, cannot

[27] On this topic, see F. JAULT-SESEKE, *L'identité biométrique de l'étranger*, in H. FULCHIRON (sous la direction de), *La famille du migrant*, Strasbourg, 2020, pp. 262-273.

alone determine whether the person concerned is a minor. It adds that doubt benefits the person concerned[28].

Moreover, in a recent and important judgment, the European Court of Human Rights has linked the primary importance of the best interests of the child with the principle of presumption of minority in respect of unaccompanied migrant children reaching Europe[29]. This movement which takes into account the vulnerability of the migrant child must be continued.

4.2. The case of refugees: need for new civil status documents.

4.2.1. The UNHCR's profile global registration system.

The UNHCR plays a key role in the process of identifying refugees. In 2002, UNHCR developed an IT case management tool called proGres (Profile Global Registration System). The proGres tool provides a common source of information about individuals that is used by different work units to facilitate protection of persons of concern to the organization. proGres is the main repository in UNHCR for storing individuals' data. It has now rolled-out additional IT tools which are complementary to progress.The new system is named PRIMES for «Population Registration and Identity Management EcoSystem». While proGres stored data locally – around 500 data bases worldwide – PRIMES consolidates all UNHCR data in a single database that can be accessed via the web. It encompasses all interoperable UNHCR registration, identity management and caseload management tools and applications (existing ones, such as proGres and BIMS, as well as those developed in the future. PRIMES will be interoperable with IT systems used by governments (mainly in the area of civil registration and population registries) and partner organizations, such as WFP (SCOPE) and Unicef (Primero)[30].

A separate process, where required by governments or service providers, will offer «validation» or authentication of identities (on the basis of available evidence and interaction with UNHCR over time), giving high, substantive or moderate assurance of the claimed identity.

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[28] For an application, see recently *Cour de Cassation*, judgment of 12 January 2022, no 20-17.343. The case concerned a boy born in Guinea having a suppletive judgment, an extract from the civil status register and a passport but these documents were not considered conclusive and an expertise was ordered. The Court of Appeal which had not put the doubt in favour of the boy is censured.

[29] European Court of Human Rights, judgment of 21 July 2022, application no 5797/17, *Darboe*.

[30] Rapid Application (RApp) – which allows an offline data collection of refugees (later uploaded to proGres), IDPs, and others; BIMS – the Biometric Identity Management System that captures biometrics; CashAssist – that enables registered refugees to receive cash assistance; GDT or Global Distribution Tool, allowing registered refugees to receive in-kind assistance (food, NFI, etc.).

4.2.2. The reconstitution of civil status documents.

The reconstitution of civil status documents exists already. It has to be generalized.

In France, two provisions are of interest. The first is the Art. L 121-9 of the CESEDA. It provides that the French Office for the Protection of Refugees and Stateless Persons (OFPRA) is authorised to issue to refugees and beneficiaries of subsidiary protection or stateless status, after investigation if necessary, the documents necessary to enable them either to carry out the various acts of civil life, or to have the provisions of domestic legislation or international agreements concerning their protection applied, in particular documents in lieu of civil status certificates. The Director General of the Office shall authenticate the acts and documents submitted to him. The acts and documents he draws up shall have the value of authentic instruments. These various documents shall make up for the absence of acts and documents issued in the country of origin. The second provision is the Art. 46 of the civil code. It states that «where no registers exist, or where they are lost, proof shall be received both by titles and by witnesses; and, in such cases, marriages, births and deaths may be proved both by the registers and documents emanating from deceased fathers and mothers, and by witnesses». Until the reconstitution or restitution of the registers has been carried out, all civil status records whose originals have been destroyed or have disappeared as a result of a disaster or acts of war may be replaced by notorial deeds. These notarial deeds are issued by a notary. The notarial deed is drawn up on the basis of the statements of at least three witnesses and any other documents produced which attest to the civil status of the person concerned. The notarial deed is signed by the notary and the witnesses.

Other countries also authorize the reconstitution of documents. For example, in Belgium, the commissariat for refugee establishes an attestation that will serve as basis for a new certificate (civil register). Only the refugees and not the beneficiaries of subsidiary protection benefits from this solution.

Thus, in specific situations, the law provides for the reconstitution of documents. Shouldn't the reconstitution be increased, or even generalized as the Court of Appeal of Paris several times suggested it[31]?

5. Final remarks.

[31] French case law: when a person has no known civil status, one must be established for him or her by a declaration of birth (Paris, 3 November 1927, D.P. 1930, 2, 25, D.C. 1930, 2, 25, note Savatier). There is a public policy interest in any person habitually living in France, even if he or she was born abroad and has a foreign nationality, being provided with a civil status (Paris, 24 February 1977, D.S. 1978, 168; Paris, 2 April 1998, in *Revue trimestrielle de droit civil*, 1998, p. 651). *Adde* C. BIDAUD, H. FULCHIRON, under *Cass., Ass. Plén., 3 juill. 2015*, D., 2015, p. 1819 and C. BIDAUD, *La transcription des actes de l'état civil étrangers sur les registres français*, in *Revue critique de Droit International Privé*, 2020, p. 247 suggesting the creation of an *ad hoc* claim.

Different ways exist to enforce the right to identity which must be recognised for every person and which is particularly threatened in situation of migration.

Until now, each Member State has been dealing with the issue without real EU coordination. The European Union has a role to play. The European Union has competence and not only in the frame of the development aid. Its action is also a matter of Asylum and Migration Policy (Arts. 78 to 80 TFEU). It has to cooperate with existing relevant organisations, namely the Hague conference of Private International Law, the United Nations, and the International Commission on Civil Statute. The existence of this *ad hoc* international organisation is an asset that should be used rather than weakened.

ABSTRACT: In various cases, migrants have no documents or no valid documents. Their right to identity is therefore threatened. There are various solutions to combat this risk. On the one hand, the improvement of civil status services in countries of origin, namely through digitalization or biometric techniques, is to be explored. On the other, reconstitution of civil identity in transit and host countries should also be considered.

KEYWORDS: Migration; right to identity; documents; birth registration; digitalization.

The scope of Regulation (EU) 2016/1191 in the light of Bulgarian domestic law

Eva Kaseva*

CONTENTS: 1. Introduction. – 2. General characteristics of Regulation (EU) 2016/1191. – 3. *Ratione materiae*. – 4. Bulgarian domestic rules. – 4.1. Birth. – 4.2. A person being alive. – 4.3. Death. – 4.4. Name. – 4.5. Marriage, including capacity to marry and marital status. – 4.6. Divorce, legal separation or marriage annulment. – 4.7. Registered partnership and legal separation. – 4.8. Parenthood. – 4.9. Adoption. – 4.10. Domicile and/or residence. – 4.11. Absence of a criminal record. – 4.12. Voting. – 5. Conclusions.

1. Introduction.

Globalization, which took place in the second half of the XX century and the beginning of the XXI century, is characterized by migration and movement of people, and the reasons are different – education, work, family. The free movement of people is also one of the fundamental freedoms owned by the citizens of the European Union. Citizens of the Republic of Bulgaria, who settle in a country other than their country of origin, face a large number of administrative procedures connected with personal status, each of which leads to requests for official documents (such as: divorce decree, birth certificate, proof of kinship or marital status). The same applies to every citizen who returns to their country of origin after a stay in a foreign country. In order to be able to use official documents outside the country in which they were issued, the recognition in the host country is necessary[1].

In Bulgarian legislation there is the following terminology – «civil status», «civil registration» and «civil status claims», as well. «Civil status» covers the whole complex of facts relating to citizens' lives: birth, marriage, death, divorce, citizenship[2]. «Civil

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[1] The question of recognition of personal status is placed on the table during past decade in European Union and there are decisions of European Court of Justice (ECJ) on the matter: judgment of 14 October 2008, case C-353/06, *Grunkin-Paul*, EU:C:2008:559; judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein* v *Landeshauptmann von Wien*, EU:C:2010:806; judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn* v *Vilniaus miesto savivaldybės administracija*, EU:C:2011:291; judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff* v *Standesamt der Stadt Karlsruhe u ZentralerJuristischerDienst der Stadt Karlsruhe*, EU:C:2016:401; judgment of 8 June 2017, case C-541/15, *Freitag*, EU:C:2017:432.

[2] D. KONSTANTINOV, *Civil status*, Sofia, 1958, p. 198.

registration» is defined in Art. 3 of the Bulgarian Civil Registration Act (CRA)[3] and includes «data about one person, which distinguishes him from other persons in society and in his family as the holder of subjective rights, such as name, citizenship, marital status, kinship, permanent address, etc.». «Civil status claims» are settled in Art. 331(1) of the Bulgarian Code of Civil Procedure[4]. They include: claims for establishment or contestation of parenthood, claims for termination of adoption and matrimonial claims.

In Bulgarian Private International Law literature, the methods of recognition of personal status are differentiated as follows:

- traditional procedural recognition (of foreign courts decisions) settled in Arts. 117-124 of Bulgarian Code of Private International Law (BCPIL)[5];
- civil registration acts recognition under Bulgarian Civil Registration Act;
- the conflict-of-laws method of recognition;
- the automatic recognition – recognition of civil consequences of foreign public acts;
- recognition under the Convention on the Issue of Multilingual Extracts from Civil Status Records, drafted by the International Commission on Civil Status which defines a uniform format for extracts on civil status (birth, marriage, death), signed in Vienna on 8 September 1976;
- recognition through the application of European secondary legislation: i.e. Regulation (EU) 2016/1191[6].

The current study is focused on the last-mentioned method – i.e. the recognition of personal status through the norms of Regulation (EU) 2016/1191 – Public Documents Regulation. General characteristics of the Regulation will be made, the conditions, which have to be met in order to apply the Regulation will be analyzed, its scope will be examined and especially it will be presented in details which are the documents that can be issued in Republic of Bulgaria (under Bulgarian domestic law) to certify the facts included in its scope Art. 2(1)(a)-(m) of the Regulation (e.g. act of birth, act of death, act of marriage, etc.). It will be indicated which national act settles each document and clarified which are the requirements to be met.

2. General characteristics of Regulation (EU) 2016/1191.

[3] Bulgarian Civil Registration Act, Promulgated in Official Journal of Bulgaria No 67 of 27 July 1999, last amendment of 11 December 2020.

[4] Promulgated in Official Journal of Bulgaria No 59 of 20 July 2007, in force from 1 March 2008, last amendment of 22 February 2022.

[5] Promulgated in Official Journal of Bulgaria No 42 of 17 May 2005, last amendment of 21 December 2010.

[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 (in brief «Regulation 2016/1191», «Public Documents Regulation», or only «Regulation»).

Regulation (EU) 2016/1191 is adopted on the ground of Art. 21(2) of the Treaty on the Functioning of the European Union (TFEU) – the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating every citizen of the Union excercise the right to move and reside freely within the territory of the Member States. This ground distinguishes it from other EU acts adopted on the basis of Art. 81 TFEU on «Judicial cooperation in civil matters»[7].

More concretely, the objectives of the Regulation are defined in its proposal[8]. They includereducing practical difficulties caused by the identified administrative formalities; reducing translation costs related to the free circulation of public documents within the EU; simplifying the fragmented legal framework regulating the circulation of public documents between the Member States; ensuring a more effective level of detection of fraud and forgery of public documents and eliminating risks of discrimination among Union citizens and businesses.

Moreover, in the preamble of the adopted Regulation – Recital 57 is settled that its objective is promotion of the free movement of Unioncitizens by facilitating the free circulation of certain public documents within the Union. The objective is formulated in accordance with the principle of subsidiarity and the principle of proportionality as set out in Art. 5 of the Treaty on European Union.

The Regulation consists of a preamble with 57 Recitals and 27 Articles divided into six Chapters. The Regulation also contains eleven Annexes.

Its *ratione temporis* is defined in its Art. 27. It is applied in Bulgaria since 16 February 2019. Art. 27(2)(a)-(c) explicitly defines provisions that apply from earlier dates, in view of the necessary preparation for Regulation implementation.

The territorial scope of the Regulation is defined also in Art. 27. It is specified that the Regulation shall be binding in its entirety and directly applicable in all Member States.

As far as the relationship of the Regulation with international instruments is concerned, it should be pointed out that in Recital 56 from the preamble is settled that the Regulation should be applied in accordance with the fundamental rights and principles settled in Charter of Fundamental rights of the European Union.

In Art. 19 is regulated the relationship of the Regulation with international conventions, agreements and arrangements. The provision of Art. 19(1) defines that Regulation is without prejudice to the application of international conventions to which

[7] See for example: 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; 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, etc.

[8] See: COM(2013) 228 final of 24 April 2013.

one or more Member States are party at the time of adoption of the Regulation and which concern matters covered by it.

In accordance with this is Recital 4 from its preamble which settled that the Regulation should be regarded as a separate and autonomous instrument from the Apostille Convention.

The Regulation does not affect the application of European Convention of 1968 on the Abolition of Legalisation of Documents Executed by Diplomatic Agents or Consular Officers and Convention on the Issue of Multilingual Extracts from Civil Status Records, drafted by the International Commission on Civil Status. Since the multilingual standard forms under this Regulation do not have legal value and do not overlap with the multilingual standard forms provided for in ICCS Conventions (No. 16), (No. 33) and (No. 34) or with the life certificates provided for in ICCS Convention (No. 27), the Regulation should not affect the application of those Conventions as between Member States or between a Member State and a third country.

Although the text of Art. 19(1), the following Para. 2 settled that the Regulation prevail over bilateral or multilateral agreements concluded between the Member States: Member States are able to maintain or conclude arrangements between two or more of them in matters which do not fall within the scope of the Regulation such as the evidentiary value of public documents, multilingual standard forms with legal value, exemption from legalisation of such forms, and exemption from legalisation of public documents in areas other than those covered by the Regulation.

The Regulation does not preclude Member States from negotiating, concluding, acceding to, amending or applying international agreements and arrangements with third countries concerning legalisation or similar formality in respect of public documents concerning matters covered by Regulation, and issued by the authorities of Member States or third countries in order to be used in relations between the Member States and the third countries concerned (Art. 19(4)). This provision is considered as an answer to opinion 1/13 of the Court of Justice, which settles EU external competence[9].

Art. 17 states that the Regulation is without prejudice to the application of: other provisions of Union law on legislation, similar formality, Union law on electronic signatures and electronic identification, and other systems of administrative cooperation between Member State.

The Regulation shall be applied with priority over the internal acts of the Republic of Bulgaria, according to Art. 288 TFEU.

3. *Ratione materiae*.

[9] Court of Justice (Grand Chamber), opinion 1/13 of 14 October 2014, EU:C:2014:2303.

In Art. 2 the scope of the Regulation is defined. The provision settles that the Regulation applies to:

- public documents – defined in its Art. 3(1) of the Regulation;
- issued by the authorities of the Member State – defined in Art. 3(2) of the Regulation;
- primary purpose of which is to establish one or more of the facts settled in Art. 2(1)(a)-(m) of the Regulation;
- which have to be presented to the authorities of another Member State.

The Regulation applies to certified copies of public documents made by a competent authority of the Member State in which the original public document was issued. The Regulation covers electronic versions of public documents and multilingual standard forms suitable for electronic exchange.

Exluded from the scope are: copies of certified copies,documents issued by private persons, public documents issued by the authorities of a third country;public documents on a change of name; passports or identity cards issued in a Member State as such documents are not subject to legalisation or similar formality when presented in another Member State; civil status documents issued on the basis of the relevant International Commission on Civil Status (ICCS) Conventions. It is important to point out that the Regulation does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State.

4. Bulgarian domestic rules.

For birth, death and marriage in Bulgaria are issued civil status acts. They are defined in the Bulgarian civil law theory as official written documents drawn up by competent authorities in accordance with the procedure established by law, which establish events determined by law or certify facts of civil status of individuals and which serve as evidence of these events or facts. They are a formal written document with probative force. Their preparation is a type of administrative service. They are designed by the Ministry of Justice. They are issued at the request of the interested persons by civil status officers in the municipality or the mayor's office on whose territory the events took place.

According to Art. 35 of the CRA, in the Republic of Bulgaria the mayor of the municipality is a civil status officer on the territory of the municipality – he issues civil status acts and certificates based on the population register. He may assign these functions by written order to the mayors of the mayoralties and the deputy mayors in the settlements where registers of civil status acts are maintained, and to other officials of the municipal administration. The law also regulates several special hypotheses in which, subject to certain prerequisites, civil status acts are drawn up by other bodies. For example, Arts. 63-65 of the CRA – the servicemen who are outside the territory of the Republic of

Bulgaria or are on the territory of the country, but due to military actions are deprived of the opportunity to inform the civilian authorities, are appointed by the command to perform such functions. In case of birth, civil marriage or death, which occurred on a ship located outside Bulgarian territorial waters, the captain is obliged to make an entry in the logbook and to draw up an act under Arts. 66-68 of the CRA. Also, the diplomatic mission of the Republic of Bulgaria has functions on the civil status of Bulgarian citizens residing in the host country. The Consular Representative of the Republic of Bulgaria performs functions related to the civil status of Bulgarian citizens residing in his consular district. Citizens of the Republic of Bulgaria who are abroad may request, in compliance with Bulgarian or local laws, the drawing up of civil status acts by the respective Bulgarian diplomatic or consular representative, or by foreign local civil status authorities in the place where they are the events subject to registration have occurred. The regulation is contained in Arts. 69-72 of the CRA.

It should be specified in the Republic of Bulgaria which public documents certify the facts listed in Art. 2(1(a)-(m) of the Regulation and what are the conditions for their issuance.

4.1. Birth.

A birth certificateis issued for birth, after civil status officer receive a written massage from medical person according to Art. 42 of the Bulgarian Civil Registration Act. In the general hypothesis according to Art. 43(6) of the CRA, the civil status officer shall draw up the birth certificate after certifying in writing the event within seven days from the birth (excluding the day of birth). Birth certificate is issued to the parents. Immediately after the drawing up of the birth certificate, an electronic birth certificate is created on the basis of it. All requisites of the certificates, as well as their regulation, are contained in Arts. 42-50 of the CRA.

In case of birth of a child – Bulgarian citizen – born outside the territory of the country, a birth certificate is also drawn up by the respective Bulgarian diplomatic or consular representatives, or by the foreign local civil status authorities in the place where the events subject to registration took place. The birth can be certified also by: transcript-extract from the birth certificate, full transcript of the birth certificate, certified copy of the birth certificate. A birth certificate is also issued in case of incomplete adoption.

4.2. A person being alive.

A special act, except for the birth certificate, that a person is alive is not issued by the Bulgarian authorities. A document that includes all children born to the mother entered in the population register is a Certificate for children born from the mother. As it

records the date of birth and date of death of all children born from the mother, this official document can be said to certify all three facts set out in the scope of the Regulation – birth, person alive, death. Its regulation is in Art. 16 and Annex 7 of Ordinance No RD-02-20-6 for issuing certificates on the basis of the population register[10].

4.3. Death.

The death shall be certified by a competent medical person, who shall report it to a civil status officer. The officer shall draw up a death certificate within 48 hours of the death. Its regulation is in Arts. 54-62 of the CRA. A variant of a civil status certificate certifying death is a death certificate drawn up on the basis of an effective court decision declaring a person dead. The act is drawn up by the civil status officer on the basis of a certified copy of the court decision (Art. 59 of the CRA). Also, the death can be certified with a transcript of the death certificate, a complete transcript of the death certificate, a certified copy of the death certificate.

In case of death of a Bulgarian citizen outside the territory of the country, a death certificate is also drawn up by the respective Bulgarian diplomatic or consular representatives, or by the foreign local civil status authorities in the place where the events subject to registration took place.

4.4. Name.

The name is the recognized and guaranteed by law possibility of a person to have the verbal designation, formed in a way determined by the law, with which the designation is individualized. It is an intangible, absolutely subjective, personal, non-property, non-transferable and non-inheritable right. It is entered in the birth certificate. This is done at the birth of a Bulgarian citizen on the territory of the Republic of Bulgaria, as well as if the child was born outside the country of the birth certificate, drawn up by the relevant Bulgarian diplomatic or consular representatives, or by foreign local civil status authorities in the place where the child is born.

The regulation of the names of Bulgarian citizens is contained in Arts. 12-21 of the CRA, as well as in Art. 53 of the Bulgarian Code of Private International Law (BCPIL), whose first provision settles that the name of the person and its change are regulated by the domestic law of the person. In the general case of substantive law for Bulgarian citizens - the personal name of each person is chosen by his parents and communicated in writing to the civil status officer when drawing up the birth certificate. Another official document that establishes the name of the person, in addition to the birth certificate, is the Certificate of identity of a person with different names. It proves that two or more first

[10] Promulgated in Official Journal of Bulgaria No 37 of 15 May 2012.

and / or middle names and / or surnames are of the same person. The CRA also establishes hypotheses in which the name is determined by an act of the court – for example: in case of adoption, in case of termination of adoption, in case of established origin.

4.5. Marriage, including capacity to marry and marital status.

According to the CRA, only a civil marriage concluded between a man and a woman, whichis concluded before a civil status officer, is legal. It is certified by a civil marriage certificate, a transcript of an extract from a civil marriage certificate, a full transcript of a civil marriage certificate, a certified copy of a civil marriage certificate. A marriage certificate from a Bulgarian citizen abroad is also a document certifying the existence of a marriage.

The requisites of the civil marriage act and its regulation are contained in Arts. 51-53a of the CRA. The regulation of marriage with an international element in Art. 76(1) of the BCPIL stipulates that the conditions for marriage are determined for each of the persons under the law of the state of which the person was a citizen at the time of marriage.

In particular, regarding the capacity to marry, the documents establishing the existence of the conditions for marriage are: a declaration by each of the marriages that there are no obstacles to marriage, a medical certificate that he/she does not suffer from the diseases referred to in Art. 7(1) items 2-3 of the Family Code of Republic of Bulgaria (FC)[11]; declaration that he/she is aware of the diseases of the other under Art. 7(1) items 2-3 FC. These documents are exhaustively listed in art. 9, par. 1 of the FC, and these are the documents establishing the existence of marital capacity. To these should be added a decision of the district court in the event that one of the persons who will marry has reached 16 years of age.

As to the marital status: Ordinance No. RD-02-20-6 provides for the issuance of three types of certificates that establish marital status. First, in accordance with article 13 of Ordinance No RD-02-20-6, when proof of a person's marital status is required, a Marital Certificate shall be issued in accordance with Annex 4. The marital status entered in the certificate may be «unmarried», «married», «divorced» or «widowed». Secondly, Art. 14 of the same Ordinance provides for the issuance of a Certificate of marital status, spouse and children in accordance with Annex 5. The certificate shall include the marital status of the person, data on spouse and all living and deceased children. Third, marital status is also entered in the certificate issued under Art. 15 of the Ordinance under consideration, namely – Certificate of spouse and family ties in a form according to Annex 6, which is issued to prove marital status and existing kinship by rights and silver line.

[11] Promulgated in Official Journal of Bulgaria No 47 of 23 June 2009, last amendment of 4 December 2020.

Although the Certificate of Marital Status, Spouse and Children, as well as the Certificate of Spouse and family ties may establish facts other than marital status, these certificates fall within the scope of the Regulation, as meeting the condition of establishing the marital status of a person.

4.6. Divorce, legal separation or marriage annulment.

Regarding the divorce – it is certified by the court decision for divorce in matrimonial proceedings conducted on the basis of Arts. 318-330 of the Civil Procedure Code of the Republic of Bulgaria, in conjunction with Arts. 49-59 of the FC. If it has an international element – the provisions of Regulation (EC) No 2201/2003[12] (then Regulation (EU) 2019/1111)[13], Regulation (EU) No 1259/2010[14], BCPIL, legal aid contracts concluded by the Republic of Bulgaria shall apply accordingly.

Marriage annulment: in a similar way, the annulment of the marriage is certified by the court decision in matrimonial proceedings conducted on the basis of Arts. 318-330 of the Civil Procedure Code, in conjunction with Arts. 46-48 of the FC, as well as if the marriage has an international element, the above-cited acts apply.

In case of divorce and annulment of the marriage, they can be certified with a transcript-extract from the act of civil marriage, as in the field «Notes» of the sample it is indicated that the marriage is terminated and the date on which it was terminated.

4.7. Registered partnership and legal separation.

The institutes of legal separation and registered partnership are not regulated in Bulgarian substantive law. However, it should be noted that in Bulgaria are applied Council Regulation (EU) No 1259/2010 as well as Regulation (EU) 2016/1104[15]. It is possible that the Bulgarian court, applying the provisions of the said regulations to a case, should apply a foreign law in which the respective institutes are regulated. If, as a result of this, an act is issued certifying the facts listed in Art. 2(1)(f),(g) and (h) of Regulation (EU) 2016/1191, this document is regarded as included in the scope of the Regulation. Namely regarding: registered partnership, including legal capacity to enter into a

[12] 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.

[13] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

[14] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

[15] 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.

registered partnership, and registered partnership status; dissolution of a registered partnership, legal separation or annulment of a registered partnership.

4.8. Parenthood.

Recital 14 of the preamble to the Regulation clarifies that the concept of «parenthood» should be seen as meaning the legal relationship between a child and the child's parents. The provisions of Arts. 331-335 of the Civil Procedure Code – apply for establishing or contesting parenthood. Relevant documents falling within the scope of the Regulation are a birth certificate, an act of a judicial authority issued on a claim to establish/challenge maternity/paternity, a written application for recognition, a declaration of recognition with a notarized signature, as well as the following documents for challenge of recognition – a written application for contestation, an act of a judicial authority, issued on a claim for contestation/destruction of recognition.In the scope of the Regulation as official documents establishing the parenthood under Bulgarian domestic Law should also be included the certificates already considered – the Marital Certificate, the Certificate of marital status, spouse and children, the Certificate of spouse and family ties, the Certificate for children born from the mother.

As far as it concerns «parenthood» I will pay special attention to case C-490/20 of ECJ which is on request for preliminary ruling from Administrative Court of the City of Sofia, Bulgaria, which in fact is the first case referencing the Public Documents Regulation to ECJ[16]. The dispute concerns a married couple consisting of two women, one of whom, V.M.A., is a Bulgarian national, while the other is a national of the United Kingdom. They got married in 2018 in Gibraltar, where same-sex marriage is possible since December 2016, and had a child in Spain. They reside in the same country. The birth was registered according to Spanish Law, and a birth certificate was issued by the Spanish authorities designating both women as 'mother' of the child. On the basis of the Spanish document V.M.A. applied to the competent Bulgarian authority to issue a birth certificate for her daughter. Such a certificate is, in turn, necessary for obtaining a Bulgarian identity document. Bulgarian law does not allow marriage or any other form of union with legal effects between persons of the same sex. Parentage is determined by birth; the mother of the child is the woman who gave birth to it (also in the case of assisted reproduction). When the filiation of a child with regard to one of his parents is unknown, any parent can recognize the child. In the event of registration of a birth occurring abroad the information relating to the name of the child, the date and place of birth, the sex and the established filiation are entered in the birth certificate as they appear in the copy or in the Bulgarian translation of the foreign document produced. The municipality of Sofia

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

(Bulgaria) requested V.M.A. to indicate which of the two spouses is the biological mother, stating that the model Bulgarian birth certificate provides only one box for the 'mother' and another for the 'father', and that each of those boxes may include only one name. Following V.M.A.'s refusal to supply the requested information, the authority rejected her application, arguing the absence of information concerning the biological mother and the fact that the registration of two female parents in a birth certificate is contrary to the public policy of Bulgaria.V.M.A. brought an action against that decision before the Administrative Court of the City of Sofia, which referred to the CJEU some questions, main of which:

> «Must Article 20 TFEU and Article 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that the Bulgarian administrative authorities to which an application for a document certifying the birth of a child of Bulgarian nationality in another Member State of the EU was submitted, which had been certified by way of a Spanish birth certificate in which two persons of the female sex are registered as mothers without specifying whether one of them, and if so, which of them, is the child's biological mother, are not permitted to refuse to issue a Bulgarian birth certificate on the grounds that the applicant refuses to state which of them is the child's biological mother?»

The ECJ states that a child, being a minor, whose status as a Union citizen is not established and whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same sex, one of whom is a Union citizen, must be considered, by all Member States, a direct descendant of that Union citizen within the meaning of Directive 2004/38 for the purposes of the exercise of the rights conferred in Art. 21(1) TFEU and the secondary legislation relating thereto.

With this decisionthe ECJ held that EU Member States are required to recognise – for the purposes of EU free movement law – the familial ties established in another EU Member State between a child and her parents who are a same-sex couple. In my opinion this case is an example for automatic recognition of personal status in EU (as *Coman* case[17]) on the basis of mutual trust that one State accepts and recognizes the civil consequences of a legal situation (settled in foreign public acts) which has arisen in another State without changing its substantive law and even if the applicable law and the relevant rules in the host State are different. The main advantage of this method of recognition is that through its application the legal relationships are settled in the same way in different countries. It should be noted one of its disadvantages – obliges Member States to recognize legal institutions that are unknown to their legal systems – as same sex marriages, registered partnerships, child marriages, parenthood by surrogacy mother etc... The automatic recognition is not settled in EU act, but can be carried out on the

[17] Court of Justice (Grand Chamber), judgment of 5 June 2018, case C-673/16, *Coman and others*, EU:C:2018:385.

following grounds: decision of ECJ under Art. 267 TFEU and as well on obligations established in an international agreement. These obligations may directly regulate recognition. An example is Art. 23 of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded on 29 May 1993, that although it was accepted that Public Documents Regulation does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State, in fact this kind of recognition occurs on the ground of ECJ – Art. 267 TFEU, for the purposes of the exercise of the rights conferred in Art. 21(1) TFEU and the secondary legislation relating thereto.

4.9. Adoption.

Establishing the adoption of a child with habitual residence in the Republic of Bulgaria, as well as a foreigner with habitual residence in the Republic of Bulgaria is regulated by the provisions of Arts. 77-98, Chapter VIII, of the Family Code of the Republic of Bulgaria, Arts. 18, 50 and 78 of the CRA. If the adoption case has an international element, the provisions of Arts. 10 and 84 of the BCPIL should also be applied. In the general case, the decision on adoption is taken by a district court at the location of the Regional Directorate for Social Assistance, whose Adoption Council has appointed the adopter. The district court is also competent to judge on the termination of the adoption (Arts. 106-109 of the FC). Pursuant to Art. 50 of the FC, in case of full adoption, the civil status officer on the basis of a certified transcript of the court decision shall draw up a new birth certificate within three days of receiving the transcript. The birth certificate shall be drawn up in the municipality or the mayor's office, specified in the court decision, in the register of the current year with a date – the date of drawing up the act. The following shall be entered in the new birth certificate: 1. the actual date of birth and the new uniform civil number; 2. place of birth – the place of drawing up the act, and in the cases of international adoption – the actual place of birth; 3. parents – the adoptive parents and the data for them; when the child is adopted by only one parent, the column for the other parent is not filled in; when the child is adopted by the spouse of a parent, data on the birth parent with whom the relationship is maintained and data on the adoptive parent. The drawn-up act shall be noted in the alphabetical yearbook of the year, which corresponds to the year of birth of the adopted child, and in the alphabetical form of the year of drawing up the act. The court decision shall be kept under the conditions and by the order for storage of the birth certificate and external persons may not have access to it. Within two days, the civil status officer shall notify the municipality where the previous act of birth of the adopted person is located by letter, to note in the column «Notes» that a new one has been drawn up.

In case of incomplete adoption, the civil status official at the place of birth of the adopted person shall record in the column «Notes» of the existing birth certificate the court decision, the names of the person determined by the court and the names of the adopters. When issuing transcripts and certificates and transcripts of a birth certificate with marked incomplete adoption for parents, both the parents of origin and the adoptive parents shall be entered.

Documents establishing the adoption are: birth certificate, court decision, transcript of birth certificate, full transcript of birth certificate, certified copy of birth certificate.

4.10. Domicile and/or residence.

The regulation of domicile is in Arts. 89-99b of the CRA. Here it will only be specified that it's certified by certain documents for existence of a permanent or present address, issued with legal grounds Arts. 95 and 98 CRA, as well as Arts. 22-25 of Ordinance No RD-02-20-6 and are respectively: Certificate of permanent address; Certificate of present address; Certificate for changes of permanent address; Certificate of changes of present address. All of them are included in the scope of the Regulation according to Art. 2(1)(k).

The habitual residence is determined under Art. 48(7) of the BCPIL. This is the place «where a person has been established to reside predominantly, without this being related to the need for registration or a residence or establishment permit. In order to determine this place, special account must be taken of personal or professional circumstances arising from the person's lasting relationship with that place or from his intention to establish such a relationship (…)».

The habitual residence of persons within the meaning of Art. 48(7) of the BCPIL is a factual criterion, as no registration is required for its occurrence and therefore it is assumed that it reflects to the greatest extent the actual place where the person resides. The scope also includes persons who reside illegally on the territory of a country. It does not depend on the usual place of residence of other persons, it is independent. A precondition for its occurrence is «predominant» establishment of the natural person within a certain country. In this sense, in order to have this prerequisite, social integration through personal and professional relationships is necessary, from which to result lasting relationships of the person with the respective place. No requirement for the expiration of a certain period of time has been introduced for the occurrence of the habitual residence. What determines is not the time, but the will to create personal and professional relationships. For example, a person who intends to return from the very beginning of his or her residence, even if he or she establishes lasting relationships, retains his or her habitual residence. Another example is when a person has found a home and a job and as soon as he arrives, he has a subjective intention to settle in a certain place. That person

shall be deemed to have acquired his habitual residence in the territory of that State. In order to guarantee the interests of third parties, it is considered that a subsequent change in personal and professional relations, and hence in the usual place of residence, has an exnunc effect.

According to the Law on Foreigners in the Republic of Bulgaria (briefly, the LF)[18], the residence of foreigners in the Republic of Bulgaria is carried out on the basis of visas, international agreements or agreements of the European Union with third countries for visa-free regime; acts of the law of the European Union, which are in force and applied by the Republic of Bulgaria; permission of the services for administrative control of foreigners.Foreigners reside in the Republic of Bulgaria: short-term – up to 90 days within each 180-day period from the date of entry into the country; long-term – with a permitted term of up to one year, except in the cases provided for in this law; long-term – with an allowed initial term of 5 years and possibility for renewal after submitted application; permanently – with an indefinite term allowed. Visas are issued for short-term and long-term residence, according to Art. 9a of the LF. Visa is issued by personalizing a «visa sticker» according to the model of the European Union. The visa sticker shall be affixed to a regular passport or to a replacement regular travel document recognized by the Republic of Bulgaria. The conditions and the order for printing, storage, laying, annulment, rejection and destruction of the visa stickers and the visa application forms shall be determined by an act of the Council of Ministers. The officials authorized by the head of the respective structure in the Ministry of Foreign Affairs, in the diplomatic and consular missions of the Republic of Bulgaria abroad and in the border control bodies may take decisions on issuance, refusal to issue, cancellation and cancellation of visas, and in the services for administrative control of foreigners – for cancellation and cancellation of visas. To obtain the right to long-term, permanent or long-term residence, if he meets the conditions provided by law, the foreigner submits personally to the Migration Directorate or in sectors/groups «Migration» at the regional directorates of the Ministry of Interior a sample and documents according to regulations for the application of the law (Art. 23 of the LF). Visas, as well as permits/certificates for long-term, permanent or long-term residence are included in the scope of the Regulation according to Art. 2(1)(k).

4.11. Absence of a criminal record.

The last type of documents that Art. 2(1)(m) indicates are those who establish a lack of criminal background. It is a condition that official documents relating to this fact be issued to a citizen of the Union by the authorities of the Member State of which he/she is

[18] Promulgated in Official Journal of Bulgaria No 153 of 23 December 1998, last amendment of 18 March 2022.

a national. The Criminal Records Bureaus are the body that issues the Criminal record certificate in the Republic of Bulgaria according to Model 1 of Annex 2 to Art. 45(1) of Ordinance of 26 February 2008, No 8 on the functions and organization of the activity of the Criminal Records Bureaus[19]. The criminal record certificate is an official document issued by the Criminal Bureau at each district court, at the request of a specific individual, which contains information about the criminal record of individuals – whether they have been convicted of crimes, including convictions for which they are rehabilitated, when required by law. Detailed description of the procedure for issuance a criminal record certificate is contained in the Ordinance No 8/2008.

4.12. Voting.

The Regulation also applies to public documents the presentation of which may be required of citizens of the Union residing in a Member State of which they are not nationals when those citizens wish to vote or stand as candidates in elections to the European Parliament or in municipal elections in their Member State of residence, under the conditions laid down in Directive 93/109/EC and Council Directive 94/80/EC, respectively.

In Bulgarian voting code[20] are settled different kinds of declarations which have to be presented in the municipal administration at the address of residence by the persons who wish to vote in non-national country or to stand as candidate to the European Parliament Elections in non-national country.

All official documents required to be presented by citizens of the Union residing in a Member State of which they are not nationals when those citizens wish to vote or to stand as candidates in elections to the European Parliament are included in the scope of Regulation (EU) 2016/1191.

5. Conclusions.

From the analasis that had been made it can be summed up three conclusions.

The first one is that the scope of regulation is very broad and through it is achieved one of its purposes - facilitating the free circulation of certain public documents within the Union.

Secondly, Bulgarian law has detailed regulation of more of the institutes that are settled in Art. 2(1)(a)-(m) of the Regulation and there are no obstacles for the application of the texts of the Regulation.

[19] Promulgated in Official Journal of Bulgaria No 24 of 6 March 2008.

[20] Promulgated in Official Journal of Bulgaria No 19 of 5 March 2014, last amendment of 22 February 2022.

On the third place during the preparation of the text of Regulation, after discussions, was decided that Regulation would not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State. This decision may be defined as controversial because the practice places on the table the question of recognition in one Member State a personal status which has been acquired in another Member State (based on institutes that are not legally settled in the Member State of recognition or even contrary to its public policy), and which is certified by public document, included in the scope of the Regulation.

ABSTRACT: This paper is focused on the Regulation (EU) 2016/1191 – Public Documents Regulation. In particular, it concerns the general characteristic of the Regulation, the conditions to be met in order to apply the Regulation, and its scope of application. The analysis addresses specifically the documents that can be issued in the Republic of Bulgaria under its domestic law to certify the facts included in the scope of Regulation under Art. 2(1)(a)-(m). It is indicated which national act settles each document and clarified which are the requirements to be issued.

KEYWORDS: Regulation (EU) 2016/1191; public documents; scope; Bulgarian Code of Private International Law; Bulgarian Civil Registration Act; case C-490/20 of ECJ.

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

Francesca Maoli*

CONTENTS: 1. Introduction. – 2. The EU area of freedom, security and justice: the relevance of personal and family status for migration and free movement of persons. – 3. The 1961 Hague Apostille Convention. – 4. The role of the International Commission on Civil Status. – 5. Regulation (EU) 2016/1191: shortcomings and the difficult coordination with international conventions. – 6. The «global appeal» of the EU in synergy with other international organizations: towards a common legal framework for civil status documents?

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.).

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[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.

Challenges to the codification of cross-border dimension of the digitalization of civil status records and registers

Guillermo Palao*

CONTENTS: 1. Introduction. – 2. The HCCH e-apostille pilot programme (e-APP). – 3. Codification efforts at the ICCS/CIEC. – 4. The EU response: Regulation (EU) 2016/1191. – 5. Final remarks.

1. Introduction.

Phenomena such as globalisation and regional integration processes, in which the development of the information society and the irruption of the fourth industrial revolution play a central role, has a decisive effect in the increase of cross-border mobility of people; thus, directly affecting the regulation of the personal dimension of citizens, their identities and their civil status in relation to international situations[1]. This has provoked an increasing national normative responses worldwide, together with a remarkable level of regional and international cooperation and codification.

This multi-level codification effort, closely connected to the more general problem of facilitating the international circulation of public documents, aims at establishing mechanisms which favour the cross-border recognition of legal realities of a personal nature and of civil-status records generated under a foreign system. Precisely in relation to one of the areas of the private international law system, traditionally considered as a «poor relative»[2].

One of the challenges which this national, regional and international codification process faces, lies in the digitalisation of the national registers on civil status acts and the documents and certificates they issue. A process that is directly related to the modernisation of public administration and of the administration of justice, through the incorporation of technological tools for the management of their processes. In this respect, and directly related to the modernisation of public administration, this aims at providing

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[1] N. NORD, *La circulation des actes de l'État civil au sein de l'Union européenne*, in V. CUARTERO RUBIO, J.M. VELASCO RETAMOSA (eds.), *La vida familiar internacional en una Europa compleja: cuestiones abiertas y problemas de la práctica*, Valencia, 2022, pp. 81-102, at p. 82; W. PINTENS, *CIEC/ICCS (International Commission on Civil Status)*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (eds.), *Encyclopedia of Private Internacional Law*, Cheltenham, 2017, pp. 330-337, at p. 333; E. ROCA, *Dimensión internacional del Registro civil: los casos de Bolivia y España*, Santa Cruz de la Sierra, 2013, pp. 267-268.

[2] N. NORD, *La circulation*, cit., p. 82.

a high level of efficiency, legal certainty to citizens and an adequate level of legal protection of their personal rights (including their personal data). However, new legal solutions are required to properly address the need for the secure the acceptance of foreign public documents in a digital form and to eliminate obstacles for the mobility of persons[3], as far as it poses new and unique challenges which affect cross-border cooperation and the recognition and international circulation of foreign civil-status records, when these have been digitised and affects the underlying personal or family legal relationship with foreign elements.

In this respect, several countries have developed domestic normative solutions which, from a cross-border perspective, seek to admit foreign digital documents under the conditions of granting the functional equivalence of those public documents to those legally required on paper, when their authenticity is ensured – via notarization and an authentication process –, and may also be accompanied by with an official translation of the foreign document and even with the incorporation of an apostille. As a result, countries tend to favour the gradual incorporation of the appropriate legal modifications by means of which the traditional analogical systems of national public registers should be adapted to the digital reality, gradually making use of interactive digital tools and platforms, both requiring that citizens should make use of (advance) digital signatures (or even implementing a digital identity system), and guaranteeing the protection of citizens' personal rights through and adequate legal framework relating to personal data protection within this safe electronic framework[4].

However, such national legislative efforts appear as clearly insufficient in today's highly globalised world, not only because of the different levels of speed or the uneven incorporation of technological tools in the digitisation processes of national civil-status registers; but also because these initiatives are usually not aware of the international element which could affect digital civil-status acts – which implies the subsidiary application of general private international law solutions –. Therefore, there is a need to carry out supra-national legal initiatives in this area, which allow for a greater level of cooperation and favour the international mobility of people. Consequently, there is no doubt that in this area it is necessary to move beyond individual national efforts and, on the contrary, to adopt legal solutions at a supra-national level (whether international or regional).

[3] J.S. BERGÉ, *Rethinking Flow Beyond Control. An Outreach Legal essay*, Aix-en-Provence, 2021, pp. 112-113, available *online*.

[4] To mention some of those national initiatives, the examples of Argentine (TAD Platform), Brazil (SIRC System), France (RECE System), Spain (DICIREG Application) or Switzerland (Infostar System) should be underlined from a comparative perspective.

In this respect, and from a purely international perspective and related to the so called fourth dimension of private international law[5], both the Hague Conference on Private International Law (HCCH), as well as the International Commission on Civil Status (ICCS/CIEC) have played an active and important role in relation to this issues. Besides, and from a regional point of view, it is worth highlighting the efforts made by the European Union (EU) in order to provide a legal framework to this question. As a result, the aim of this paper is – although the significant national initiatives which have been produced – to analyse the various regional and international codification initiatives on the digitisation of civil-status records and registers and, in particular, those questions which relate to their cross-border dimension.

2. The HCCH e-apostille pilot program (e-APP).

Starting with the HCCH, the legal instrument which plays a major role in this area is the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, which has been widely supported (with 121 Contracting Parties at present)[6].

This Convention replaces the procedure of legalisation through a chain of authentication that operates in a single phase[7], and it mainly consists of the control of the existence of a single uniform certificate issued by the competent authorities in the country of issuance (Art. 6), which verifies the formal authenticity of the public document, emitted by the national authority designated by the state of origin: the apostille (Arts. 3-4)[8].

The HCCH 1961 Apostille Convention poses important challenges in relation to the digitalization process of national public documents and of civil-status records and registers. This concern derived in the creation of a Special Commission (2003), to use and to adapt its successful model of the apostille to the peculiarities of the digital environment[9]. Thus, favoured by the technology-neutral character of the 1961

[5] F. HEINDLER, *The digitisation of legal co-operation – reshaping the fourth dimension of private international law*, in T. JOHN, R. GULATI, B. KOHLER (eds.), *The Elgar Companion to The Hague Conference on Private International Law*, Cheltenham, 2020, pp. 428-438.

[6] The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents).

[7] P. DIAGO, *La circulación de documentos públicos en situaciones transfronterizas: la tensión entre la seguridad jurídica y la reducción de las cargas para el ciudadano*, in *Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz*, 2019, pp. 81-132, at p. 121.

[8] P. ZABLUD, *The 1961 Apostille Convention – authenticating documents for international use*, in T. JOHN, R. GULATI, B. KOHLER (eds.), *The Elgar Companion*, cit., pp. 277-287, pp. 279-284; P. DIAGO, *La circulación*, cit., pp. 127-128; A. BORRÀS, *De la exigencia de legalización a la libre circulación de documentos*, in M. FONT I MAS (ed.), *El documento público extranjero en España y en la Unión Europea. Estudio sobre ls características y efectos del documento público*, Barcelona, 2014, pp. 27-46, at pp. 31-32.

[9] P. DIAGO, *La circulación*, cit., p. 129.

Convention[10], it led to the launch of the «electronic Apostille Pilot Programme» in 2006 and, since 2012, it evolved into the current «electronic Apostille Programme» («the e-APP»)[11], implemented by 46 Contracting Parties. Nevertheless, the programme does not seem to impact much further, nor does it seem to inspire a larger confidence for new contracting parties[12].

The e-APP basically consists of two main technological elements, e-apostilles and e-registers[13], and does not favour any specific technology (neutrality), enabling Contracting Parties to freely choose the most suitable to their interests.

In this respect, and on the one hand, e-apostilles are electronically attached to digital public document, which has been lawfully scanned, as well as submitted and verified by electronic means on an electronic form by competent national authorities in the country of origin[14]. Their fundamentals are based on the basic same working principles of the traditional apostille, adapted to the technological environment.

On the other hand, the system implies the creation and the operation of electronic registers of e-apostilles in all Contracting Parties (e-registers), which are maintained in a publicly accessible and electronic form, and can be accessed online by recipients, in order to verify the e-apostille that they have received and certain requisites that it must fulfil (i.e. its signature, capacity and seal/stamp)[15].

The categories of the e-registers may vary form one Contracting Party to the other (depending on their level of technological development), and they are competent to quickly and efficiently receive, validate and accept an e-apostille issued in another Contracting Party, as well as to record the following information: the number and date of the certificate, the name of the person signing the public document and the capacity in which they have acted (and in case the documents were unsigned, the name of the authority which has attached the seal or stamp)[16].

3. Codification efforts at the ICCS/CIEC.

[10] A. BORRÀS, *De la exigencia*, cit., pp. 37-38.

[11] See The electronic apostille programme. In this respect, C. BERNASCONI, *The Electronic Apostille Program (e-APP): Bringing the Apostille Convention into the Electronic Era*, in J.J. FORNER DELAYGUA, C. GONZÀLEZ BEILFUSS, R. V. FARRÉ (eds.), *Entre Bruselas y La Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado, Liber Amicorum Alegría Borrás*, Barcelona, 2013, pp. 199-212, at pp. 202-203; A. RODRÌGUEZ BENOT, *La aplicación de las nuevas tecnologías a la cooperación jurídica internacional: la apostilla electrónica*, in ASOCIACIÓN AMERICANA DE DERECHO INTERNACIONAL PRIVADO (ed.), *Derecho internacional privado, derecho de la libertad y el respeto mutuo: ensayos a la memoria de Tatiana B. de Maekelt*, Asunción, 2010, pp. 649-665, at pp. 650-658.

[12] A. BORRÀS, *De la exigencia*, cit., p. 39.

[13] C. BERNASCONI, *The Electronic*, cit., pp. 204-206; D.J.B. SVANTESSON, *The (uneasy) relationship between the HCCH and information technology*, in T. JOHN, R. GULATI, B. KOHLER (eds.), *The Elgar Companion*, cit., pp. 449-463, at pp. 453-454; P. ZABLUD, *The 1961 Apostille Convention*, cit., p. 285.

[14] P. DIAGO, *La circulación*, cit., p. 128.

[15] P. DIAGO, *La circulación*, cit., pp. 128-129.

[16] See the implementation chart of the e-APP.

The interest of the ICCS/CIEC to promote the use of digitised civil-status records and registers is directly connected to the goals of this specialized international organization and led to the prolific codification activity it has developed[17]. In this respect, the ICCS/CIEC has done a remarkable work, in terms of the techniques and of the methods which the Commission has implemented, as well as the numerous and significant instruments it has developed in recent decades[18], with a direct impact on the problems raised by the growing digitalisation of civil-status records and registers as a logical continuity of the work of the Commission[19].

Such codification effort can be observed, respect to the digitalisation, in several ICCS/CIEC recommendations and conventions. Firstly, Recommendation (No. 8) on the computerisation of civil registration (1991)[20] establishes the minimum technical criteria for the development and functioning of any digital civil-status system and basic governing standards. The analogical precedent of this was Recommendation (No. 4) relating to the accessibility to the public of civil status registers and records (1984)[21]. Art. 1 underlines the need for Contracting Parties to take the necessary steps to guarantee that the development, use and any modification of systems for the automatic processing of civil status data: meet well-defined requirements in respect of material protection; provide that access to and the use and updating of civil status data registered is subject to controls and under the supervision of the civil registrar; enable the correction of civil-status data; and they accessible to the public. Besides, it advises that such systems provide for: the acceptance of verified digital copies and extracts in the same way as the original record on paper (Art. 2), the translation of information coded pursuant to a codification approved by the ICCS/CIEC (Art. 3); the compatibility with those used in the other Contracting States (Art. 4); and the accessibility to the public of digital civil-status records.

Besides, several ICCS/CIEC Conventions have followed the path of Recommendation (No. 8), and of Convention (No. 25) on the coding of entries appearing in civil status documents (1995)[22]. Convention (No. 30) on international communication by electronic means (2001)[23], complemented by the Convention (No. 33) on the use of the International Commission on Civil Status Platform for the international

[17] A presentation of and reference to the work done by the ICCS/CIEC, is accessible *online*.

[18] N. NORD, *La circulation*, cit., pp. 95-100; J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil (CIEC). International Commission on Civil Status (ICCS)*, The Hague, 2018, p. 64.

[19] J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil*, cit., p. 49.

[20] Recommandation (n° 8) *relative à l'informatisation de l'état civil*.

[21] Recommandation (n° 4) *relative à la publicité des registres et actes de l'état civil*.

[22] Convention (No. 25) on the coding of entries appearing in civil status documents.

[23] Convention (No. 30) on the international communication by electronic means.

communication of civil status data by electronic means (2012)[24]. According to Art. 1, this Convention aims at providing a legal framework that favours the electronic circulation of civil-status records, as referred to in the various instruments developed within the ICCS/CIEC framework[25], without creating new obligations for Contracting Parties[26].

Based on the principle of functional equivalence, the Convention establishes that the competent authorities in each Contracting Party (Art. 4[27]) assume to attribute the same legal validity to digital records as to traditional paper records (Art. 3). Provided that certain conditions are guaranteed, such as the integrity and authenticity of the content of the electronic transmission, as well as the security and confidentiality of the digital communication (Art. 2)[28].

Despite its objectives and merits, Convention (No. 30) has been poorly ratified (6 countries) and has not entered into force. Among the problems which it might have encountered, it could be mentioned: the scant treatment of the thorny issue of the processing of personal data; the need for it to be granted the status of authentic acts between countries; and the fact that it did not introduce requirements for the adaptation of national legislation for its effective implementation[29].

The interest of ICCS/CIEC has also developed the ICCS/CIEC Platform for the international communication of civil-status data by electronic means, which has been complemented by the adjustment of the model certificates drawn up in the framework of Convention (No. 34) for computer processing and direct electronic transmission between the State authorities (2014)[30], and their utilisation may even be extended beyond the scope of the Commission's own objectives and instruments. However, in spite of its advantages, in 2017 the work leading to the implementation of the Platform was suspended[31].

The legal infrastructure relating to the Platform is set out in the Convention (No. 33)[32]. The Platform was conceived as a technical tool and as a complement Convention (No. 30), and was designed to allow interoperability, as well as to ensure simple, efficient, secure and not particularly costly in terms of access and management[33].

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[24] Convention (No. 33) on the use of the International Commission on Civil Status Platform for the international communication of civil-status data by electronic means.

[25] Annex I to the Convention's Explanatory Report.

[26] Explanatory Report in relation to Art. 1.

[27] In reference to the authorities or civil registers of the Contracting States, as underlined by the Explanatory Report, cit., in relation to Art. 4.

[28] To «comply with the provisions in force regarding data protection» (Explanatory Report, cit., in relation to Art. 2).

[29] J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil*, cit., p. 52.

[30] Convention (No. 34) on the issue of multilingual and coded extracts from civil-status records and multilingual and coded civil-status certificates.

[31] J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil*, cit., pp. 64-65.

[32] Which was based on the following countries: Belgium, France, Luxembourg and Poland.

[33] Explanatory Report, cit., in relation to the technical presentation of the Platform. See also W. PINTENS, *CIEC/ICCS*, cit.

Respect to the practical operation of the Platform[34], the following should be mentioned: first, Art. 2 establishes the conditions for the use of the Platform. Its operation can either be limited to allowing the transmission and exchange of the civil status records referred to in the ICCS/CIEC conventions (Art. 3)[35]; or be extended on a voluntary basis to the exchange of this type of information or that relating to nationality other than that referred to in the Conventions (Art. 4); or it can even be used progressively in respect of certain authorities, data or specific ICCS/CIEC conventions (Art. 5).

Secondly, Contracting parties are committed to limit the use of the information received through the Platform for purposes other than those provided for in the ICCS/CIEC conventions (Art. 6), as well as to use an advanced electronic signature under the conditions set out in the Appendix I to ensure the security and the confidentiality of digital transmission of civil status records (Art. 7)[36].

Thirdly, data transmitted via the Platform should be attributed a legal value at least equivalent to that which would have been transmitted on a physical medium (Art. 8).

Fourthly, Contracting Parties undertake to ensure an adequate level of protection of individuals with regard to the processing of their personal data transmitted via the Platform, and to notify ICCS/CIEC immediately of any problems that may arise with regard to the protection of such data in the context of the use of the Platform (Art. 16).

Finally, Convention (No. 33) lays down specific rules concerning such aspects as: the opening for signature of the Convention (Art. 9), the manner of becoming a Contracting Party to it (Art. 10) and the exclusion of new ratifications, acceptances, approvals or accessions after the entry into force of Convention (No. 30) (Art. 24); the possibility of declaring the suspension of the use of the Platform for a Contracting State by ICCS/CIEC or, on an *ad hoc* basis, by another Contracting State (Arts. 17-18); the declarations that may be made by the Contracting States (Arts. 19-20); the sharing of the cost of the Platform (Art. 20); or the procedure for the revision of the Convention or its Annexes (Art. 22).

4. The EU's response: Regulation (EU) 2016/1191.

The EU has also shown a keen interest in the intra-European circulation of public documents as it affects EU policies related to the development of an Area of freedom, security and justice, as well as to the objective of facilitating the free movement of persons (Art. 21(2) TFEU)[37]. The EU has been sensitive to the changes brought about by

[34] J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil*, cit., pp. 52-53.

[35] A list of which is set out in its Annex II.

[36] Annex I of Convention (No 33), cit., establishes the Platform Rules of Procedure.

[37] Recital 1. See M. GUZMÀN ZAPATER, *La libre circulación de documentos públicos relativos al estado civil en la Unión Europe*, in M. FONT I MAS (ed.), *El documento público*, cit., pp. 90-96.

technological developments, being strongly inspired by the precedents developed at the HCCH and at the ICCS/CIEC outlined above[38], which led to the publication 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 and amending Regulation (EU) No 1024/2012[39], applicable from 16 February 2019 (Art. 27).

Regulation (EU) 2016/1191 is the first European instrument to deal specifically with the problem of the free movement of authentic acts within the EU, but it has been criticised for being less ambitious than those which were initially planned[40]. Informed by the principle of mutual trust and functional equivalence[41], it aims to provide a specific and simplified uniform response regarding the administrative formalities, requirements and formalities to be fulfilled by certain public documents and certified copies thereof (including certain civil-status records[42]) issued by the authorities of a Member State – MS – (in accordance with its national law), for their presentation in another MS, and thus to promote their intra-European circulation.

The main elements of Regulation (EU) 2016/1191 are as follows. To begin with, the instrument is based on the free movement of authentic acts issued by the authorities of a MS. By virtue of Art. 1, it aims to eliminate all formalities relating to their legalisation or similar (Art. 4), and to simplify formalities in respect of certified copies (Art. 5), translations and multilingual standard forms which should be attached to them (Arts. 6 to 12).

Besides, its substantive scope relates to those «public documents» – Art. 3(1)[43] – which have been issued by an «authority» – Art. 3(2) – provided that they aim to establish

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

[39] 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.

[40] M. FONT I MAS, *La libera circolazione degli atti pubblici in materia civile: un passo avanti nello spazio giudiziario europeo*, in *Freedom, Security & Justice: European Legal Studies*, 2017, pp. 104-125, at p. 116, available *online*.

[41] P. DIAGO, *La circulación*, cit., p. 105; M. GUZMÀN ZAPATER, La *libre circulación de los documentos públicos en materia de estado civil en la UE: el Reglamento UE 2016/1191 del PE y del Consejo*, in *Revista General de Derecho Euro*peo, 2017, pp. 162-179, p. 169.

[42] But excluding those issued on the basis of the relevant ICCS/CIEC conventions (Recital 11).

[43] Art. 2(3)-(4) exclude public documents issued by the authorities of a third country (Recital 48); or certified copies of birth documents made by the authorities of a MS, as well as to the recognition in a MS of legal effects relating to the content of public documents issued by the authorities of another MS. See P. DIAGO, *La circulación*, cit., p. 109.

one of the facts referred to in Art. 2(1) – the wording of which shows their significant impact on civil-status matters[44] –, as well as those provided for in Art. 2(2)[45].

Thirdly, the functioning of the Regulation is based on the presumption of the authenticity of the instruments which it covers, but only in their extrinsic dimension; consequently, without referring to the effects which they have by reason of their content or their recognition[46]. Therefore, it neither amends national legislation in this area, nor does it refer to their evidentiary effect, or possible cross-border enforcement effects – Art. 2(4).

Moreover, this EU instrument establishes a system of cooperation between the competent authorities of the MS to monitor cases of fraud and possible falsification of the documents which it covers. In the event of reasonable doubt, Art. 14 establishes a procedure for checking and requesting information from the authority which issued the document or the central authority of the issuing MS – via the Internal Market Information System (IMI)[47] – which, if confirmation of its authenticity is not received, the requesting authority will not be obliged to process it in exceptional circumstances. For the functioning of this information mechanism, provision is made for the designation of central authorities in each MS (Art. 15), the functions of which are set out in Art. 16.

It also of importance to underline that the Regulation is intended to co-exist with regard to: MSs' own domestic legislation (Art. 1(1)II) – such as, for example, that on public access to public documents[48] –; Conventions – i.e. from HCCH and the ICCS/CIEC – (Art. 19)[49]; as well as it is without prejudice to the application of other

[44] Art. 2(1) «(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] «This Regulation also applies to public documents the presentation of which may be required of citizens of the Union residing in a Member State of which they are not nationals when those citizens wish to vote or stand as candidates in elections to the European Parliament or in municipal elections in their Member State of residence, under the conditions laid down in Directive 93/109/EC and Council Directive 94/80/EC respectively».

[46] J. FITCHEN, *The Private International Law of Authentic Instruments*, Oxford, 2022, p. 96; A. CAMUZAT, *La forcé probante des actes de l'état civil étrangers*, in H. FULCHIRON (ed.), *La circulation des personnes et leur statut dans un monde globalisé*, Paris, 2019, pp. 311-321, at pp. 319-320; P. DIAGO, *La circulación*, cit., p. 112; P. JIMÉNEZ BLANCO, *Movilidad transfronteriza de personas, vida familiar y Derecho Internacional privado*, in *Revista Electrónica de Estudios Internacionales*, 2018, pp. 1-49, at p. 29, available *online*; M. GUZMÀN ZAPATER, *La libre circulación*, cit., p. 170.

[47] Arts. 13 and 20(1).

[48] Art. 20(2).

[49] All MS are contracting parties to the HCCH Apostille Convention 1961. From the ICCS/CIEC perspective, this concerns Conventions (No. 16), (No. 27), (No. 33) and (No. 34). See M. GUZMÀN ZAPATER, La *libre circulación*, cit., p. 178.

provisions of the EU – i.e. on legalisation or other formalities[50], as well as on electronic signatures and electronic identification or other mechanisms of administrative cooperation – (Art. 17)[51].

Finally, for its proper functioning the system requires that MS provide a series of information (Arts. 22, 24 and 25) to be publicly available on the European e-Justice Portal; the designation of central authorities to promote cooperation and exchange of information; as well as the creation of an *ad hoc* committee for the exchange of best practices in the application of the Regulation (Art. 23).

Regulation (EU) 2016/1191 is also consistent with the current technological framework, and addresses the digitisation of public documents – consequently, civil-status records and registers –, in several provisions. On the one hand, Art. 12 deals with the development of electronic versions of multilingual standard forms which will be contained at the European e-Justice Portal. MS have a certain degree of discretion in this respect, as they are able to: decide if and under which conditions public documents and multilingual standard forms in electronic format can be submitted; integrate the electronic version of a multilingual standard form from the European e-Justice Portal into a different location accessible at national level, and to issue it from there; and create electronic versions of multilingual standard forms using a technology other than that used by the European e-Justice Portal[52].

On the other hand, Central authorities should benefit for the functionalities, as well as communicate and exercise their functions by using «IMI». In addition to this, Art. 14(4) provides that requests for information, in those cases of reasonable doubt which have been mentioned, shall be accompanied by a copy of the public document concerned or of its certified copy, transmitted electronically by means of IMI. As established in Art. 23(2)(c), the exchange of best practice shall also concern the use of electronic versions of public documents. Lastly, the application of the mentioned provisions of this Regulation is without prejudice to the application of other provisions of the EU, affecting EU legislation on questions like electronic signatures and electronic identification or other mechanisms of administrative cooperation (Art. 17).

[50] This affects, in relation to civil-status registers, the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which has been repealed, from 1 August 2022, by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

[51] This affects, as mentioned by Recital 34, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. However, take into account, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) .

[52] However, Recital 29. The mentioned multilingual standard forms are available *online*.

Regulation (EU) 2016/1191 may receive some criticisms[53], mainly explained for its lack of ambition and relate to not only its limited scope of application, its effects, as well as for the subsidiary character of the instrument which allows a high level of legal fragmentation an a plurality of systems – affecting to the application of national regime, international Conventions and other EU Regulations in the field of civil justice[54] –; but also relate to its approach to the digitalisation of civil-status records and registers[55]. Consequently, it may represent an unfinished legal regime[56]. So it would be advisable either to take a more committed and decisive position on the issue of the intra-European circulation of digital civil-status records[57], or to support more actively and directly the ICCS/CIEC instruments[58].

In this regard, the solutions proposed by the European legislator in Regulation (EU) 2016/1191 are not sufficient and do not offer adequate answers to such relevant issues. For a start, the establishment of uniform digital multilingual standard forms which are considered as binding on the authorities of the MS. Besides, the gradual requirement for the digitisation of civil-status records and registers at European level, through the harmonisation of the underlying IT system architecture, of the technological tools facilitating direct electronic communication between public authorities, and even the interconnection of civil-status registers[59]. Also, as provided in Arts. 26(1)(c) and (2)(c), in relation to the review of the Regulation, the convenience to promote: «the use of electronic systems for the direct transmission of public documents and the exchange of information between the authorities of the Member States in order to exclude any possibility of fraud in relation to the matters covered by this Regulation».

5. Final remarks.

The increase of internationalisation and digitalisation are two essential elements in the current activity of civil-status registers. Thus, while globalisation has led to a significant increase in the cross-border mobility of people, the irruption of the information society has led to a growing digitalisation of public administrations, also affecting the management of national civil-status registers. As a result, an intense codification effort at

[53] N. NORD, *La circulation*, cit., pp. 100-101; M. FONT I MAS, *La libera circolazione*, cit., pp. 120-122.

[54] N. NORD, *La circulation*, cit., pp. 89-91; P. DIAGO, *La circulación*, cit., pp. 119-120.

[55] M. GUZMÀN ZAPATER, La *libre circulación*, cit., p. 166; M. FONT I MAS, *La autenticidad formal de los documentos públicos en España como obstáculo a las relaciones internacionales y la propuesta de Reglamento sobre la simplificación de la aceptación de documentos en la UE*, in M. FONT I MAS (ed.), *El documento público*, cit., pp. 82-83.

[56] N. NORD, *La circulation*, cit., p. 85.

[57] P. DIAGO, *La circulación*, cit., p. 117.

[58] N. NORD, *La circulation*, cit., pp. 100-101.

[59] Communication of the Commission, Digitalisation of justice in the European Union. A toolbox of opportunities, COM(2020) 710 final of 2 December 2020.

the national, regional and international levels has taken place over the last few years, in order to promote the digitisation and the international circulation of civil-status documents.

The result achieved is far from being ideal, as it is characterised by the high level of complexity deriving from the plurality of codification venues and applicable legal sources, as well as the limited and fragmentary nature of the normative solutions contained in such instruments. Thus, it is advisable to reconsider the current model, with the aim of taking full advantage of the opportunities offered by ICTs and reducing the legal obstacles that the current situation generates in the international mobility of persons.

Such required change of attitude on the part of the international and European legislator would require a deepening of dialogue and constructive cooperation between the different institutions involved in this area, as well as to take advantage of the strengths offered by the various codification initiatives with regard to the plurality of issues (normative and technical), which are involved in the cross-border dimension of the digitalization of civil status records and registers.

ABSTRACT: The increase of internationalisation and digitalisation are two essential elements deeply affecting the current activity of civil status registers. The incorporation of new technological tools in the management of civil status registers has proved to be highly beneficial, affecting also to their international dimension and the cross-border circulation of civil status records. As a result, an intense codification effort has taken place at the national, regional and international levels over the last few years, to promote the digitisation and the international circulation of civil status documents. The global challenges faced by this matter call for the need of supra-national responses, although the high level of complexity deriving from the plurality of codification venues and applicable legal sources, as well as the limited and fragmentary nature of the normative solutions contained in such instruments. Three are the main international codification venues whose normative results should be analysed from the perspective of the digitisation and the internationalisation of the activity of civil status registers: the HCCH, the ICCS/ CIEC and the EU. In this respect, despite of the undeniable efforts made in the different codification centres, it is advisable to reconsider the current model, with the aim of taking full advantage of the opportunities offered by ICTs and reducing the legal obstacles that the current situation generates in the international mobility of persons. Therefore, this would require, a deepening of dialogue and constructive cooperation between the different institutions involved in this area and to take advantage of the strengths offered by the various codification initiatives.

KEYWORDS: Civil status registers; digital civil status records; cross-border circulation of public documents; private international law; Hague Conference on Private International Law; International Commission on Civil Status; European Union.

«If you are a parent in one country, you are a parent in every country»: is it true for social parenthood?

Stefania Pia Perrino*

CONTENTS: 1. Defining the phenomenon. – 2. The declinations of the phenomenon. – 3. Social parenthood against the public policy. – 4. The recent ruling by the European Court of Justice. – 5. Conclusion.

1. Defining the phenomenon.

Parenthood is the legal relationship between a child and the child's parents: this notion of the parental *status* can be found in Recital 14 of Regulation (EU) 2016/1191[1]. A similar notion can be traced in the Presidential decree of 30 May 1989, no. 223[2], which provides the legal framework for the registry regulation of the resident population in Italy. In the Presidential decree, Art. 4 describes the concept of demographic resident family as the group of people connected by marriage, kinship, adoption, and affection, people who live together and stay in the same city.

In the above-mentioned sources there is no indication of the relevance of the genetic link or of the relevance of the use of ordinary methods of sexual reproduction for filiation. Differently, the Italian discipline dedicated to filiation – first of all the Civil Code – is characterized by a direct reference to filiation born during marriage, legitimate filiation, or to natural filiation, as biological filiation, identified by genetic links between parents and children, except for the provisions of the law on adoptions[3].

However, recently, EU citizens and even Italian citizens are establishing parenthood through consent or intended parent agreements, where allowed, without any genetic link with children, through artificial reproduction techniques or different kind of

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[1] 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] Presidential decree of 30 May 1989, no. 223, Approvazione del nuovo regolamento anagrafico della popolazione residente.

[3] On the matter, see G. IORIO, *Corso di diritto privato*, IV ed., Torino, 2020, p. 1015.

adoptions. This new phenomenon – that is relevant both in EU and in extra EU countries – can be defined as social or intended parenthood[4].

Social parenthood – in a first approximation – can be intended as the relationship between the person assuming parental responsibility and the child, in the absence of a genetic, biological, and gestational contribution between the former and the latter.

The above-mentioned category[5] may include all forms of filiation resulting from the various types of adoption[6], the stepchild adoption[7], filiation resulting from heterologous or allogenic medically assisted procreation[8], filiation from surrogacy[9], filiation from *post mortem* procreation[10], adoption of embryos[11]; all whether in favor of

[4] A.R. FAVRETTO, C. SCIVOLETTO, *Genitorialità sociale affidataria e continuità dei legami affettivi*, in *Sociologia del Diritto*, 2020, 1, pp. 131-152; L. GIACOMELLI, *Tutela dei minori e pragmatismo dei giudici: verso il riconoscimento delle «nuove» forme di filiazione e genitorialità*, in *Osservatorio AIC*, 2018, no. 3, pp. 551-587, available online; A. GORGONI, *La filiazione*, Torino, 2018, p. 83.

[5] On the notion of social parent, see also T. AULETTA, *L'incidenza dell'interesse del minore nella costituzione o rimozione dello stato filiale*, in M. BIANCA (a cura di), *The best interest of the child*, Roma, 2021, pp. 523-610.

[6] C.M. BIANCA, *Diritto civile. La famiglia*, vol. 2.1, VI ed., Milano, 2017, p. 451 ff.; M. DOGLIOTTI, F. ASTIGGIANO, *Le adozioni. minori italiani e stranieri, maggiorenni*, Milano, 2014, p. 3 ff.; P. MOROZZO DELLA ROCCA, *L'adozione dei minori. Presupposti ed effetti*, in AA.VV., *Filiazione e adozione*, vol. III, in G. FERRANDO (diretto da), *Il nuovo diritto di famiglia*, Bologna, 2007, p. 616 ff.; L. LENTI, *L'adozione*, in G. COLLURA, L. LENTI, M. MANTOVANI (a cura di), *Filiazione*, vol. II, in P. ZATTI (diretto da), *Trattato di diritto di famiglia*, Milano, 2002, p. 575 ff.; M. DOGLIOTTI, *Genitorialità biologica, genitorialità sociale, segreto sulle origini dell'adottato*, in *Famiglia e diritto*, 1999, pp. 406-409.

[7] M.G. STANZIONE, *Filiazione e genitorialità: il problema del terzo genitore*, Torino, 2010, p. 111 ff.

[8] R. VILLANI, *La "nuova" procreazione medicalmente assistita*, in L. LENTI, M. MANTOVANI (a cura di), *Il nuovo diritto della filiazione*, vol. II, in P. ZATTI (diretto da), *Trattato di diritto di famiglia – Le riforme*, Milano, 2019, p. 281 ff.; AA.VV., *La fecondazione assistita. Riflessioni di otto grandi giuristi*, Milano, 2005, p. 15 ff.; M. DOGLIOTTI, *La legge sulla procreazione assistita: problemi vecchi e nuovi*, in *Famiglia e diritto*, 2004, pp. 117-121; ID., *Una prima pronuncia sulla procreazione assistita: tutte infondate le questioni di legittimità costituzionale?*, in *Famiglia e diritto*, 2004, pp. 384-386; F. SANTOSUOSSO, *La procreazione medicalmente assistita*, Milano, 2004, p. 3 ff.; L. LENTI, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, Padova, 1993, p. 277 ff.; A. TRABUCCHI, *Inseminazione artificiale (diritto civile)*, in *Novissimo Digesto Italiano*, 1962, pp. 732-741.

[9] A. GORGONI, *La filiazione*, cit., p. 81 ff.; I. CORTI, *La maternità per sostituzione*, in S. CANESTRARI, G. FERRANDO, C.M. MAZZONI, S. RODOTÀ, P. ZATTI (a cura di), *Il governo del corpo*, in S. RODOTÀ, P. ZATTI (diretto da), *Trattato di Biodiritto*, Milano, 2011, pp. 1479-1494; EAD., *La maternità per sostituzione*, Milano, 2000; P. GIUNTI, Per te tamen haberem…*Modelli antichi e moderni tra maternità biologica e maternità sociale*, in R. FIORI (a cura di), *Modelli teorici e metodologici nella storia del diritto privato*, Napoli, 2011, pp. 243-276; M. SESTA, *Norme imperative, ordine pubblico e buon costume: sono leciti gli accordi di surrogazione?*, in *Nuova giurisprudenza civile commentata*, 2000, II, pp. 203-213; P. ZATTI, *Maternità e surrogazione*, in *Nuova giurisprudenza civile commentata*, 2000, II, pp. 193-202.

[10] R. GIOVAGNOLI, *I contrasti del diritto civile*, Torino, 2020, p. 6 ff.; A. FIGONE, *Fecondazione omologa post mortem: nell'atto di nascita la paternità in capo al padre defunto*, in *ilFamiliarista*, 20 November 2019, available online; G. CASSANO, *Diritto di procreare e diritto del figlio alla doppia figura genitoriale nella inseminazione artificiale post mortem*, in *Famiglia e diritto*, 1999, pp. 384-393; G. BALDINI, *Ricognizione dei profili problematici in tema di fecondazione artificiale* post mortem, in *Rassegna di diritto civile*, 1995, pp. 725-745.

[11] In the general area of embryo sharing, see L. FRITH, E. BLYTH, S. LUI, *Family building using embryo adoption: relationships and contact arrangements between provider and recipient families-a mixed-methods study*, in *Human Reproduction*, 2017, pp. 1092-1099; L. FRITH, E. BLYTH, *They can't have my embryo: the ethics of conditional embryo donation*, in *Bioethics*, 2013, pp. 317-324; L. FRITH, E. BLYTH,

female or male same-sex couples or different sex couples, even singles or in favor of one of the pair which does not share a gene pool with the child.

As can be seen from the broad definition offered, scholars can isolate two constituent components, relevant to the category. The first, identified as the positive prerequisite, relates to the assumption of the office of parental responsibility as a conscious and responsible choice by the parent. There is a clear reference to Art. 1 of the Italian abortion law[12]: Italy «guarantees the right to conscious and responsible procreation».

The second, identified in the negative prerequisite, relates to the lack or irrelevance of the same genetic or biological heritage between both parents and the child born or the lack of a gestation carried out by one of the parents for the birth of the child. The pregnancy can be carried out by a woman who differs from the one who wishes to carry out the family project and assume parental responsibility or the pregnancy can be carried out by her partner in a same-sex couple. The second case identifies as the so-called ROPA method, an acronym that means Reception of Oocytes from Partner[13]: in a same sex couple, one of the women can donate her oocytes to fertilize them with third parties' donated gametes and transfer the resulting embryo in her partner's uterus.

Alternatively, or additionally, there may be no shared genetic heritage, because asexual procreation is used, and the couple uses gametes or oocytes that belong to donors outside the couple. Furthermore, a social relationship may be established at the end of a procedure for the adoption of a child, aimed at ascertaining the requirements laid down by law. Filiation can be achieved even after the death of one of the patients of assisted procreation treatments: apart from the presumptions and provisions contained in the Civil Code, a legal relationship of filiation is established with the prematurely deceased parent, when the mother decides to carry out assisted procreation. In such a case there may be a genetic link with the father, or it may be missing, giving rise to a hypothesis of social parenthood.

The expression «social parenthood» refers to parenthood and not to filiation, as the Italian legislature frequently does: the nomenclature is adopted to emphasize the positive

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M.S. PAUL, R. BERGER, *Conditional embryo relinquishment: choosing to relinquish embryos for family-building through a Christian embryo 'adoption' programme*, in *Human Reproduction*, 2011, pp. 3327-3338; R.O. SAMANI, M.R.R. MOALEM, S.T. MERGHATI, L. ALIZADEH, *Debate in embryo donation: embryo donation or both-gamete donation?*, in *Reproductive BioMedicine Online*, 2009, pp. 29-33, available *online*.

[12] Law 22 May 1978, no. 194, Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza.

[13] In case law, see Italian Constitutional Court, judgment of 23 October 2019, no. 221 and Italian Court of Cassation, section I, judgment of 30 September 2016, no. 19599; S. STEFANELLI, *Procreazione medicalmente assistita e maternità surrogata: limiti nazionali e diritti fondamentali*, Milano, 2021, p. 133 ff.; EAD., *Non è incostituzionale il divieto di accesso alla procreazione medicalmente assistita per le coppie omosessuali femminili*, in *ilFamiliarista*, 5 February 2020; C. TRIPODINA, *Controrordine: la determinazione di avere un figlio (se delle coppie omosessuali) non è "incoercibile". La Corte costituzionale allo specchio della fecondazione eterologa*, in *Giurisprudenza costituzionale*, 2019, pp. 2622-2633.

and voluntarist component, from which the assumption of the office of parental responsibility over the child derives. Moreover, the term is influenced by the experience of other legal systems, where the discipline is devoted to parenting and not to filiation. The term is influenced by the European regulation on the protection of freedom of movement and residence, such as Regulation (EU) 2016/1191 on public documents.

Social parenthood differs from the forms of filiation known from the Civil Code not only in name: more precisely, it differs from natural filiation, the principle of *favor veritatis* is not the guiding principle of the discipline; unlike legitimate filiation, marriage is not relevant, except as a subjective requirement for access to the institutions from which social parenthood derives.

The identification of the arising category, that is different in terms of foundation, structure, and discipline, however, does not aim at circumventing the general interpretative canon, pursuant to Art. 315 of the Civil Code, according to which «all children have the same legal *status*», but aims at reaffirming the principle in question.

In addition to the noun, the adjective used in the syntagma is also relevant and the phenomenon can be defined by the expression «social parenting» for several reasons. First, the expression evokes the different but close term «social formation». The adjective reminds the interpreter of the progressive evolution of the family phenomenon: from a society legally protected by Art. 29 of the Italian Constitution, since it is founded on the marital bond, we have come to rethink the family as a concept with variable geometry[14], including social formations that are increasingly important, even of not equally protected by law, according to Arts. 2-3 of the Italian Constitution[15]. The two phenomena – parenthood and formations – necessarily intersect, often the first phenomenon underlies the second and the related developments occurred, so that the analysis of social parenthood requires the jurist to consider this intersection.

The second reason is more immediately understandable: the case law[16] and scholars[17] have begun to mention the expression «social parent» to indicate the phenomenon in its various declinations, to include cases in which the adult assumes the parental responsibility or on an established and continuous socio-affective relationship or on the reconstruction of relationships. An authoritative doctrinaire voice[18], commenting on the European pronouncements that have dealt with the subject, does not exclude that

[14] F.D. BUSNELLI, *La famiglia e l'arcipelago familiare*, in *Rivista di diritto civile*, 2002, 1, pp. 509-529. See also V. SCALISI, *Le stagioni della famiglia nel diritto dall'Unità d'Italia a oggi. Parte seconda, "Pluralizzazione" e "riconoscimento" anche in prospettiva europea*, in *Rivista di diritto civile*, 2013, pp. 1287-1318.

[15] On the matter, see G. IORIO, *Corso di diritto privato*, cit., p. 1075 ff.

[16] Tribunal of Palermo, section I, decree of 6 April 2015, in *Corriere giuridico*, 2015, pp. 1549-1555.

[17] A. GORGONI, *La filiazione*, cit., p. 89.

[18] V. SCALISI, *Il superiore interesse del minore ovvero il fatto come diritto*, in *Rivista di diritto civile*, 2018, pp. 405-434.

in all these cases, regardless of biological or genetic ties, it is the superior interest of the child[19] to base the actual filiation relationship completely independent of any correlative biological parenthood.

Finally, the European Report on Human Artificial Insemination of the Council of Europe adheres to the principle of social paternity in principle no. 14.2[20].

However, social parenthood phenomenon is not illustrated in any code, law, or discipline of positive law[21]: this is a category which has emerged in recent years, and which is dealt with by jurisprudence and scholars on «case by case» basis. Different scholars use different names, such as intended parenthood, or *de facto* parenthood, in the same country and even through the European Union there is not a common framework nor a common syllabus on the matter.

2. The declinations of the phenomenon.

The different hypotheses of social parenthood are partly regulated by the legislator: for instance, with law of 4 May 1983, no. 184[22], concerning adoptions, or with law of 19 February 2004, no. 40[23], concerning assisted procreation, in the Italian legal system[24].

For different aspects, jurisprudence allows new cases of social parenthood to emerge, implementing the «potential normativity»[25] through the hermeneutics of constitutional precepts and of the law applied to the concrete case. This has happened – for example – with the declaration of constitutional illegitimacy of the ban on heterologous procreation, which has made possible the use of fertilization through gametes and oocytes of donors, which are third parties to the couple[26].

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[19] M. BIANCA (a cura di), *The best interest of the child*, Roma, 2021, available *online*; G. LANEVE, *La tutela degli interessi del minore nel rapporto genitori-figli a quarant'anni dalla sentenza Corte cost. n. 11 del 1981*, in *Studium Iuris*, 2021, pp. 1332-1341; E. LAMARQUE, *Prima i bambini. Il principio dei best interests of the child nella prospettiva costituzionale*, Milano, 2016, p. 150 ff.

[20] Report on Human Artificial Procreation. Principles set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), 1989, available *online*.

[21] On the matter, T. AULETTA, *L'incidenza dell'interesse del minore nella costituzione o rimozione dello stato filiale*, cit., p. 557. The author affirms that only some cases of social parenthood are regulated by law, such as adoptions and medically assisted procreation, while others are *de facto* situations that are not regulated by law but arise in cases where an adult is exercising parental responsibility as a member of the spouse's or cohabiting partner's family. About the different cases, see para. 2 in this paper.

[22] Law of 4 May 1983, no. 184, Diritto del minore ad una famiglia.

[23] Law of 19 February 2004, no. 40, Norme in materia di procreazione medicalmente assistita.

[24] R. VILLANI, *La "nuova" procreazione medicalmente assistita*, cit., p. 329; C. CAMPIGLIO, *La procreazione medicalmente assistita nel quadro internazionale e transnazionale*, in S. CANESTRARI, G. FERRANDO, C.M. MAZZONI, S. RODOTÀ, P. ZATTI (a cura di), *Il governo del corpo*, cit., pp. 1497-1516.

[25] P. GROSSI, *Ritorno al diritto*, Bari, 2015, p. 33 ff.; ID., *Il diritto civile italiano alle soglie del terzo millennio (una pos-fazione)*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 2010, pp. 465-487.

[26] Italian Constitutional Court, judgment of 10 June 2014, no. 162, commented by U. SALANITRO, *I requisiti soggettivi per la procreazione assistita: limiti ai diritti fondamentali e ruolo dell'interprete*, in *La nuova giurisprudenza civile commentata*, 2016, pp. 1360-1367; V. CARBONE, *Sterilità della coppia. Fecondazione eterologa anche in Italia*, in *Famiglia e Diritto*, 2014, pp. 761-770; G. CASABURI, *Requiem*

Jurisprudence[27], again, identified the internal coherence between the regulatory provisions through an interpretation compatible with the Constitution, as in the case of *post mortem* fertilization. Notwithstanding its general ban, the Courts have allowed the use of cryopreserved embryos or frozen gametes by the wife even after the death of her husband. To allow the procedures, the jurisprudence has brought back in the paradigm of Law no. 40/2004, and attributed the parenthood to the husband, deceased before the implantation and conception, despite the administrative sanction provided for artificial insemination techniques to couples whose members are not both living. The reason can be traced in the peculiar informed consent in assisted reproduction procedures: after the fertilization of the oocyte, there is no space for withdrawal of consent; even if the embryo is not yet formed the death arrived before the withdraw of the consent; the consent provided during the life is still an authorization for the procedure to be completed; the artificial reproduction is a unique cycle and not a compound of various medical treatments.

Similar considerations apply to the adoption of the child of the same-sex partner: the institution has not been regulated in the Law of 20 May 2016, no. 76[28], however, jurisprudence has given legal importance to the factual, significant, and stable relationship between partner and child of the other partner, operating an evolutionary interpretation of Art. 44(1)(d) of the Law no. 184/1983. In accordance with the new exegetical approach, the applicative presupposition of the impossibility of pre-adoptive fostering, provided for by the law, is to be understood as a *de facto* impossibility and also legal impossibility: the ascertained impossibility of pre-adoptive fostering, therefore, does not depend only on the declared state of abandonment, but also on a legal impediment to the pre-adoptive fostering of the child, determined by the absence of the state of abandonment, which allows to give importance to the above-mentioned factual situation.

Finally, there are cases of social parenthood which are positively recognized abroad while in Italy are expressly prohibited. These cases of social parenthood, in Italy, are often subject to administrative or even criminal sanctions, hindered by public policy limits. In these cases, public policy also prevents the recognition of the foreign act or measure in

(gioiosa) per il divieto di fecondazione eterologa: l'agonia della l. 40/04, in *Il Foro Italiano*, 2014, I, cc. 2343-2344; L. D'AVACK, *Cade il divieto all'eterologa, ma la tecnica procreativa resta un percorso tutto da regolamentare*, in *Il Diritto di famiglia e delle persone*, 2014, pp. 1005-1017; G. FERRANDO, *Autonomia delle persone e intervento pubblico nella riproduzione assistita. Illegittimo il divieto di fecondazione eterologa*, in *La nuova giurisprudenza civile commentata*, 2014, pp. 393-408.

[27] Italian Court of Cassation, section I, judgment of 15 May 2019, no. 13000; Tribunal of Lecce, judgment of 24 June 2019, no. 2190, commented by D. GIUNCHEDI, *L'impianto intrauterino degli embrioni dopo il decesso del marito*, in *Giustiziacivile.com*, 10 December 2019.

[28] Law of 20 May 2016, no. 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze.

accordance with the rules of private international law, so the social filiation and parenthood cannot be fully recognized and protected.

Examples of this sub-category are the filiation by surrogacy, forbidden by Art. 12(6) of the Law no. 40/2004 and the «adoption of abandoned embryos» or embryo-adoption[29], which is not allowed in Italy, while is legal in other countries, as snowflake adoptions. The second is not an actual adoption of minor, snowflakes adoption involves embryos. More precisely, when the embryos are cryopreserved and abandoned by the patient who paid for their formation and the specialization of the cells, the cells can be transferred to third parties to give them the chance to give birth through an artificial reproduction cycle where the new patients are not genetically linked to the embryo received.

So, this assumption brings scholars to the question: «If you are a parent in one country, you are a parent in every country»[30], as recently stated, is it true for social parenthood? More precisely: is it true for forbidden social parenthood already established abroad?

3. Social parenthood against the public policy.

As mentioned before, there are cases in which the filiation and the parenthood statuses are formed in other countries, that can be defined as liberal countries, where the statuses are descripted in statutes and codes. However, the same statuses can be precluded, forbidden, and even sanctioned in other more conservative countries. This situation may occur, frequently in the bio-law area of study, when people and specifically social families exercise their rights of circulation on the EU territory and determine a comparison between the countries which adhere to the British way or to the French way[31]. The latter group is considered more conservative in the legislation on parenthood and on the new medical procedures which can help to form families; the first group is considered by scholars more liberal on the matter.

When a family is formed in a liberal legal system through the medical or legal procedures above described, as in Greece or Spain, some problems of status recognition may occur when the family moves in a conservative system, as in Italy or Germany. When people circulate, they bring their statuses and when they move and live in other countries they seek recognition, but it happens to meet an obstacle in the public policy of a French way legal system. This situation arises also and more often when the circulation is

[29] K.D. KATZ, *Snowflake adoptions and orphan embryos: the legal implications of embryo donation*, in *Wis Womens Law Journal*, 2003, pp. 179-231.

[30] The quote is from Ursula von der Leyen, President of the European Commission, in her address of the State of the Union in September 2020.

[31] The classification can be attributed to F.D. BUSNELLI, E. PALMERINI, *Clonazione*, in *Digesto delle discipline privatistiche*, 2000, vol. 7, p. 73.

exercised outside the EU territory, for example circulating from United States or Canada to Italy or Germany.

For example, social parenthood can be found in the case of the abovementioned snowflakes adoption[32].

The adoption law cannot be applied by analogy to embryo-adoption, because the object of transfer is a peculiar, it is a specialized cell not a minor, even if protected by law. The adoption law contains a discipline of strict interpretation, and the embryo adoption needs a specific legal framework[33], considering the different territorial jurisdiction of the deciding court, the different subjective requirements for access, the different modalities of execution, the different disciplines between Italian regions and the transfer of the burden of payment of cryopreservation costs to new patients[34].

The mentioned procedure is frequent in the United States, but it is forbidden in some of the French way countries, such as Italy, where the transfer, even free of charge, of reproductive cells is prohibited and sanctioned by law. In Italy, patients can abandon their cells and embryos, but they cannot decide the destination of the cells, which must be transferred to the National Biobank under the control of the Ministry of Health. When a social family is formed in the US by embryo-adoption, is the social parenthood eligible for recognition? Social parenthood in this case cannot be constituted in Italy and when the snowflake adoption is finalized abroad, the legal foreign *status* meets a public policy obstacle in the laws which sanction the transfer of embryos outside the cases admitted[35].

Filiation through surrogacy is another case in which the notion of parent has not changed and has not been elaborated in a shared and coordinated way among legal systems, leading to confusion and gaps in family protection. Surrogacy constitutes another case of forbidden social parenthood, for both patients who want to become parents.

Surrogacy is a medical procedure that is carried out with the implantation of an embryo in the uterus of a person other than the one who will assume parental responsibility for the child and, more generally, in the uterus of a person other than those who intend to pursue the family project[36]. The procedure can also be characterized by using an oocyte from the pregnant woman, fertilized, and then implanted in the uterus. In

[32] On the matter, see J. MILLBANK, A. STUHMCKE, I. KARPIN, *Embryo donation and understanding of kinship: the impact of law and policy*, in *Human Reproduction*, 2017, pp. 133-138, available online.

[33] F.D. BUSNELLI, *Cosa resta della Legge 40? Il paradosso della soggettività del concepito*, in *Rivista di diritto civile*, 2011, pp. 459-476, at p. 467 ff.; D. CARUSI, *In vita, «in vitro», in potenza. Verso una donazione dell'embrione soprannumerario?*, in *Rivista critica del diritto privato*, 2010, pp. 333-340, at p. 340.

[34] S.P. PERRINO, *Embrio-adozioni: a brave new world?*, in *Giustiziacivile.com*, 1 February 2021, p. 4.

[35] S.P. PERRINO, *Embrio-adozioni: a brave new world?*, cit., p. 10.

[36] On the role of the third party or third parent, see E. AL MUREDEN, *Il diritto del minore alla bigenitorialità ed il ruolo del terzo genitore nella prospettiva della famiglia ricomposta*, in M. BIANCA (a cura di), *The best interest of the child*, cit., pp. 269-284.

the first case, we discuss biological surrogacy, in the second case, maternal biological surrogacy[37].

A variety of labels are attributed to this medical procedure: surrogacy, surrogate motherhood, uterus by rent, and, in its most descriptive sense, gestation for others.

The gestation for others can be altruistic, free, but also commercial and even professional[38]. Despite this, in the Italian system this medical procedure is always prohibited, sanctioned by Law no. 40/2004, according to Art. 12(6), «in any form»[39].

Many elements of the criminal offence are not clear, such as the relevant procedures for the crime legal scheme and the relevant authors of the criminal offence. Furthermore, it is unclear if the crime can punish surrogacy committed by Italian citizens abroad[40].

To extend the punishment of the crime, a consistent number of bills and draft of laws have been tabled in the Italian Parliament, with a view to repressing the phenomenon of procreative tourism aimed at achieving surrogacy by Italian citizens, even abroad, and to identify ways in which civil officers can report and denounce the offence to the Public Prosecutor[41].

This paper does not deal with the appropriateness or arguments in support or against such a ban but is concerned with the hypotheses that have engaged and continue to engage jurisprudence and doctrine in the last decade. The thought runs to the surrogacy

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[37] A. GORGONI, *La filiazione*, cit., p. 81 ff.; I. CORTI, *La maternità per sostituzione*, in S. CANESTRARI, G. FERRANDO, C.M. MAZZONI, S. RODOTÀ, P. ZATTI (a cura di), *Il governo del corpo*, cit.; EAD., *La maternità per sostituzione*, cit.; P. GIUNTI, Per te tamen haberem, cit.; M. SESTA, *Norme imperative, ordine pubblico e buon costume*, cit.; P. ZATTI, *Maternità e surrogazione*, cit.

[38] E. CAPULLI, *Gestazione per altri: corpi riproduttivi tra biocapitale e biodiritto*, in *BioLaw Journal*, 2021, no. 1, pp. 119-137, available *online*; E. JACKSON, J. MILLBANK, I. KARPIN, A. STUHMCKE, *Learning From Cross-Border Reproduction*, in *Medical law review*, 2017, pp. 23-46, available *online*; C. CHINI, *Maternità surrogate: nodi critici tra logica del dono e preminente interesse del minore*, in *BioLaw Journal*, 2016, no. 1, pp. 173-187, available *online*; E. JACKSON, *UK Law and International Commercial Surrogacy: the very antithesis of sensible*, in *Journal of medical law and ethics*, 2016, no. 4, pp. 197-214; EAD., *Selling babies? The legal and ethical implications of surrogacy*, in *Women: a cultural review*, 1996, pp. 250-258.

[39] On the different surrogacy agreement see G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, *passim*; for a different approach between altruistic and commercial surrogacy see B. PEZZINI, *Nascere da un corpo di donna: un inquadramento costituzionalmente orientato dall'analisi di genere della gravidanza per altri*, in *Costituzionalismo.it*, 2017, II, pp. 183-245, at p. 201, available *online*.

[40] M. PELISSERO, *Surrogazione di maternità: la pretesa di un diritto punitivo universale. Osservazioni sulle proposte di legge n. 2599 (Carfagna) e 306 (Meloni), Camera dei deputati*, in *Sistema Penale*, 29 June 2021, available *online*; A. VALLINI, *Procreazione medicalmente assistita (diritto penale)*, in *Enciclopedia del diritto*, Annali IX, 2016, pp. 696-724; ID., *Illecito concepimento e valore del concepito. Statuto punitivo della procreazione, principi, prassi*, Torino, 2012, p. 98 ff.; F. MANTOVANI, *Umanità e razionalità del diritto penale*, Padova, 2008, pp. 1464-1473.

[41] S.519, Modifica alla legge 19 febbraio 2004, n. 40, in materia di reato di surrogazione di maternità commesso all'estero; S.201, Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano; C.2599, Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano; C.306, Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano.

performed abroad, in accordance with foreign law, at the end of which the parents of the child born – according to foreign law – request the recognition of the *status filiationis* in Italy, even if without genetic, biological, and gestational ties[42]. Once back in Italy, it is possible to predict that the new social formation would seek the competent authority to obtain the transcription of the foreign birth certificate or of the measure recognizing social filiation or the issue of documents for the child. The public servant, however, could oppose to the transcription or to the modification of the birth certificate or to the issue of documents, when the foreign certificate does not show the biological parents but two social parents or a social parent and a biological parent or only a social parent, in different sex couples or same sex couples.

The recognition of the act or the release of the requested measures finds an obstacle in the Italian law, specifically in the public policy.

The public policy is a general clause[43] used by Member States and in general by countries to defend the legal system from legal transplant of new legal phenomena effects or from the recognition of foreign legal institutes, as provided by the rules of private international law. Therefore, the public policy clause constitutes a negative limitation, with a protective function of the legal system and represents a standard for assessing the lawfulness of private actions[44].

The abovementioned clause is not defined by the legislator, but the meaning of the clause must be scrutinized with a case-by-case method, selecting the relevant principles and values to apply for the recognition[45].

Two conceptions of public order have opposed each other over time: the domestic public order and the international public order. The distinction recalls the opposing perspectives of Savigny[46] and Mancini[47]: according to the first author, the public policy

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[42] R. BIN, *Tecniche procreative, ordine pubblico e interesse del minore*, in *BioLaw Journal*, 2021, no. 3, pp. 145-150, available *online*.

[43] P. PERLINGIERI, *Obbligazioni e contratti*, in *Annuari del contratto 2016*, Torino, 2017, p. 213; V. ROPPO, *Il contratto*, II ed., Milano, 2011, p. 387; G. GALGANO, *Diritto privato*, XIII ed., Padova, 2006, p. 267-269; ID., *Il negozio giuridico*, in A. CICU, F. MESSINEO, L. MENGONI, P. SCHLESINGER (a cura di), *Trattato di diritto civile e commerciale*, vol. III, 1, Milano, 2002, p. 284; P. BARCELLONA, *Clausole generali e giustizia costituzionale*, Torino, 2006, p. 35; P. TRIMARCHI, *Istituzioni di diritto privato*, Milano, 1995, p. 238; K.G. WURZEL, *Das juristische Denken*, II ed., Vienna-Leipzig, 1924, p. 86; O. WENDT, *Die exceptio doli generali im heutigen Recht*, in *Archiv für die zivilistische Praxis*, 1906, pp. 1-417, at p. 106 ff.

[44] G.B. FERRI, *Ordine pubblico, buon costume e la teoria del contratto*, Milano, 1970, p. 1042; see also F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea. I principi fondamentali nelle relazioni interordinamentali*, Verona, 2007, p. 98.

[45] F. PEDRINI, *Le "Clausole Generali". Profili teorici e aspetti costituzionali*, Bologna, 2013, p. 297; ID., *Contro "le clausole generali" (sans phrase). Precauzioni per l'uso di una categoria dottrinale ancora troppo vaga*, in *Rivista AIC*, 2017, no. 3, pp. 1-37, at p. 17, available *online*.

[46] M.F.C. DE SAVIGNY, *Traité de droit romain*, French trad. by M.C. GUENOUX, Paris, 1851, p. 34.

[47] P.S. MANCINI, *Della Nazionalità come fondamento del Diritto delle genti*, Torino, 2000, p. 23 ff.; ID., *De l'utilité de rendre obligatoires pour les Etats, sous forme d'uyn ou de plusieurs traité internationaux, un certain nombre de régles générales du Droit international privé, pour assurer la decision uniforme des conflits entre les différentes legislations civiles et criminelles*, in *Journal du droit international privé*, 1874, p. 295 ss.

clause indicates the set of principles and values that in each historical period characterize the national legislation[48]. Savigny's perspective emphasizes the defensive aspect of fundamental principles against the application of incompatible foreign rules. While the second author assigns a broader meaning to the clause and a positive function: the purpose of the clause is to ensure the application of the laws of the forum state by virtue of the interests they safeguard and, in so doing, to protect society from interference that may result from the introduction of values that are in conflict with or wholly alien to the principles of the *forum*[49].

The concept of public policy dealt with in this paper pertains to private international law, the function of which is to identify the regulation of legal relationships that have extraneous elements to the *lex fori*[50]. Given the function of private international law, the meaning of the clause is to be deduced from the entire positive legal order, which includes the constitution, criminal law, private law and the core of values and principles[51] that inspire the norms of international law, international customs, or treaty law. thus, not only domestic law but also norms contained in, among others, the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), the International Pacts of the United Nations General Assembly of December 1966[52].

The merging of the above-mentioned principles of public international law into the principles of public international order has been facilitated by case law[53], however it is precisely the application of the clause by case law that has led to fluctuations and twists in the interpretation of the clause over time. In some cases, the clause has been interpreted strictly, with a narrow meaning, as happened in the recognition of punitive damages decisions[54], or of certain effects of polygamous marriages of Muslim origin[55], or of the

[48] N. PALAIA, *L'ordine pubblico "internazionale"*, Padova, 2005, pp. 80-81.

[49] P.S. MANCINI, *De l'utilité de rendre obligatoires pour les Etats*, cit., p. 295.

[50] F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea*, cit., p. 108.

[51] G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., p. 21.

[52] See on the matter the accurate analysis of F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea*, cit., pp. 109-111.

[53] A. VIVIANI, *Coordinamento fra valori fondamentali internazionali e statali: la tutela dei diritti umani e la clausola di ordine pubblico*, in *Rivista di diritto internazionale privato e processuale*, 1999, pp. 847-888, at p. 864 ff.

[54] A. PISANI TEDESCO, *Il problema della responsabilità civile compensativa. Studio per un rimedio risarcitorio effettivo*, Torino, 2022, p. 10 ff.; G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., pp. 166-177, 169; G. BROGGINI, *Compatibilità di sentenze statunitensi di condanna al risarcimento di punitive damages con il diritto europeo della responsabilità civile*, in *Europa e diritto privato*, 1999, pp. 479-508; G. PONZANELLI, *I punitive damages, il caso Texaco e il diritto italiano*, in *Rivista di diritto civile*, 1987, II, pp. 405-413; Z. ZENO-ZENCOVICH, *Il problema della pena privata nell'ordinamento italiano: un approccio comparatistico ai "punitive damages" di "common law"*, in *Giurisprudenza italiana*, 1985, IV, pp. 12-27; ID., *Il risarcimento esemplare per diffamazione nel diritto americano e la riparazione pecuniaria ex art. 12 della legge sulla stampa*, in *Responsabilità civile e previdenza*, 1983, pp. 40-59.

[55] M. RIZZUTI, *Adozioni e poligenitorialità*, in *Actualidad Juridica Iberoamericana*, August 2020, pp. 646-681, available online; ID., *Il problema dei rapporti familiari poligamici. Precedenti storici ed attualità della questione*, Napoli, 2016; G. PERLINGIERI, *In tema di rapporti familiari poligamici*, in *Diritto*

dissolution of the marriages by unilateral repudiation[56], or regarding the irrevocable will[57], or *mortis causa* agreements[58]. In other cases, such as cross border family status recognition cases, the public policy clause has been interpreted widely. The broad notion has been drawn to include not only values and general principles common to States but also binding norms, such as criminally sanctioned prohibitions and disciplines of domestic law. The broader the notion of the public policy clause, the more difficult it is to recognize the effects of a foreign act or measure in Italy. This broad interpretation has been used in filiation by cross border surrogacy[59].

The public policy clause, when interpreted with the broad definition, can lead to the non-recognition or to a phenomenon frequently called by practitioners as downgrading. The term downgrading means the placing of a passenger on a flight in a lower class and entitling them to a refund of the price paid for the trip[60]. Downgrading is also translated in Italian as «demotion» and involves the assignment of duties at a lower level to a worker with a specific level of classification[61], who will be entitled to damages for demotion due to unlawful conduct on the part of the employer, which will be assessed in court and include the financial and other consequences[62]. Moreover, downgrading is a phenomenon that also affects the rating of financial products and indicates the attribution of a lower level of reliability granted by managers and rating companies, capable of orienting the investors' choices.

Notwithstanding the beforementioned meanings assigned to the term mentioned, the term has frequently been used by case law with a new meaning and in a different part of the legal system. It has been used to designate the recognition of certain foreign

delle successioni e della famiglia, 2019, pp. 821-849; G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit.

[56] G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., pp. 141-155, 153; P. VIRGADAMO, *Ripudio islamico e contrarietà all'ordine pubblico tra unitarietà del limite e corretta individuazione dei principi*, in *Il Diritto di famiglia e delle persone*, 2017, I, pp. 353-364; O. VANIN, *Ripudio islamico, principio del contraddittorio e ordine pubblico italiano*, in *La Nuova giurisprudenza civile commentata*, 2015, pp. 1031-1038.

[57] G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., pp. 177-187; G. PERLINGIERI, *Invalidità delle disposizioni "mortis causa" e unitarietà degli atti di autonomia*, in *Diritto delle successioni e della famiglia*, 2016, pp. 119-148, 139; A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014, p. 175.

[58] G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., pp. 187-199; V. BARBA, *I patti successori e il divieto di disposizione della delazione. Tra storia e funzioni*, Napoli, 2015; C. CACCAVALE, *Contratto e successioni*, in V. ROPPO (a cura di), *Interferenze*, vol. IV, in V. ROPPO (diretto da), *Trattato del contratto*, Milano, 2006, pp. 403-632; ID., *Patti successori: il sottile confine tra nullità e validità negoziale*, in *Notariato*, 1995, pp. 552-561.

[59] See the comparison in G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., p. 107 ff.

[60] Court of Justice, judgment of 22 June 2016, case C-255/15, *Steef Mennens* v *Emirates Direktion für Deutschland*, EU:C:2016:472.

[61] M. SIGNORELLI, *L'evoluzione giurisprudenziale del danno da demansionamento: una ricostruzione sistematica – Parte I*, in *Responsabilità civile e previdenza*, 2018, pp. 1494-1517.

[62] Tribunal of Avezzano, labour section, judgement of 3 September 2019, no. 168; Tribunal of Rome, labour section, judgement of 8 July 2020, no. 4190.

measures and acts in Italy, such as foreign marriages between persons of the same sex, birth, and adoption of minors in favor of same-sex couples[63]. In this cases, downgrading means the recognition of a less protected status between the parent and the child: a legal parenthood status can be legally recognized as a mild adoption, which does not generate parenthood, as stated by the Italian Constitutional Court, and it is subject to the consent of the biological parent, which is hard to get if the biological parent has not a legal power in his or her own country to express a valid consent to the adoption.

The lack of a legal and full recognition of the social link between the social parent or the social parents and the child exposes the lack of a common notion of parenthood through the Member States and constitutes the background for discrimination of children in social families. The downgrading has been used in order not to provide a full recognition, but recently the Italian Constitutional Court expressed the doubts on and the ambiguities of the mild adoption of social children[64].

The illustrated view recently has been embraced also by the Italian Supreme Court, which has proposed to the United Sections a review of its own case law[65], in the persistent inertia of the Italian legislator[66].

The recent order issued by the Italian Supreme Court aims to question the orientation adopted in 2019 by the Supreme Court, in its most authoritative composition, on the recognition of filiation effects from surrogacy abroad and, for this reason, on the public policy clause.

The case concerns the recognition of a foreign judgment to modify the birth certificate of a child born by gestation for others in favor of a same sex couple. The Court confirms the unsuitability of Art. 44(1)(d) of Law no. 184/1983 for the protection of the child and, in the event of persistent inertia on the part of the legislature, points out the advisability of a new ruling by the United Sections, compatible with constitutional and

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[63] F. DEANA, *Rapporti e status familiari nel diritto dell'Unione europea. Tra mutuo riconoscimento e salvaguardia dei particolarismi nazionali*, Torino, 2020, p. 173.

[64] Italian Constitutional Court, judgment of 9 March 2021, no. 33.

[65] Italian Court of Cassation, united sections, judgment of 8 May 2019, no. 12193, commented by M. DOGLIOTTI, *Le Sezioni Unite condannano i due padri e assolvono le due madri*, in *Famiglia e diritto*, 2019, pp. 667-676 and G. FERRANDO, *Maternità per sostituzione all'estero: le Sezioni Unite dichiarano inammissibile la trascrizione dell'atto di nascita. Un primo commento*, in *Famiglia e diritto*, 2019, pp. 677-686. For an accurate analysis, see V. BARBA, *Ordine pubblico e gestazione per sostituzione. Nota a Cass. Sez. Un. 12193/2019*, in *GenIUS*, 2019, no. 2, pp. 19-37; M. BIANCA, *La tanto attesa decisione delle Sezioni Unite. Ordine pubblico* versus *superiore interesse del minore?*, in *Familia*, 2019, pp. 369-385; G. PERLINGIERI, *Ordine pubblico e identità culturale. Luci e ombre nella recente pronuncia delle Sezioni Unite in tema di c.d. maternità surrogata*, in *Diritto delle successioni e della famiglia*, 2019, pp. 337-345; G. RECINTO, *La decisione delle Sezioni unite in materia di c.d. maternità surrogata: non tutto può e deve essere "filiazione"*, in *Diritto delle successioni e della famiglia*, 2019, pp. 347-354; U. SALANITRO, *Quale ordine pubblico secondo le sezioni unite? Tra omogenitorialità e surrogazione, all'insegna della continuità*, in *Giustiziacivile.com*, 29 May 2019; M.C. VENUTI, *Le sezioni unite e l'omopaternità: lo strabico bilanciamento tra il best interest of the child e gli interessi sottesi al divieto di gestazione per altri*, in *GenIUS*, 2019, no. 2, pp. 6-18.

[66] Italian Court of Cassation, united sections, order of 21 January 2022, no. 1842.

European law, with the statements contained in the recent ruling of the Court of Justice already illustrated and in view of the lack of drafts or bills currently under discussion in Parliament on filiation by surrogacy[67].

The first section of the Italian Supreme Court opens a «call of the Courts, and first and foremost of the United Sections, to seek an interpretation suitable to ensure the protection of the constitutional goods at stake»[68].

The Court reflects on the elaboration of a new and different interpretative address since the Legislator does not intervene in an innovative manner. The first section moves from the rules on the deliberation of foreign judgments, to verify the limits of recognition of the foreign judgment and the actual existence of public policy obstacles. The Court states that Art. 64 of Law no. 218/1995[69] does not determine, through the deliberation of the foreign measure, the entry of the institution unknown to domestic law, but rather the recognition only of the effects deriving therefrom and thus of the rights that that institution attributes to the persons involved.

For the recognition of a foreign measure, the effects deriving from the foreign institute must not collide with public order, that is, with Art. 12(6) of Law no. 40/2004 and its corollaries. It thus becomes necessary to go beyond the fact of the general prohibition of surrogacy to identify the application boundaries of this type of offence, its constituent elements, and its protected legal assets.

Particular attention, though not expressly mentioned, is thus devoted to the principle of so-called offensiveness[70] in the abstract and in concrete terms. The compatibility test of the effects of the foreign institution with the set of principles of public order must be carried out in concrete terms, considering in what way the surrogacy carried out abroad was carried out and ascertaining whether those ways can offend the dignity of the pregnant woman, as well as undermining human relations.

In the Court's opinion, it is doubtful that the typical conduct of surrogacy can be considered offensive when it is carried out in a state where the procedure is medicalized, where the procedure is regulated by law with a discipline which aims to protect the pregnant woman and the child. There is also doubt as to the offensiveness and incompatibility with public order of surrogacy when the rules of the State in which it is

[67] Numerous drafts and bills on surrogacy have been presented: none of these deals with the protection of the best interests of the child, none of them has reached an advanced state of examination such as to respond to the Constitutional Court's warning. Most of the recent bills propose changes to the offence of surrogacy provided for by Law no. 40/2004, extending prosecution to facts committed also abroad and requiring civil registrars to communicate the request for transcription to the judicial authority. In this sense, see the most recent ones *supra*, at footnote 41.

[68] Italian Court of Cassation, order no. 1842/2022, cit., p. 17, translated by the author of this paper.

[69] Law of 31 May 1995, no. 218, Riforma del sistema italiano di diritto internazionale privato.

[70] F. MANTOVANI, *Diritto penale. Parte generale*, XI ed., Milano, 2020, p. 181 ss.; V. TIGANO, *Il delitto di surrogazione della maternità come limite di ordine pubblico al riconoscimento dei provvedimenti stranieri in materia di* status filiationis, in *Rivista italiana di diritto e procedura penale*, 2021, pp. 1043-1070.

performed provide for the possibility for the pregnant woman to revoke consent at any time, with a formal and calculable provision, up to the moment of birth, from which significant relations are established between the social parents and the child. Again, surrogacy carried out in a state in which parenthood is attributed according to predictable and certain rules, with a series of strict prohibitions on exploitation or coercion or even just payment in favor of the pregnant woman, is considered not incompatible *a priori* with the public policy clause.

Thus, by carefully analyzing the scheme of the offence of surrogacy in the light of the mentioned principles is correct to argue that the criminal sanction does not apply to those conducts without offensiveness towards the protected legal value. Therefore, the incompatibility with public policy clause does not exist when the procedure is carried out in jurisdictions where the practice is not remunerated or does not entail any margin for the exploitation of the woman and her body. Furthermore, it is pointed out that it would be disproportionate to have an automatic sanctioning mechanism for the former on a par with the latter.

The approach thus described enhances a principle peculiar to criminal law, as was already the case in the United Sections' ruling on the deliberation in Italy of punitive damages[71], by resorting to the principles of certainty, predictability, and proportionality. For these reasons, therefore, the dignity of the pregnant woman cannot always and in any case be held to prevail, just as the superior interest of the child cannot automatically be held to prevail.

In the recent order, the Court of Cassation opts for a meaning of the public policy clause which includes not only the domestic State law but also basic principles of legal civilization, typical of modern States and also of the Italian legal system[72].

4. The recent ruling by the European Court of Justice.

A positive signal towards a common and shared notion of «parenthood», or more in general «family member», and a strict interpretation of the public policy clause comes from the European Court of Justice, in a recent preliminary ruling.

[71] Italian Court of Cassation, united sections, judgment of 5 July 2017, no. 16601, commented by A. PALMIERI, R. PARDOLESI, E. D'ALESSANDRO, R. SIMONE, P.G. MONATERI, in *Il Foro italiano*, 2017, I, cc. 2626-2654; A. BRIGUGLIO, *Danni punitivi e delibazione di sentenza straniera: "turning point nell'interesse della legge"*, in *Responsabilità civile e previdenza*, 2017, pp. 1597-1608. See also on the issue the report of *Ufficio del Massimario della Corte di Cassazione*: R. MUCCI, *Danni punitivi e ordinamento interno: la natura polifunzionale della responsabilità civile*, in *Rassegna della giurisprudenza di legittimità. Gli orientamenti delle Sezioni Civili – approfondimenti tematici*, vol. III, pp. 41-49, available *online*. On the criminal law principles applied in private law, see F. VIGANÒ, *Garanzie penalistiche e sanzioni amministrative*, in *Rivista italiana di diritto e procedura penale*, 2020, pp. 1775-1819; V. MANES, *Profili e confini dell'illecito para-penale*, in *Rivista italiana di diritto e procedura penale*, 2017, pp. 988-1007.

[72] F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea*, cit., p. 112.

A brief description of the case seems useful, in order to fully understand the impact of the decision.

A Bulgarian national and a United Kingdom national, in a same sex married couple, gave birth to their daughter in Spain. According to the Spanish birth certificate both were appointed as mothers of the child. To obtain a Bulgarian identity document for the daughter useful for the circulation on the territory, the Bulgarian national mother was requested a transcript of the birth certificate and the public officer appointed that on the request form only one person can check the box «mother». By a following decision, the Sofia municipality refused to the Bulgarian mother the issue of the birth certificate for her daughter. The reasons given for that refusal decision were the lack of information concerning the identity of the child's biological parent and the fact that a reference to two female parents on a birth certificate was contrary to the public policy of the Republic of Bulgaria, which does not allow marriages between two same sex people. The Bulgarian citizen brought an action against that refusal decision and the court raised some doubts, which brought to the referring to the European Court of Justice according to Art. 267 TFEU, on Art. 4(2) TEU, Arts. 20-21 TFEU, which states: «[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect» but also on Arts. 7, 9, 24 and 45 of the Charter of Fundamental Rights of the European Union.

The Grand Chamber of the CJEU has ruled on the refusal of the Bulgarian public officer to issue the birth certificate of the child, daughter of a British biological mother and a Bulgarian social mother, which precluded the obtaining of an identity document and, consequently, frustrated the child's right to move within the territory of the European Union[73].

The refusal of the civil registrar of the Municipality of Sofia, as in the Italian cases described above, is based on the public policy clause in the Bulgarian State, in the meaning of the domestic public policy. Bulgaria does not recognize same sex parenthood, nor same sex adoptions, nor same sex marriage, so – according to the public officer – the couple cannot form a legal recognized family abroad and be recognized in the Bulgarian State. Consequently, the Bulgarian officer cannot issue the identity documents for the child, as requested by her social mother, without checking on the request form the box «father» and with a lack of information concerning the identity of the child's biological parent.

The European Court of Justice states, in contrast with the opinion of the officer, that the Bulgarian State has a duty to issue an identity document to Bulgarian citizens and to the child, born of a Bulgarian mother, regardless of the issue or the transcript of a new

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

birth certificate with the biological parent mention. In this way, the minor can exercise her rights of movement, together with her parents, regardless of their gender and sexual orientation. Otherwise, a national measure that seeks to impede the free movement of persons and of minors, on the grounds of the sexual orientation and gender of their parents, can only be justified to protect fundamental rights enshrined in the Treaties and the Charter of Fundamental Rights.

This is not the case of protection of other fundamental rights of Treaties and the Charter. In the decided case, the obstacle interposed by the State is not functional to the protection of fundamental rights. On the contrary, the alleged application of the limits of internal public policy to the issuance of the document determines an unjustified sacrifice of the rights of the child, provided for in Arts. 7, 24 and 45 of the Charter of Fundamental Rights of the European Union. Furthermore, it infringes with the principle of non-discrimination and with the best interests of the child. It would be contrary to the fundamental rights of the Charter to deprive the child of the relationship with one of her parents in the context of the exercise of her right to move and reside freely on the territory of the Member States or even to make it *de facto* impossible or excessively difficult for her to exercise that right merely because her parents are of the same sex.

The affirmation of the prevalence of the law of the Treaties of the Charter of Fundamental Rights has a peculiarity in the present case: the right to movement brings with it a new and modern meaning of the right to move and reside. The right to movement of persons also becomes the right of movement along with the *statuses* of which people are legitimate holders, whatever the place where the *status* is conferred. Therefore, guaranteeing the movement and residence within the Union also means guaranteeing the enjoyment of the rights and relations deriving from the *statuses* originally acquired by the social formation, independently of the limits of public policy present in the States in which the social formation circulates and resides.

Therefore, the Court states that the child must be considered a direct «descendant» of the Bulgarian citizen, even in the absence of a genetic or a biological link; similarly, the social mother must be considered a «family member». On this point, however, the CJEU specifies that this statement is relevant «for the purposes of the exercise of the rights conferred by Article 21(1) TFEU and related secondary legislation». The court regulates the boundaries within which the pronouncement is relevant: if the public policy clause does not operate when it is necessary to ensure the freedom to move and to reside in the Union with the *status* acquired abroad, the internal limits come back to operate in other cases and, therefore, for civil purposes.

More importantly for the public policy clause interpretation, it is useful to highlight that the European Court of Justice restricted again the public policy clause spectrum of

application, by quoting the summary of another important ruling on the subject[74]: «[t]he 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».

5. Conclusion.

A new concept of parenthood is arising and challenging lawyers, civil servants, scholars, and judges. Parenthood can be traced in several scenarios that codes could not predict, since changes have occurred in the scientific and social spheres and even legal changes have occurred in some of the European and non-European legal systems. This uneven evolution and development impacts on children and their family, specifically when a gene pool is not shared between them.

Parenthood is legally relevant and protected when States provide a legal framework specifically for it; this is the case for full, mild, and international adoptions or artificial insemination procedures with third-party gametes donation in favor of different sex couples. Once one has become a parent in one State, it shall be possible to be legally a parent in other States, especially within the European Union. On the other hand, the social parent is not always a legal parent in every State and this situation arises when States have different rules of law with public policy restrictions that hinder the movement of *status*. As explained above, this is frequently the case for surrogacy, but it may be the case also for embryo adoptions.

«If you are a parent in one country, you are a parent in every country»: is it true for social parenthood? It is quite difficult to give a clear-cut answer to the question, while national legal systems evolve and change on the matter and this area of study is intersected by several law, statutes, codes. The answer also depends on the interpretation of the public policy clause adopted by the case law and practitioners. A clause that has been interpreted quite differently in the last ten years by the Court of Justice, by the Supreme Court and by tribunals in Italy in the above-mentioned areas of contract, liability and family law. A different interpretative approach is evident within family law and also in areas where the rules and different institutions all aim to protect the dignity of women and the dignity of the unborn child[75].

[74] Court of Justice, judgment of 5 June 2018, case C-673/16, *Relu Adrian Coman e a.* v *Inspectoratul General pentru Imigrări e Ministerul Afacerilor Interne*, EU:C:2018:385, para. 44.

[75] See the different approach on the recognition of the foreign institutions' effects within contract law, tort, succession law and more specifically in family law in G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., p. 93 ff.

Only few of European and non-European countries have a legal framework that gives certainty on the *status filiationis*, even for social families. Inequalities between systems lead to discrimination when recognition of foreign acts and judgments is sought, with an easy recourse to the public policy clause, which is subject to varying interpretations by jurists in the various countries. The public policy clause can be interpreted to make prevail the inner aversion to surrogacy or to embryo adoption, even if not every conduct can be considered offensive for the dignity of the woman and for the prevalence and non-circumvention of adoption regulations[76].

However, the recent rulings of the Court of Justice of the European Union and the first section of the Italian Court of Cassation open new scenarios of analysis for the jurist and urge the study of the new phenomenon of social parenthood, as well as a more careful analysis of principles to be included and considered in the public policy clause.

The jurist is called upon to accurately apply the mentioned clause with reference to the effects produced by the foreign institution, in consideration of the fundamental values embodied in the Constitution, treaties, conventions and international declarations, always considering the domestic discipline within which the «meanings of the fundamental principles of the legal system»[77] live and are enriched. However, it is not enough to assume the existence of a public policy clause and enumerate the principles contained therein, but it is necessary that the violation of the rules and values, within which the clause is declined, determines the infringement of the fundamental rights, protected values and legal goods deserving of protection selected by the criminal and civil codes.

[76] On this point, see Italian Court of Cassation, order no. 1842/2022, cit.

[77] F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea*, cit., pp. 108-110.

ABSTRACT: Parenthood is the legal relationship between a child and the child's parents and recently EU citizens are establishing this relationship through consent or intended parent agreements, without any genetic link. The new concept is known in case law as social parenthood and can be traced in different scenarios: same sex couples' adoption; artificial reproduction; surrogacy; *post mortem* fertilization.

The paper will investigate if the lack of a common notion of social parenthood can constitute an obstacle for the free movement of citizens and analyze the recent case *Pancharevo* of the Court of Justice of the European Union.

KEYWORDS: Social parenthood; freedom of movement; artificial reproduction; adoption; surrogacy.

Quo vadis mater? Motherhood, freedom of movement, and the circulation of documents

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CONTENTS: 1. Introduction. – 2. Cross-border recognition of status and intra-European mobility. – 2.1. Cross-border recognition of status, EU citizenship, and the right to free movement and residence. – 2.1.1. Limits: national identity and public policy. – 2.2. Circulation of documents. – 3. Fragmenting the status until it limps: motherhood in *V.M.A.* case – 3.1. Overview of the case. – 3.2. Mother, mothers (…). – 3.3. The Bulgarian approach to status recognition. – 3.4. The decision of CJEU. – 4. Conclusions.

1. Introduction.

Does the circulation of public documents under Regulation 2016/1191[1] allow the cross-border recognition of multiple maternal statuses? Recently, in the case *V.M.A.*[2], the European Court of Justice (CJEU) entered the uncharted territory of ruling on family ties between two mothers and their daughter, for the purposes of freedom of movement.

Thanks to the mobility of people within the EU and cross-border families, the lack of harmonization in the domain of parenthood, and on motherhood specifically, cannot go unnoticed. Some Member States (such as Bulgaria) adhere to the *mater semper certa* principle, providing for the recognition of biological motherhood only. Differently, under the national law of other Member States (such as the Spanish one), the law does recognise other motherhoods, in addition to the one based on parturition. Therefore, when EU citizens move to a State other than the one in which their family ties were established, their family statuses might be downgraded, or even considered void. This clearly exposes all the members of the family to a great degree of uncertainty regarding their statuses and the set of rights originating from them.

This paper explores the circulation of family statuses in the EU in the case of intra-European mobility, with a specific focus on motherhood. First, the EU law approach to cross-border recognition of family statuses is investigated, by considering the CJEU's case law and Regulation 2016/1191 on the circulation of public documents. The impact of the CJEU judgment in the *V.M.A.* case is then analysed. After a short overview of the case, the paper illustrates the Spanish and Bulgarian national approaches to legal

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[1] 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] Court of Justice, judgment of 14 December 2021, case C-490/20, *V.M.A.*, EU:C:2021:1008.

motherhood. Building on this, the impact of EU law on the circulation of statuses is explored by analysing the Administrative Court of the city of Sofia's remission order and the CJEU ruling.

The paper suggests that, by imposing the mutual recognition of the content of the birth certificate issued by another Member State, the CJEU judgment in the *V.M.A* case has introduced a new *status filiationis* under EU law, rather than imposing on the Member States the duty to recognize the foreign status of double motherhood.

2. Cross-border recognition of status and intra-European mobility.

2.1. Cross-border recognition of status, EU citizenship, and the right to free movement and residence.

Even though family status and ties fall within the exclusive competence of the Member States in family law, EU law exercises some influence in this area. Indeed, EU law has an impact both on law reforms and on the interpretation of national statuses when fundamental rights, EU citizenship status and free movement are at stake[3]. Therefore, Member States shall comply with EU law, even though they are free to decide how to design family statuses under internal law. More precisely, for the purpose of free movement and residence (Art. 21 TFEU) and according to the principle of non-discrimination (Art. 18 TFEU), they are to recognise the civil statuses that have been issued by another Member State to EU citizens under their national law. In this regard, Deana[4] suggests the existence of the right to cross-border continuity of family status, protecting EU citizens' family ties in their context, extent and stability.

The CJEU case law has recognised continuity to specific statuses, such as the one associated with surnames[5], or marriage/coupledom[6]. The Court has initially granted continuity of status where the involved Member States' laws shared ground principles concerning the status at stake. This reflects the approach taken in *Grunkin Paul*[7]. The decision was justified, *inter alia*, on the basis that no issue concerning public policy was cited before the court that might have precluded the recognition of the surname. Later, the Court developed a braver approach to continuity of status, pointing out that statuses may circulate despite the existence of structural differences concerning the principles at

[3] Court of Justice, judgments of 2 October 2003, case C-148/02, *Garcia Avello*, EU:C:2003:539; 19 October 2004, case C-200/02, *Zhu Chen*, EU:C:2004:639; 4 October 2008, case C-353/06, *Grunkin Paul*, EU:C:2008:559.

[4] F. DEANA, *Cross-border continuity of family status and public policy concerns in the European Union*, in *DPCE online*, 2019, pp. 1979-2002, at p. 1980, available *online*.

[5] Case *Garcia Avello*, cit.

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

[7] Case *Grunkin Paul*, cit., para. 38.

the very basis of national statuses. Indeed, in the case *Coman*[8], the Court held that Member States are bound to recognise the spouse status of same-sex married EU citizens, regardless of whether same-sex marriage is prohibited under their national law. However, the status recognition was rendered binding for the sole purpose of family reunification. As far as children are concerned, the Court drew a clear link between the EU minor citizen's right to free movement and their family ties. In *Zhu and Chen*[9] the CJEU held that the parent who is also the primary carer of the child is to be in the position to reside with that minor in the Host Member State. Therefore, the right to respect for private and family life (Art. 7 of the Charter of Fundamental Rights[10]), as well as the rights of the child (Art. 24 of the Charter), play a significant role in the circulation of statuses within the Member States, in addition to and altogether with the right to move and reside freely, rather than as an autonomous criterion.

2.1.1. Limits: national identity and public policy.

Even though «EU law eventually interferes with domestic legislation protecting EU citizens' right to a status' cross-border continuity»[11], national rules cannot constitute a breach of EU law. However, EU law does not impose a positive obligation on the Member States to automatically recognize foreign statuses. Indeed, Member States are allowed to disregard the status granted by another Member State on the ground of national identity and public policy[12]. Art. 4(2) TEU, as introduced by the Lisbon Treaty, challenges the principle of primacy and uniformity of EU law, and it represents a broad basis for the limitation to the application of EU law. Under this provision, the concept of national identity is confined within the limits of national political and constitutional structures. It is hardly necessary to mention the influence of national constitutions in shaping the legal notion of family, both in its vertical and horizontal dimensions.

Building on the distinction commonly found in the legal systems based upon the French civil code[13], public policy is here meant as international, rather than internal[14].

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[8] Case *Coman*, cit.

[9] Case *Zhu Chen*, cit.

[10] Available *online*.

[11] F. DEANA, *Cross-border continuity*, cit., p. 1986.

[12] Court of Justice, judgments of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*, EU:C:2016:401; *Coman*, cit., para. 42.

[13] *E.g.*, French law makes a distinction between *ordre public interne* and *ordre public international*, while Italian law distinguishes between *ordine pubblico interno* and *ordine pubblico internazionale*. On this, see J.J. LEMOULAND, G. PIETTE, J. HAUSERE, *Ordre public et bonnes mœurs,* in *Répertoire de droit civil Dalloz*, 2021; E. VITTA, *Diritto internazionale privato*, in *Digesto delle Discipline Privatistiche. Sezione civile*, vol. VI, Torino, 1990, pp. 227-279. See also K. MURPHY, *The Traditional View of Public Policy and Ordre Public in Private International Law*, in *Georgia Journal of International & Comparative Law*, 1981, pp. 591-615, available *online*.

[14] *Sic* M. GEBAUER, F. BERNER, *Ordre Public (Public Policy)*, in *Max Planck Encyclopedias of International Law*, 2019, available *online*. On the distinction between international and internal (or

More specifically, national courts can refuse on the ground of international public policy to apply a foreign rule or recognize a foreign judgment, if they are deemed to be contrary to the core values of the *lex fori*[15]. In this regard, the CJEU case law has repeatedly highlighted that the public policy clause must be interpreted restrictively[16]. National courts are not allowed to determine unilaterally what triggers public policy. Rather cryptically, the CJEU held that, under EU law, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.
As a corollary to the right to free movement, the limitation of cross-border recognition of family status performed by national authorities may be justified only if consistent with the fundamental rights guaranteed by the Charter[17]. Moreover, the limitation shall be based on objective considerations and proportionate to the legitimate aim pursued[18].

2.2. Circulation of documents.

Regulation 2016/1191 on the circulation of public documents promotes the EU citizens' freedom of movement by simplifying the circulation within the EU of public documents issued by other Member States' public authorities, such as birth certificates. More precisely, the public documents covered by the Regulation are exempt from legalization or similar formalities, and a multilingual standard form is established in order to make translations redundant.

Does the Regulation promote the circulation of statuses altogether with public documents? According to the text of the Regulation, the answer would probably be no. In fact, the aim of the Regulation is the simplification of administrative requirements and formalities for the circulation of a *numerus clausus* of public documents[19]. Moreover, this EU legal tool does not affect the recognition, in one Member State, of the life-event contained in the public document drawn up by the authorities of another Member State[20].

Although the Regulation excludes automatic recognition, some scholars argued that the circulation of public documents may impact the circulation of statuses as well.

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domestic) public policy, see also T. HOŠKO, *Public Policy as an Exception to Free Movement Within the Internal Market and the European Judicial Area: A Comparison*, in *Croatian Yearbook of European Law & Policy*, 2014, pp. 189-214, available *online*.

[15] Internal public policy requires that special protection should be given by the law to the fundamental principles at the very core of the legal system. Unlike the international one, internal public policy is recognized as a limitation on freedom of contract. On this, see *supra*, fn. 13.

[16] Court of Justice, judgments of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*, EU:C:2016:401, para. 67; 13 July 2017, case C-193/16, *E v Subdelegación del Gobierno en Álava*, EU:C:2017:542, para. 18; *Coman*, cit., para. 44; *V.M.A.*, cit., para. 55.

[17] Case *Coman*, cit., para. 47.

[18] Case *Grunkin Paul*, cit., para. 29. On the proportionality test concerning free movement, see also Court of Justice, judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn and Wardyn*, EU:C:2011:291.

[19] See Recitals 1 and 3, and Art. 2 Regulation (EU) 2016/1191, cit.

[20] See Recital 18, and Art. 2(4) Regulation (EU) 2016/1191, cit.

Building on the principle of the unity of the status of EU citizens[21], it was pointed out that the Member States are obliged to recognise family ties when the free movement of persons is at stake[22]. Because of the uniqueness of the status of EU citizens, Jiménez Blanco and Espiniella Menéndez suggested that the «mere proof of the existence (and presumption of validity) of the act or the relationship in the state of origin is enough to deploy its substantive effects in the other state simply as a result of mutual recognition»[23]. Moreover, as Schuster[24] indicated, the Regulation's legal basis is the freedom of movement, therefore, it shall be interpreted in accordance with its objective. This approach seems consistent with the one taken by the CJEU in *Dafeki*[25]. Here, it was held that «the rights arising from freedom of movement for workers is not possible without production of documents relative to personal status, which are generally issued by the worker's State of origin. It follows that the administrative and judicial authorities of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question»[26].

3. Fragmenting the status until it limps: motherhood in the *V.M.A.* case.

3. 1. Overview of the case.

V.M.A. and K.D.K. are a Bulgarian and a British national, respectively. The two women reside in Spain since 2015 and married in Gibraltar in 2018. In December 2019, their daughter, S.D.K.A. was born in Spain, therefore the Spanish authorities issued the child's birth certificate. According to Spanish law[27], the birth certificate refers to V.M.A. as «Mother A» and K.D.K. as «Mother» of the child.

V.M.A. applied to the Sofia municipality, Pancharevo district, for a birth certificate for her daughter, since, under Bulgarian law, this document is required to issue a Bulgarian ID document. V.M.A.'s application was denied on two grounds: first, she refused to comply with the local authorities' request to provide information with respect

[21] Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti*, paras. 10 and 12, EU:C:1992:295.

[22] P. JIMÉNEZ BLANCO, Á. ESPINIELLA MENÉNDEZ, *The right to family life and obstacles arising from intra-European mobility*, in S. DE VRIES, H. DE WAELE, M-P. GRANGER (edited by), *Civil Rights and EU Citizenship*, Cheltenham, 2018, pp. 194-228.

[23] *Ibid.*, p. 212.

[24] A. SCHUSTER, *The European Court of Human Rights and the notion of family life*, in F. HAMILTON, G. NOTO LA DIEGA (Edited by), *Same-Sex Relationships, Law and Social Change*, Abingdon-New York, 2020, pp. 127-138.

[25] Court of Justice, judgment of 2 December 1997, case C-336/94, *Dafeki*, ECR I-6761.

[26] Case *Dafeki*, cit., para. 19.

[27] See para. 3.2.

to the identity of S.D.K.A.'s biological mother[28]; second, there is a public policy objection to a birth certificate listing two women as mothers. Against this decision, V.M.A. brought then an action before the Administrative Court of the city of Sofia[29]. The Court found that under Bulgarian law only the birth mother is the legal mother and that the national birth certificate model does not allow for two mothers to be registered – unlike the Spanish one. Therefore, the Administrative Court expressed some doubts concerning the interpretation of Art. 4(2) TEU, Arts. 20 and 21 TFEU and Arts. 7, 9, 24, and 45 of the Charter of Fundamental Rights of the European Union (the Charter). As a result, the Administrative Court stayed the proceedings and referred the issues concerning how to weigh the different interests at stake to the European Court of Justice (CJEU) for a preliminary ruling. More specifically, the CJEU was asked for guidance on whether the Member States are prohibited to refuse to register the birth of a child, which has already been certified by another Member State's birth certificate mentioning two mothers, on grounds of the applicant's refusal to disclose who is the biological mother of the child. Moreover, the Bulgarian Court investigated the Member States' discretion on the establishment of legal parentage, and whether one of the mothers' UK nationality should have any impact on the outcome of this case. Finally, it was inquired if the principle of effectiveness obliges the competent national authorities to derogate from the model birth certificate which forms part of the applicable national law.

In the Grand Chamber formation, the CJEU held that, regardless of the national law, Bulgaria had to issue to the child – who is a Bulgarian citizen – a Bulgarian identity document without requiring a new birth certificate (in addition to the Spanish one) to be drawn up beforehand by their national authorities; moreover, Member States shall recognise the document provided by another Member State which allows the minor EU citizen to exercise their right to free movement with both their parents.

3.2. Mother, mothers, (…).

As far as parentage is concerned, EU Member States' national laws adopted quite different solutions, resulting in a lack of harmonization in this area. These differences become even more evident because of the mobilities of families, affecting the relationships between their adult and minor members. The *V.M.A.* case represents a dramatic example of the divergences between national statuses concerning parenthood, and more precisely motherhood.

Traditionally, the *mater semper certa est* principle was embedded under both Spanish and Bulgarian laws, therefore the birthmother was the legal mother.

[28] The applicant had indeed argued that, under Bulgarian law, she was not required to disclose that information.

[29] Hereinafter the «Administrative Court».

This approach was confirmed in 2009 by the Bulgarian Parliament when the family code of the Republic of Bulgaria (FCRB)[30] entered into force. In this regard, Art. 60 FCRB provides that «the descent from the mother is determined by birth».

The same attitude towards motherhood has been confirmed rigidly in Spain until 2007[31]. Despite supporting this general rule, *Ley* 3/2007[32] reformed Art. 7(3) of *Ley* 14/2006: the legal definition of mother was then expanded exceptionally to the birthmother's wife. Indeed, as a result, the birthmother's wife may be registered as *mother* in the child's birth certificate on an intentional basis[33]. Unlike the *pater is est quem nuptiae demostrant* presumption regarding the mother's husband, the married co-mother shall express her intention to be the child's mother. In other words, procreational will (*voluntad procreacional*)[34] is the constitutive element of the *ab initio* motherhood of the biological-mother's wife. Furthermore, Art. 7(3) of *Ley* 14/2006[35] read in conjunction with Art. 4(5) of *Ley* 20/2011[36], makes it clear that both the birthmother and her wife, who has taken part willingly in the parenthood project, are registered as mothers in the Civil Registry: in this sense, the Directorate General of Registries and Notaries held that there is no need to disclose any information regarding the pregnancy or the artificial reproduction technique (ART)[37].

Differently, under Bulgarian law, «the mother of the child is the woman who gave birth to the child, including in case of assisted reproduction». Therefore, the birth mother is the legal mother both when the pregnancy is the result of sexual intercourse or ART.

By the explicit mention to assisted reproduction in the text of the law, it appears clear that either the genetic link between the child and the woman who provided the egg or the intent to assume social parenthood for the child has no legal effect. In this sense, Petrova emphasises that «childbirth (and not conception) is the relevant legal fact, which is essential for establishing the descent from the mother. It does not matter whether the child has been conceived in a natural or artificial way by applying any of the assisted reproduction methods»[38].

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[30] Family code of the Republic of Bulgaria, State Gazette 23/06/2009, n. 47, available *online*.

[31] *Ley* 35/1988, *de 22 de noviembre, sobre Técnicas de Reproducción Asistida*; *Ley* 14/2006, *de 26 de mayo, sobre técnicas de reproducción humana asistida*. See also *Ley* 3/2007, *de 22 de marzo, para la igualdad efectiva de mujeres y hombres.*

[32] *Ley* 3/2007, *de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*.

[33] E. FARNÓS AMORÓS, *La filiación derivada de la reproducción asistida: voluntad y biología*, in *Anuario de derecho civil*, 2015, 1, pp. 5-61, at p. 13, available *online*.

[34] E. LAMM, *La importancia de la voluntad procreacional en la nueva categoría de filiación derivada de las técnicas de reproducción asistida*, in *Revista de Bioética y Derecho*, 2012, pp. 76-91, at p. 81, available *online*.

[35] As modified by *Ley* 19/2015, *de 13 de julio, de medidas de reforma administrativa en el ámbito de la Administración de Justicia y del Registro Civil*.

[36] *Ley* 20/2011, *de 21 de julio, del Registro Civil*.

[37] *Resolución*, *de 1 de febrero, de la Dirección General de los Registros y del Notariado*.

[38] M.P. PETROVA, *Establishing the descent from the mother – a prerequisite for establishing the descent of a child*, in *Fundamental and applied researches*, 2018, pp. 95-98, at p. 95, available *online*.

Thus, although sharing a common starting point, the two legal systems have reached quite different outcomes in terms of motherhood status. By recognizing the intent-based motherhood of the biological mother's wife, and therefore allowing dual legal motherhood (*doble maternidad legal*), Spanish law has eroded the monistic concept of motherhood based on parturition[39]. Contrarily, Bulgarian law confirmed its adhesion to the *mater semper certa est* principle: it has been argued[40] that these criteria are strictly linked to the security of the child's status and national identity. Hence, statutory law recognises only biology-based motherhood, *favor* (biological) *veritatis* is the very substance of motherhood. In such a scenario, the birthmother is *the* legal mother of the child: the single-status approach to motherhood prevents the legal recognition of other motherhoods.

However, it is interesting to notice that intent-based motherhood represents just an exception: indeed, Title V of Book II of the civil code bases implicitly matrimonial and extramarital motherhood and fatherhood on the *mater semper certa* and *pater is est* principles, respectively; moreover, Art. 10 of *Ley* 14/2006 reads that «surrogacy-born children's legal parenthood is determined through childbirth». Furthermore, the childbirth-mother's wife is mother *ab initio* too, only when the two women are married: this does not apply if they are living in *more uxorio*. Thus, the Spanish legal system recognises *favor voluntatis* limitedly (exceptionally) to female same-sex married couples, and *favor veritatis* still is the main rule.

3.3. The Bulgarian approach to status recognition.

In dealing with this case, two statuses are taken into account by the Administrative Court of the city of Sofia: nationality and parenthood. Despite being two well-defined and distinct legal concepts, in this case, they are deeply intertwined. Indeed, under Art. 25 of the Bulgarian Constitution[41], Bulgarian nationality depends on filiation (*ius sanguinis*). Even though the registration of a birth certificate listing two mothers was found to be contrary to national law, the Administrative Court of the city of Sofia was clear that this does not call into question the child's Bulgarian citizenship. This seems to lead to a short-circuit: on the one hand the child is considered a Bulgarian citizen, and

[39] *Sic*, M. LINACERO DE LA FUENTE, *La filiación*, in M. LINACERO DE LA FUENTE, *Tratado de Derecho de familia: aspectos sustantivos*, Valencia, 2021; F.J. JIMÉNEZ MUÑOZ, *Últimos avances en la regulación española de la filiación derivada de las técnicas de reproducción asistida*, in E. OLIVA GÓMEZ, F.J. JIMÉNEZ MUÑOZ, R. TAPIA VEGA, E.N. HERNÁNDEZ CASTELO (coordinadores), *Hacia el ámbito del derecho familiar*, Ciudad de México, 2017; S. TAMAYO HAYA, *Hacia un nuevo model de filiación basado en la voluntad en las sociedades contemporáneas*, in *Revista Digital Facultad de Derecho*, 2013, pp. 261-316, at p. 278.

[40] M.P. PETROVA, *The right to security of the child as legal consequence of its established parentage*, in *Globalization, the State and the Individual*, 2017, pp. 119-123, available online.

[41] Hereinafter, B. Cost.

therefore the *status filiationis* between the minor and the Bulgarian mother is implicitly recognised; on the other, national authorities claim that the registration of the same parental status is contrary to Bulgarian international public policy. Some have argued that this is just nonsensical[42]: in this regard, according to de Groot, the problem is that the *status filiationis* recognised under Spanish law is intermittently given legal effects by Bulgarian authorities.

We hardly need reminding of, but for the sake of completeness we do, Member States' exclusive competence in determining parentage for the purpose of family law. According to Swennen and Croce[43], when categorizing and ruling on legal kinship, family law in civil law jurisdiction moves along three layers: status, civil registration, and labelling.

The status approach inextricably links legal kinship and public policy: the shaping, formation, and dissolution of the family bonds which are legally relevant are indeed governed by imperative legal conditions, disregarding parties' contractual freedom. Moreover, a civil status becomes effective both *inter partes* and *erga omnes* on the basis of civil registration: civil status is conferred to the parties through the registration in a civil registry. Finally, labelling allows linking family relationships *in concreto* to kinship nomenclature *ipso jure*.

Building on this categorization, since S.D.K.A. was found to have Bulgarian nationality[44] there is no doubt that a legal-parenthood-link between the child and V.M.A. has been recognised. According to the Administrative Court, the «child was granted Bulgarian citizenship by virtue of Art. 25(1) of the Constitution of the Republic of Bulgaria «("A Bulgarian citizen is anyone of whom at least one parent is a Bulgarian citizen or who was born on the territory of the Republic of Bulgaria, if he does not acquire another citizenship by descent. Bulgarian citizenship may also be acquired by naturalization") and by virtue of Art. 8 *Zakon za balgarskoto grazhdanstvo* (Law on Bulgarian Nationality) ("A person is a Bulgarian national by parentage if at least one of their parents is a Bulgarian national")» (emphasis added) [45].

In this sense, the parental legal bond between S.D.K.A. and V.M.A. registered in the Spanish birth certificate was recognised legal effects within the Bulgarian jurisdiction,

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[42] D.A.J.G. De Groot, *EU law and the mutual recognition of parenthood between Member States: the case of V.M.A. v. Stolichna Obsthina*, in *GLOBALCIT – Special Report*, 2021, 1, pp. 1-21, at p. 8.

[43] F. Swennen, M. Croce, *Family (Law) Assemblages: New Modes of Being (Legal)*, in *Journal of Law and Society*, 2017, pp. 532-558, at p. 536, available *online*.

[44] Administrativen sad Sofia-grad (II, Ch. 22), judgment of 2 October 2020, no. 7424. English translation available *online*.

[45] Original text: «детето получава българско гражданство по силата на чл.25 ал.1 от Конституцията на Република България / "Български гражданин е всеки, на когото поне единият родител е български гражданин или който е роден на територията на Република България, ако не придобива друго гражданство по произход. Българско гражданство може да се придобие и по натурализация"/ и по силата на чл. чл. 8 от Закона за българското гражданство / "Български гражданин по произход е всеки, на когото поне единият родител е български гражданин"».

as far as citizenship was concerned. The same did not happen where motherhood was at stake. In this regard, under Bulgarian law, the only label option for female parenthood is motherhood[46], and motherhood is based on parturition. In this case, neither the Spanish birth certificate nor the parties had provided information on the identity of the biological mother. It was therefore impossible for the kinship registered under Spanish law to fit in the only legal label available under Bulgarian law. Still, the child was granted Bulgarian nationality because of the legal parental link between the child and the Bulgarian mother, as in the Spanish birth certificate.

It seems therefore reasonable to argue that, according to the Administrative Court's order, the interaction between national (Bulgarian) and the circulation of public documents resulted in a pseudo label in addition to motherhood: parenthood. In such a scenario, this pseudo-label translates into a *pseudo-status*[47] because, unlike motherhood, parenthood is not reflected in the substantive national law: in this sense parenthood is not «kinship in the books»[48]. Therefore, because of the Bulgarian law's continued adherence to the monistic notion of family, the lack of a suitable label prevented the registration of the family status in the civil registry. This bifurcation between motherhood and parenthood resulted in a limping status[49]. Even though nationality was explicitly recognised, it was just an empty box: since the identity of the biological mother was unknown, Bulgarian authorities were not able to issue a birth certificate, and therefore the child was denied Bulgarian identity documents. Similarly, parenthood remained without legal effects, other than recognizing the child's (empty) nationality.

3.4. The decision of the CJEU.

The Administrative Court of the city of Sofia recognised that the application of national law in compliance with Bulgarian national identity would have led to the child being deprived of Bulgarian identity documents. This would have made it difficult (if not impossible) for her to exercise the right to free movement and residence under Art. 21 TFEU. Thus, the national court raised preliminary questions to the CJEU. The incompatibility between the Spanish birth certificate, which recognises double legal motherhood, and Bulgarian substantive law was addressed. The remitting court asked whether the Member States were obliged to issue the birth certificate of a citizen in their Registry so that the child can have an identity document, even though the original birth

[46] On the Bulgarian discipline on motherhood, see para. 3.2.

[47] Swennen and Croce define those as mini-or quasi-civil statuses. F. SWENNEN, M. CROCE, *Family (Law) Assemblages*, cit., p. 550.

[48] On the difference between «kinship in action» and «kinship in the books», see F. SWENNEN, M. CROCE, *The Symbolic Power Of Legal Kinship Terminology*, in *Social & Legal Studies*, 2015, pp. 181-203, at p. 182, available *online*.

[49] Sic K. DORENBERG, *Hinkende Rechtsverhältnisse im internationalen Familienrecht*, Berlin, 1968, p. 15.

certificate was drawn up by another Member State in accordance with their law and in contrast with the first Member State substantive law. Moreover, in case of an affirmative answer, the Administrative Court inquired whether the EU law required such a certificate to list the two women in their capacity as mothers. Therefore, motherhood was at the very core of the Bulgarian preliminary questions concerning the balancing between Member states' national identities and EU citizenship and citizens' freedom of movement.

The CJEU emphasised that the Spanish authorities had lawfully recognised the parent-child relationship between the baby girl and both V.M.A. and K.D.K. On this very basis, under Art. 21(1) TFEU, EU citizens enjoy the right to lead a normal family life[50], and therefore the two parents – who are the child's primary carers – have the right to accompany the minor when their right to free movement and residence within the EU is exercised.

The Court explicitly addresses V.M.A. and K.D.K. as the «parents of a Union citizen […] of whom they are the primary carers».[51] To this extent, it might be argued that the right to lead a normal family life entails both the right to accompany and the right to care for the child[52]. However, in dealing with this matter, the Court ruled that the parents' «right to accompany the child»[53] shall be recognized to both V.M.A. and K.D.K. by all Member States, because of the Spanish birth certificate. The CJEU made no mention to the right to care for the child where the right under Art. 21 TFEU is being exercised. No doubt this was a deliberate choice of language. Moreover, the CJEU emphasised that Member States are not asked to provide for the parenthood of same-sex couples, nor to recognise the parent-child relationship for purposes other than the exercise of the rights under Art. 21 TFEU.

Therefore, as far as the right to lead a normal family life is concerned, the CJEU followed the path it had already set in previous case law[54]. Indeed, in *V.M.A.*, under Art. 21(1) TFEU, normality once again entails the family members' right to accompany the child (in terms of staying together) while exercising their right to free movement and residence, rather than the recognition of the parental responsibilities that normally originate from legal parenthood.

Building on this, in order to allow the minor-citizen to exercise their rights that derive from EU law, the judgment provided that the parent-child relationship shall be

[50] Case *V.M.A.*, cit., para. 47.

[51] *Ibidem.*

[52] It is interesting to notice the CJEU's parent-centric phrasing in trying to work out the content of the right to lead a normal family. Despite the recurrent reference to the child's rights under Art. 21 TFEU, the Court address the right to accompany the child and the entitlement to travel with the child from the parents' perspective, rather than from the child's or in a relational perspective.

[53] Case *V.M.A.*, cit., para. 48.

[54] Court of Justice, judgments of 7 July 1992, case C-370/90, *Singh*, paras. 21 and 23, EU:C:1992:296; 11 July 2002, case C-60/00, *Mary Carpenter*, EU:C:2002:434, para. 39; 25 July 2008, *Metock and Others*, case C-127/08, EU:2008:449, paras. 62 and 56; 14 November 2017, case C-165/16, *Lounes*, EU:C:2017:862, para. 52; *Coman*, cit., para. 32.

recognized by all the other Member States. The CJEU answered then the question about how the recognition is to be performed, and to what extent. As far as the first issue is concerned, the authorities of the host Member State are found to be the best placed to draw up a document (*e.g*., a birth certificate) which identifies the persons entitled to travel with the child. Therefore, the other Member States are obliged to recognise the parent-child relationship by recognizing that document.

In considering the second question, they held that such a recognition has the sole purpose of allowing the minor-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»[55].

Therefore, after *V.M.A.*, Member States are obliged to recognise the birth certificate issued by another EU State: there is no need for the Member States to register (*rectius*, transcribe) the foreign birth certificate in their Civil Registry in order to allow for the child to exercise their freedom of movement and residence. Indeed, the Court made it clear that, under Art. 21 TFEU, Member States shall recognise the parent-child relationship as attested by the birth certificate issued by another EU state, although for the sole purpose of the child's exercise of their right to free movement and residence. Bulgarian authorities were not obliged then to issue a Bulgarian birth certificate in addition to the Spanish one. On this very basis, the CJEU dismissed the remitting Court's argument concerning the threat to the national identity and public policy of the Member States. The Court found that recognizing birth certificates issued by another Member State does not require the Member States to reform their national law accordingly.

In addition, the Court stressed that the right to respect for private and family life, as well as the child's rights, play a fundamental role in this scenario. Indeed, the relationship between the two women and the child was found to constitute family life under Art. 7 of the Charter[56]. In addition, the CJEU held that the best interests of the child should be taken into primary consideration: under Arts. 24 and 7 of the Charter in conjunction with Art. 2 CRC, the child is recognised the right to enjoy their parents' company, regardless of their sexual orientation. Therefore, by recognising the two mothers and their child as family members, the *V.M.A.* judgment expanded the notion of family under the EU law.

4. Conclusions.

In *V.M.A.*, the CJEU held that Member States are bound to recognise the parent-child relationship that has been established in a birth certificate issued by another Member State in accordance with its law. Therefore, one might wonder whether the circulation of

[55] Case *V.M.A.*, cit., para. 49.
[56] Case *V.M.A.*, cit., paras. 61-63.

public documents under Regulation 2016/1191 now entails the automatic circulation of the statuses therein contained as well.

According to Art. 2(3), «this Regulation does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by authorities of another Member State»[57]. Put another way, the Regulation is meant to simplify the administrative requirements imposed by the Member States for the circulation of public documents, and not their content.

In line with the Regulation, the CJEU held that the recognition of the parent-child relationship operates under EU law for the sole purpose of the child's freedom of movement and residence. Thus, Member States are asked to operate functional recognition[58] of the *status filiationis* contained in the birth certificate issued by another Member State. In this regard, it is important to distinguish between two statuses: the status *filiations* acquired through the application of the Member States' domestic law and the one under EU law. Parental responsibilities derive from the first status, while the second one allows for children and their parents, regardless of their sexual orientation, to exercise their right to move and reside freely within the territory of the EU. Both statuses give legal representation to the filial relationship as proven by the birth certificate. However, they have been considered by the CJEU as two parallel tracks. In order to better understand this, it is worth noticing that, despite the Bulgarian Court's phrasing of the referral case, the CJEU addressed the statuses contained in the Spanish birth certificate in gender-neutral terms: parenthood, rather than motherhood. The Court has indeed recognized dual female parenthood *ab initio, i.e.*, from the child's birth. According to the judgment, where a female parenthood status is issued by a Member State, it shall circulate in all the EU States, regardless of the nature of the bond between the woman and the child (biological, genetic, or socio-intentional)[59]. As a result, even where the national legal systems opt for a monistic approach to motherhood, procreational intent *ex se* produces effects in the allocation of female parenthood under Art. 21 TFEU. Through parenthood, the CJEU recognised the parental tie between the two female parents and their daughter for the sole purpose of free movement and residence, rather than the maternal statuses issued under Spanish law.

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[57] Similarly, Recital 18 reads «[t]his Regulation should not affect the recognition in one Member State of legal effects relating to the content of a public document issued in another Member State».

[58] On this, O. FERACI, *Il riconoscimento «funzionalmente orientato» dello* status *di un minore nato da due madri nello spazio giuridico europeo: una lettura internazional-privatistica della sentenza* Pancharevo, in *Rivista di diritto internazionale*, 2022, pp. 564-579, at p. 571.

[59] On motherhoods and the relevance of parturition, see J. LONG, *Di madre non ce n'è una sola, ma di utero sì. Alcune riflessioni sul ruolo dell'ordine pubblico internazionale nelle fattispecie di surrogazione di maternità*, in S. NICCOLAI, E. OLIVITO (a cura di), *Maternità filiazione genitorialità*, Napoli, 2017, pp. 145-159; on the difference between parentage and parenthood, see A. BAINHAM, *Parentage, Parenthood and Parental Responsibility*, in A. BAINHAM, S. DAY SCLATER, M. RICHARDS (Edited by), *What is a Parent? A Socio-Legal Analysis*, Oxford-Portland, 1999, pp. 25-46.

In this regard, what the Member States are bound to recognise is not the foreign *status filiationis*, *i.e.*, the double motherhood issued under Spanish law. By operation of law, the CJEU recognised another status: such recognition is functional[60] to the minor citizen's exercise of their freedom under Art. 21 TFEU. Therefore, even though the parent-child relationship contained in the birth certificate is to be automatically recognised by all Member States, such a relationship is relevant under EU law only as far as the freedom of movement and residence is concerned.

In this sense, the CJEU draw a clear-cut distinction between the circulation of the parenthood under EU law and the foreign *status filiationis*. Indeed, the EU status is automatically recognized by all Member States. Where the foreign status – and parental responsibilities – are concerned, the *V.M.A.* judgment has not marked a transition from the conflict-of-law to the recognition method[61]. Such status falls indeed under the umbrella of family matters concerning parental responsibility, therefore this is where private international law comes into the picture[62].

In this regard, we cannot help but wonder whether this distinction is compatible not only with the child's rights under Arts. 24 and 7 of the Charter[63] and the best interests of the child[64], but also with the rights under Art. 21 TFEU. Indeed, through the functional recognition of the parenthood status, only the right to a normal family life has been recognized under EU law. According to the judgment, because of the parent-child relationship established in the birth certificate issued by a Member State under its national law, every Member State is bound to allow the parents to exercise their right to accompany the child. No other burden is imposed on them. Despite the fact that a legal status is granted to a wider variety of people, parenthood is recognised for the sole purpose of the freedom of movement and residence within the Member States. Therefore, where the parent-child relationship is recognized by operation of law under Art. 21 TFEU, the child's right to respect for family and private life, as well as their right to a continuous relationship with both their parents is limited to the scope of exercising freedom of

[60] On this, O. FERACI, *Il riconoscimento*, cit., at p. 571.

[61] On this, A. ZANOBETTI, *La circolazione degli atti pubblici nello spazio di libertà, sicurezza e giustizia*, in *Freedom, Security & Justice: European Legal Studies*, 2019, pp. 20-35, at p. 32, available *online*.

[62] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels IIa (Recast) Regulation). See J. GRAY, *Party Autonomy Under the New Brussels IIa (Recast) Regulation: Stalemates and Innovation*, in *Utrecht Law Review*, 2022, no. 1, pp. 45-56, available *online*; L. CARPANETO, *Impact of the Best Interests of the Child on the Brussels II ter Regulation*, in E. BERGAMINI, C. RAGNI (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge, 2019, pp. 265-285.

[63] P. FRANZINA, *The Place of Human Rights in the Private International Law of the Union in Family Matters*, in E. BERGAMINI, C. RAGNI (eds.), *Fundamental Rights*, cit., pp. 141-155.

[64] M. DISTEFANO, *The Best Interests of the Child Principle at the Intersection of Private International Law and Human Rights*, in E. BERGAMINI, C. RAGNI (eds.), *Fundamental Rights*, cit., pp. 157-170; R. BARATTA, *Recognition of Foreign Personal and Family Status: A Rights Based Perspective*, in *Rivista di diritto internazionale privato e processuale*, 2016, pp. 413-443.

movement and residence[65]. Put another way, despite recognizing the parent-child relationship as a family tie under Art. 7 of the Charter, national authorities are not asked to recognize all the rights, duties, and responsibilities that the recognition of motherhood would have legally implied. The right to normal family life is indeed limited to the EU citizens' right to live together with their family members. These limitations find their reason in the Member States' exclusive competence in family matters, and therefore in deciding whether to recognize the relationship between a child and their same-sex parents under their national law. Even though the CJEU recognized the relationship between the child and their same-sex parents as family life under Art. 7 of the Charter, the Charter does not have the effect of extending the competence which has already been conferred on the Union by the Treaties[66].

As a result, the legal parents are allowed to join the child where they exercise their right to move and reside without impediment within the EU territory, but they are not recognized the power to take care of them while exercising their rights under Art. 21 TFEU. In such a scenario, is it possible for the child to actually exercise their right to move and reside freely within the EU, where their parents cannot take medical decisions or enrol them in school[67]?

Maintaining the distinction between EU and domestic statuses leads to quite a paradoxical outcome[68]. Under EU law, parents and children (who are citizens) can indeed move and reside freely in the territory of the Union, but where this happens, the very existence of their legal relationship is questioned under the Member States' national law[69]. By keeping the right to move and reside freely separate and district from the right to a family life, the relationship between the child and one of their parents (if not both) may terminate when the family ventures beyond the borders of the host Member State[70].

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[65] Case *V.M.A.*, cit., para. 68 (n. 2).

[66] Art. 52(2) Charter. On the tension between international and constitutional paradigm under EU law, see K. ZIEGLER, *The Relationship between EU Law and International Law*, in *University of Leicester School of Law Research Paper*, 2015, no. 4, available *online*.

[67] A. TRYFONIDOU, *Rainbow Families and EU Free Movement Law*, in E. BERGAMINI, C. RAGNI (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge, 2019, pp. 87-89. See also V. SCALISI, *«Famiglia» e «Famiglie» in Europa*, in *Rivista di Diritto Civile*, 2013, pp. 7-24.

[68] *Mutatis mutandis*, G. PALMERI, M.C. VENUTI, *La trascrivibilità del matrimonio tra identità personale e circolazione dello status coniugale*, in *GenIUS*, 2015, pp. 92-102.

[69] J. RIJPMA, N. KOFFEMAN, *Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?*, in D. GALLO, L. PALADINI, P. PUSTORINO (Editors), *Same-Sex Couples before National, Supranational and International Jurisdictions*, Heidelberg-New York-Dordrecht-London, 2014, pp. 455-490.

[70] In this regard, Koppelman named this phenomenon as «blanket rule of nonrecognition», with respect to both the horizontal and vertical dimensions of same-sex families. A. KOPPELMAN, *Same sex, different States. When Same Sex Marriages Cross State Lines*, New Haven-London, 2006, pp. 70 and 109. See also M.M. WINKLER, *Same-Sex Families Across Borders*, in D. GALLO, L. PALADINI, P. PUSTORINO (Editors), *Same-Sex Couples*, cit., pp. 455-490; L.S. ANDERSON, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship*, in *Pierce Law Review*, 2006, no. 1, pp. 1-30, at p. 18.

Tryfonidou[71] and Dune[72] pointed out that the Member State's failure of to recognise the *status filiations* recognized by the Member State from which the rainbow family is moving «can clearly amount to an unjustified breach of the child's right to private and family life under Art. 7 EUCFR and as a general principle of EU law»[73].

There is another possible reading[74]: indeed, the right to lead a normal family life might be extended for all legal purposes, rather than limited to free circulation *stricto sensu*. However, as explicitly addressed by Advocate General Kokott[75], and implicitly mentioned by the CJEU[76], parenthood under EU law does not amount to the foreign status: by way of example, unlike motherhood, parenthood has no impact on the grant of Member States' nationality.

Building on this, the question arises whether in practice the circulation of the EU status would lead to the circulation of the domestic status as well. In this sense, it is worth noticing that, after the preliminary ruling was delivered, the Administrative Court of the city of Sofia[77] ordered the municipal authorities to issue a Bulgarian birth certificate for the child, rather than the Bulgarian ID only (as provided by the CJEU). The Court indeed recognized that the child's right to family life allows the parent and the child to cohabit, under conditions that are generally comparable to those of other families. In this regard, normality was not limited to a matter of staying together. It was also emphasised that no distinction should be made on the basis of the sexual orientation of the parents.

The CJEU ruling represents another brick laid in the legal recognition of same-sex families. People that have been left out of the law for a long time are now allowed a kinship label and a kinship status. In our case, despite the lack of such status under Bulgarian law, both V.M.A. and K.D.K. will enjoy the parental status, regardless of what originated the legal parent-child bond (parturition, intention, genetic link). However, despite the undeniable step forward in the recognition of rainbow families' rights, by refusing to engage with motherhood(s), the Court has confirmed that the children of rainbow families are «Children of a Lesser God»[78].

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[71] A. TRYFONIDOU, *Rainbow Families*, cit., pp. 89-92.

[72] P. DUNNE, *Who Is a Parent and Who Is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part I: The European Perspective*, in *Journal of the American Academy of Matrimonial Lawyers*, 2017, no., pp. 48-49.

[73] A. TRYFONIDOU, *Rainbow Families*, cit., p. 92.

[74] A. TRYFONIDOU, *The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: A Critical View of the CJEU's V.M.A. ruling*, in *European Law Blog*, available *online*.

[75] Opinion of Advocate General Kokott, case *V.M.A.*, cit., EU:C:2021:296, paras. 105-107.

[76] Case *V.M.A.*, cit., para. 67; see *supra* para. 3.4.

[77] Administrativen sad Sofia-grad (II, Ch. 22), judgment of 13 May 2022, n. 3251. The Sofia Municipality have then filed a cassation appeal against this judgment.

[78] A. TRYFONIDOU, *EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?*, in *Yearbook of European Law*, 2019, pp. 220-266, available *online*.

ABSTRACT: Building on the Court of Justice of the European Union (CJEU) judgment on the case C-490/20, *V.M.A. v. Stolichna obshtina, rayon Pancharevo*, this paper considers the circulation of birth certificates under Regulation (EU) 2016/1191 investigating its effects on the legal notion of motherhood.

Developing reproductive technology and social changes impacted differently on the EU Member States' national law on parentage and motherhood. In this sense, as seen in the aforementioned CJEU judgment, some legal scenarios, such as the Bulgarian one, recognise the legal effects of the sole biological tie between the child and their mother, clinging on to a monist notion of mother. Differently, other national laws opened up to a pluralist concept of motherhood: indeed, in addition to childbirth, intent gives rise to the legal status of mother. For example, under Spanish law, both the woman who delivered the baby and the female social parent are recognised the status of mother. In such a diverse lawscape, free movement and respect for human rights have made motherhood accessible to a wider group of people. What happens then when a monist legal system deals with a birth certificate issued for one of its citizens by another Member State recognizing intent-based motherhood? Answering this question will help us get closer to understanding *quo vadis mater?*.

In order to do so, this paper primarily explores whether the circulation of birth certificates implies circulation of status as well. As explicitly stated in Recital 18, the aim of Regulation 2016/1191 is not to change substantive law relating to parenthood. Furthermore, the same recital provides that the Regulation should not affect the recognition in one Member State of legal effects relating to the content of a public document issued in another Member State. Secondly, the paper aims at investigating to what extent, if any, the circulation of public documents under Regulation 2016/1191 makes a contribution to the shaping the legal notion of motherhood. Despite the EU Court of Justice's use of gender-neutral language concerning parentage (*i.e.*, parents, instead of mothers), this work aims at exploring the impact of legal developments concerning the circulation of birth certificates on motherhood.

KEYWORDS: Circulation; status; motherhood; female parenthood; parentage.

Die Verordnung im Vergleich zu den Übereinkommen der CIEC und anderen relevanten internationalen Übereinkommen (z.B. Haager Apostille-Übereinkommen (1961))

Irena Ryšánková*

1. Einleitung.

Den öffentlichen Urkunden wird nicht genug Interesse gewidmet. So oder ähnlich leiten üblicherweise öffentlichen Urkunden gewidmete Abhandlungen in die Materie ein[1]. Im französischen Schrifttum wurden sie deswegen auch als «parents pauvres» des internationalen Privatrechts bezeichnet[2]. Die Aussage ist zutreffend. Im direkten Kontrast dazu steht die Komplexität des internationalen Urkundenverkehrs, die zweifellos auch der Anzahl an Regelungswerken auf diesem Gebiet geschuldet ist, und gleichzeitig die Wichtigkeit, die die öffentlichen Urkunden für die Bürger und die Rechtspraxis haben.

Die Verordnung stellt in diesem Zusammenhang eine weitere Komponente in dem Mosaik des internationalen Urkundenverkehrs dar. Für den innereuropäischen Urkundenverkehr soll sie durch Abschaffung der Echtheitsnachweise und Einführung von Übersetzungsformularen eine Vereinheitlichung bewirken und den EU-Bürgern

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[1] H. SCHACK, *Internationales Zivilverfahrensrecht*, München, 2021, S. 304; P. CALLÉ, *La légalisation des actes publics*, in H. PEROZ (dir.), *La circulation européenne des actes publics*, Bruxelles, 2020, SS. 61-76, S. 62 f.; C. KIEDORF, *Legalisation von Urkunden*, Köln, 1975, S. 3.

[2] Zuerst verwendet bei G.L.A. DROZ, *La compétence judiciaire et l'effet des jugements dans la Communauté économique européenne selon la convention de Bruxelles du 27 septembre 1968*, Paris, 1972, Rn. 605.

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dadurch zur effektiven Inanspruchnahme des Rechts auf Freizügigkeit verhelfen. Bei seiner Suche nach einer gesamteuropäischen Lösung betrat der europäische Verordnungsgeber kein Neuland, vielmehr schöpfte er seine Inspiration aus den bestehenden Übereinkommen der Haager Konferenz und der Internationalen Kommission für das Zivilstandswesen (CIEC). Aus diesem Grunde lohnt es sich, einen Blick auf diese Instrumente zu werfen und sie der Regelung, die der Verordnungsgeber für den innereuropäischen Urkundenverkehr festlegte, gegenüber zu stellen.

2. Wesensmerkmal der Legalisation im internationalen Urkundenverkehr.

Im innerstaatlichen Rechtsverkehr der Rechtsordnungen, die das Institut einer öffentlichen Urkunde (*acte authentique*, *public document*) vorsehen, wird auf ihre Herkunft vertraut. Es wird angenommen, dass die Urkunde von demjenigen stammt, der als ihr Aussteller angegeben wurde, weshalb keine zusätzlichen Authentizitätsnachweise verlangt werden (*acta publica probant sese ipsa*). Grund dafür ist, dass die Außenmerkmale einer solchen öffentlichen Urkunde den innerstaatlichen Stellen bekannt und i.d.R. unkompliziert überprüfbar sind[3]. Eine öffentliche Urkunde wird als authentisch angesehen, solange ihre Unechtheit nicht nachgewiesen wurde. An die Echtheit werden weitere Wirkungen geknüpft, die die jeweiligen Rechtsordnungen mit öffentlichen Urkunden verbinden (i.d.R. erhöhte Beweiskraft)[4].

Solche Außenmerkmale sind jedoch von Land zu Land unterschiedlich und den jeweiligen innerstaatlichen Stellen unbekannt. Damit eine ausländische öffentliche Urkunde, ähnlich wie eine inländische, als echt angesehen werden könnte, müsste sich eine innerstaatliche Behörde jedes Mal, wenn ihr eine ausländische Urkunde vorgelegt würde, mit der betroffenen ausländischen Rechtsordnung und den ausländischen Verhältnissen vertraut machen, um auf ihre Authentizität schließen zu können[5]. Dass dies eine schwere Last für die Behörden darstellen würde, liegt nah.

Um die Herkunft der Urkunde zwecks ihrer Anwendung im internationalen Rechtsverkehr sicherzustellen und ihn so vor Fälschungen zu schützen, wird seit geräumiger Zeit die sog. Legalisation verwendet[6]. Allgemeine Anerkennung genießt ihre Definition in Art. 2 Apostille-Übereinkommen[7]. Durch die Legalisation bestätigen die

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[3] H. SCHACK, *Internationales Zivilverfahrensrecht*, oben zitiert, S. 304; P. CALLÉ, *La légalisation*, oben zitiert, S. 62 f.; C. KIEDORF, *Legalisation von Urkunden*, oben zitiert, S. 3.

[4] CH. REITHMANN, *Allgemeines Urkundenrecht – Begriffe und Beweisregel*, Köln, 1972, S. 14.

[5] Y. LOUSSOUARN, *Explanatory Report on the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, zugänglich online.

[6] Für Geschichte und Entwicklung der Legalisation vgl. P. ZABLUD, *The 1961 Apostille Convention – authenticating documents for international use*, in T. JOHN, R. GULATI, B. KOHLER (eds.), *The Elgar Companion to The Hague Conference on Private International Law*, Cheltenham, 2020, SS. 277-287, S. 278.

[7] Haager Übereinkommen vom 5. Oktober 1961 zur Befreiung ausländischer Urkunden von der Legalisation (Volltext auf Englisch und Französisch zugänglich online).

diplomatischen oder konsularischen Vertreter des Landes, in dessen Hoheitsgebiet die Urkunde vorgelegt werden soll, die Echtheit der Unterschrift, die Eigenschaft, in welcher der Unterzeichner der Urkunde gehandelt hat, und gegebenenfalls die Echtheit des Siegels oder Stempels, mit dem die Urkunde versehen ist.[8]

Die Legalisation dient daher als Nachweis der Echtheit der Urkunde. *Per definitionem* hat sie keine weiteren Auswirkungen. Vor allem bestätigt sie weder die Richtigkeit des Urkundeninhalts noch wird dadurch seine materiellrechtliche Wirksamkeit vorausgesetzt, darüber entscheidet das Recht des Vorlagestaates einschließlich dessen Vorschiften des internationalen Privatrechts.

3. Abschaffung der Echtheitsnachweise: Rechtslage *ex ante*.

3.1. Apostille-Übereinkommen.

Als Authentifizierungskette erwies sich die Legalisation im Laufe der Jahre als langwierig, komplex und kostenintensiv[9]. Der Europarat hat daher in den fünfziger Jahren die Haager Konferenz ersucht, ein Übereinkommen auszuarbeiten, das den internationalen Urkundenverkehr vereinfachen sollte[10].

Die Legalisation abzuschaffen, aber gleichzeitig ihre Wirkungen beizubehalten, das war die Aufgabe, mit der sich die Haager-Konferenz im Rahmen der Vorbereitungsarbeiten konfrontiert sah. Eine der möglichen Lösungen bestand in der ersatzlosen Abschaffung der Legalisation[11]. Dementsprechend hat es die Konferenz in Erwägung gezogen, eine Regel festzulegen, wonach einer von der Legalisation befreiten Urkunde in Bezug auf die Authentizität ihrer Herkunft dieselbe Wirkung zukäme, die sie hätte, wenn sie legalisiert worden wäre. Eine ausländische öffentliche Urkunde wäre dann der inländischen gleichgestellt[12]. Die Konferenz entschloss sich schließlich gegen diese Regelung, da die Rechtsordnungen i.d.R. Möglichkeiten vorsehen, die Unechtheit nachzuweisen. Bei Zweifeln an der Echtheit einer ausländischen Urkunde wäre die Beschaffung solcher Beweise im Ausland für eine innerstaatliche Stelle dabei mit erheblichen Schwierigkeiten verbunden. Aus diesem Grunde wollte die Konferenz die Legalisation nicht ersatzlos abschaffen, sondern durch ein anderes Instrument ersetzen, das drei Voraussetzungen erfüllen müsste. Erstens dieselbe Beweiskraft wie die

[8] Es handelt sich um die Definition der Legalisation im engeren Sinne, die das Übereinkommen durch die Apostille ersetzt. Die Legalisation im weiteren Sinne, wodurch bestätigt wird, dass die Urkundsperson für die Beurkundung zuständig und befugt war, bleibt davon unberührt. Die Legalisation im weiteren Sinne wird jedoch kaum noch benötigt.

[9] W. WEBER, *Das Haager Übereinkommen zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation*, in *Deutsche Notar-Zeitschrift*, 1967, SS. 469-485, S. 469.

[10] Y. LOUSSOUARN, *Explanatory Report*, oben zitiert, Fn. 5.

[11] Denkschrift zum Entwurf eines Gesetzes zum Apostille-Übereinkommen (BT-Drs. IV/2787), S. 15.

[12] Y. LOUSSOUARN, *Explanatory Report*, oben zitiert, Fn. 5.

Legalisation für die Echtheit der Urkunde erbringen, zweitens einfach überprüfbar sein und drittens eine effektive Vereinfachung an sich darstellen[13]. Die Konferenz entschied sich daher für eine einmalige Authentizitätsbestätigung – die Apostille[14].

Die Apostille ist ein Zertifikat in vorgeschriebener Form, das auf der Urkunde selbst oder auf einem mit ihr verbundenen Blatt (sg. Allonge) angebracht wird (Art. 4(1)). Sie bezeugt, wie die Legalisation, die Echtheit der Unterschrift, die Eigenschaft, in welcher der Unterzeichner der Urkunde gehandelt hat, und gegebenenfalls die Echtheit des Siegels oder Stempels, mit dem die Urkunde versehen ist (Art. 5(2)). Die Unterschrift und das Siegel auf der Apostille bedürfen selbst keiner weiteren Beglaubigung (Art. 5(3)). Die Überprüfbarkeit sollte durch Nummerierung der Apostillen gesichert sein. Diese Geschäftsnummern sind zusammen mit anderen Angaben in Register oder sonstige Verzeichnisse einzutragen, die von Behörden, die die Apostille erteilen, geführt werden müssen (Art. 7). Die Vereinfachung des internationalen Urkundenverkehrs besteht darin, dass die Apostille – als das vorher beschriebene Zertifikat – auf Antrag von zuständigen Behörden des Errichtungsstaates einmalig erteilt wird, wodurch die mühsamen Legalisierungsketten entbehrlich gemacht wurden.

3.1.1. Schwachstellen bei der Durchführung des Apostille-Übereinkommens.

Mit aktuellen 124 Vertragsstaaten[15] und weltweit jährlich mehreren Millionen erteilten Apostillen[16] stellt das Apostille-Übereinkommen das bisher erfolgreichste Übereinkommen der Haager-Konferenz dar. Obgleich es zweifellos zur Vereinfachung des internationalen Urkundenverkehrs beitrug, bleiben bei seiner Umsetzung Problempunkte bestehen.

3.1.1.1. Trennbarkeit der Allonge.

Den ersten Problempunkt stellt die Trennbarkeit der Allonge dar. Das Übereinkommen sieht in Art. 4 vor, dass die Apostille auf der Urkunde selbst oder auf einem separaten, aber mit ihr verbundenen, Blatt angebracht werden soll. Es spezifiziert jedoch nicht, in welcher Art und Weise das Blatt mit der Urkunde zu verbinden ist. Als mit dem Übereinkommen konform wird z.B. die Benutzung von Klebstoff, (mehrfarbigen) Bändern, Wachssiegeln, eingeprägten Siegeln oder selbstklebenden

[13] Y. LOUSSOUARN, *Explanatory Report*, oben zitiert, Fn. 5.

[14] Das Wort an sich ist französischen Ursprungs und bedeutet: Ergänzung am Rande eines Schriftstücks oder am Ende eines Briefes (Haager Konferenz für Internationales Privatrecht, *Apostille-Handbook*, II Aufl., 2013, S. 10, zugänglich *online*).

[15] Die aktuelle Übersicht ist zugänglich *online*.

[16] Haager Konferenz für Internationales Privatrecht, *Apostille-Handbook*, oben zitiert, S. 22.

Aufklebern betrachtet[17]. Die Allonge darf dabei ebenfalls mit einfachen Klammern befestigt werden[18]. So könnte sie von der Urkunde, für welche sie erteilt wurde und mit welcher sie zirkulieren soll, einfach getrennt und mit einer anderen Urkunde verbunden werden[19].

3.1.1.2. Verifizierungssystem.

Einen weiteren Problempunkt stellt die nachträgliche Überprüfbarkeit der Apostille in den vorgesehenen Registern bzw. Verzeichnissen dar. Die Haager Konferenz setzte es sich bei der Ausarbeitung des Übereinkommens zum Ziel, ein System einzuführen, bei dem falsche Angaben oder falsche Unterschriften auf dem Zertifikat zu erkennen wären. Da die Apostille nach dem Übereinkommen *per se* als echt gilt, sollte das System auch den Nachweis ihrer Unechtheit erleichtern[20].

Die Behörden, die in den Vertragsstaaten zur Ausstellung der Apostille bestimmt sind (Art. 6(1))[21], müssen daher Register oder andere Verzeichnisse führen, in denen sie die Ausstellung der Apostillen eintragen, wobei folgende Angaben zu vermerken sind: a) die Geschäftsnummer und der Tag der Ausstellung der Apostille, b) der Name des Unterzeichners der öffentlichen Urkunde und die Eigenschaft, in der er gehandelt hat, oder bei Urkunden ohne Unterschrift die Behörde, die das Siegel oder den Stempel beigefügt hat (Art. 7(1)). Die nachträgliche Kontrolle der ausgestellten Apostillen in den geführten Registern bzw. Verzeichnissen wird jedoch kaum durchgeführt[22]. Als Hauptgrund werden die Sprachbarrieren zwischen den Vertragsstaaten gesehen[23]. Dieses Problem hat auch die Konferenz erkannt. Als Reaktion auf die Empfehlung der Spezialkommission aus dem Jahre 2003[24] hat sie daher das sg. E-APP Programm ausgearbeitet. Dieses Programm besteht aus zwei Komponenten: der E-Apostille und des E-Registers[25]. Die Vertragsstaaten können dabei frei entscheiden, ob sie eine oder beide Komponenten des Programms durchführen.

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[17] Haager Konferenz für Internationales Privatrecht, *Conclusions and Recommendations of the Special Commission on the practical operation of The Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003)*, Oktober-November 2003, Rn. 16, zugänglich *online*.

[18] Haager Konferenz für Internationales Privatrecht, *Conclusions and Recommendations*, oben zitiert, Rn. 16.

[19] So auch P. CALLÉ, *La légalisation*, oben zitiert, S. 75.

[20] Y. LOUSSOUARN, *Explanatory Report*, oben zitiert, Fn. 5.

[21] Zentralisierte Stellen auf internationaler oder nationaler Ebene wurden zwar in Erwägung gezogen, optiert wurde aber schließlich für ein dezentralisiertes System.

[22] Ch. Bernasconi, *The e-apostille pilot program for the HCCH and the NNA*, März 2006, Rn. 20, zugänglich *online*.

[23] P. CALLÉ, *La légalisation*, oben zitiert, S. 75.

[24] Haager Konferenz für Internationales Privatrecht, *Conclusions and Recommendations*, oben zitiert, Rn. 16., Fn. 16.

[25] F. FUCHS, *Der internationale Urkundenverkehr 4.0: Die elektronische Apostille*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2020, SS. 302-305, S. 304.

Bei einem E-Register handelt es sich um eine elektronische Version der in Art. 7 des Übereinkommens vorgesehenen Register[26]. Der einzige Unterschied besteht darin, dass die Behörde, der eine apostillierte ausländische öffentliche Urkunde vorgelegt wurde, darauf online zugreifen kann. Je nach Informationen, die bei einer Abfrage angezeigt werden, lassen sich die E-Register derzeit in drei Hauptkategorien einteilen: In der ersten Kategorie werden nur Grundinformationen anzeigt, die bestätigen, dass eine Apostille mit der entsprechenden Nummer und dem entsprechenden Datum tatsächlich ausgestellt wurde. In der Regel handelt es sich dabei um eine «Ja/Nein»-Antwort. Solche E-Register bestätigen lediglich, dass die Apostille existiert, nicht hingegen, dass sie mit der richtigen Urkunde im Umlauf ist. Die E-Register in der zweiten Kategorie liefern neben der Bestätigung der Nummer und des Datums der ausgestellten Apostille ebenfalls zusammenfassende Auskünfte über die Apostille und/oder die öffentliche Urkunde, z.B. den Ort der Ausstellung der Urkunde, die ausstellende Behörde usw. Die E-Register der dritten Kategorie ermöglichen es, anhand der gescannten Urkunde und der Apostille zu überprüfen, ob die Apostille mit dem richtigen Dokument im Umlauf ist[27]. Von den Vertragsstaaten, die gleichzeitig Mitgliedstaaten der EU sind, haben derzeit lediglich Österreich, Belgien, Bulgarien, Dänemark, Estland, Irland, Lettland, Rumänien, Slowenien und Spanien die E-Register bereitgestellt[28]. Die Links, die direkt zu den E-Registern führen, können auf der Webseite der Haager-Konferenz abgerufen werden[29].

3.2. Kompletter Verzicht auf Echtheitsbestätigungen.

De lege lata wird die Abschaffung der Legalisation, wodurch die Zirkulation der öffentlichen Urkunden erleichtert werden soll, durch zwei Arten von Regelungstechniken erreicht. Einerseits handelt es sich um die oben behandelte Apostille nach dem Apostille-Übereinkommen, d.h. eine vereinfachte präventive Echtheitsüberprüfung mit der Möglichkeit einer nachträglichen Kontrolle. Soweit ersichtlich, gibt es weltweit kein vergleichbares Rechtsinstrument. Andererseits gibt es ein breites Mosaik an Regelungswerken, die jegliche Art von Echtheitsbestätigungen ersatzlos abschaffen. Es handelt sich dabei um zahlreiche bi- und multilaterale internationale Abkommen und Vorschriften des Unionsrechts. Nur ein Teil von diesen Rechtsinstrumenten sieht dabei einen autonomen Überprüfungsmechanismus vor.

3.2.1. Übereinkommen der CIEC.

[26] Haager Konferenz für Internationales Privatrecht, *11th International Forum on the electronic Apostille Programme (e-APP) Conclusions & Recommendations (16 to 18 October 2019)*, Fn. 1, zugänglich *online*.

[27] P. CALLÉ, *La légalisation*, oben zitiert, S. 75 f.

[28] Die aktuelle Tabelle ist zugänglich *online*.

[29] *Ibidem*.

Die CIEC hat für die Urkunden mit zivilstandrechtlichem Inhalt eine Reihe von Regelungswerken entwickelt. Sie wurde 1950 von Belgien, Frankreich, Luxemburg, den Niederlanden und der Schweiz gegründet. Auf dem Höhepunkt ihrer Existenz in 2008 hatte sie 17 Mitgliedstaaten, aktuell sind es jedoch nur noch sechs[30]. Bisher hat sie 34 Übereinkommen und neun Empfehlungen ausgearbeitet. Sieben von diesen Übereinkommen[31] sehen eine ersatzlose Befreiung von Echtheitsnachweisen vor.

Das älteste geltende Regelungswerk stellt das Übereinkommen (Nr. 2)[32] dar. Durch seine Bestimmungen haben sich die Vertragsstaaten dazu verpflichtet, Abschriften und Auszüge aus Personenstandbüchern in Bezug auf Geburten, Eheschließungen, Ehescheidungen und Sterbefälle kostenlos zu erteilen, wenn das Ersuchen für Verwaltungszwecke oder zugunsten bedürftiger Personen gestellt wird (Art. 1 i.V.m. Art. 5). Diese Abschriften und Auszüge benötigen im Hoheitsgebiet der Vertragsstaaten keiner Legalisation (Art. 4). Einen autonomen Überprüfungsmechanismus bezüglich des Ursprungs der Urkunde sieht das Übereinkommen nicht vor.

Den breitesten sachlichen Anwendungsbereich hat das Übereinkommen (Nr. 17)[33]. Mit seiner Ausarbeitung wollte die Kommission die häufig verwendeten Urkunden mit zivilstandrechtlichem Inhalt von Echtheitsnachweisen jeglicher Art befreien. Dadurch beabsichtigte sie die Schließung von Regelungslücken bestehender internationaler bi- und multinationaler Abkommen und die Vereinheitlichung des Urkundenverkehrs[34]. Unter dieses Übereinkommen fallen nach seinem Art. 2 Urkunden *(records and documents / actes et documents*), die sich auf den Personenstand, die Geschäftsfähigkeit oder die familienrechtlichen Verhältnisse natürlicher Personen, auf ihre Staatsangehörigkeit, ihren Wohnsitz oder ihren Aufenthalt beziehen, gleichviel für welchen Zweck sie bestimmt sind (Nr. 1), und alle anderen Urkunden, wenn sie zum Zweck der Eheschließung oder

[30] Zu Hintergründen dieser Entwicklung s. z.B. H. VAN LOON, *Requiem or Transformation? Perspectives for the CIEC/ICCS and its Work*, in *Yearbook of Private International Law*, 2018/2019, SS. 73-93.

[31] Übereinkommen (Nr. 1) vom 27. September 1957 über die Erteilung gewisser für das Ausland bestimmter Auszüge aus Personenstandsbüchern (Volltext auf Französisch und Englisch zugänglich *online*); Übereinkommen (Nr. 2) vom 26. September 1957 über die kostenlose Erteilung von Personenstandsurkunden und den Verzicht auf ihre Legalisation (Volltext auf Französisch und Englisch zugänglich *online*); Übereinkommen (Nr. 12) vom 10. September 1970 über die Legitimation durch nachfolgende Ehe (Volltext auf Französisch und Englisch zugänglich *online*); Übereinkommen (Nr. 16) vom 8. September 1976 über die Ausstellung mehrsprachiger Auszüge aus Personenstandsbüchern (Volltext auf Französisch und Englisch zugänglich *online*); Übereinkommen (Nr. 17) vom 8. September 1976 über die Befreiung bestimmter Urkunden von der Beglaubigung/Legalisation (Volltext auf Französisch und Englisch zugänglich *online*); Übereinkommen (Nr. 21) vom 8. September 1982 über die Ausstellung einer Bescheinigung über die Führung verschiedener Familiennamen (Volltext auf Französisch und Englisch zugänglich *online*) und Übereinkommen (Nr. 24) vom 5. September 1990 über die Anerkennung und Aktualisierung der Personenstandsbücher (Volltext auf Französisch und Englisch zugänglich *online*).

[32] S. Fn. 30.

[33] S. Fn. 30.

[34] CIEC, *Convention N° 17, Rapport Explicatif*.

der Eintragung in ein Personenstandsbuch vorgelegt werden (Nr. 2). Unter dem Begriff «acte» in der authentischen französischen Sprachfassung des Übereinkommens sind die Abschriften und Auszüge aus den Zivilstandsregistern zu verstehen. Der Begriff «document» deckt alle anderen offiziellen Schriftstücke (*pièce officielle*) ab, wie z.B. Urteile und Beschlüsse, Erlässe, Entscheidungen, Erlaubnisse etc.[35] Um den Urkundenverkehr vor Fälschungen zu schützen, sieht das Übereinkommen einen autonomen optionalen Überprüfungsmechanismus vor (Art. 3). Wurde die Urkunde nicht auf einem amtlichen Wege übermittelt und hat die Behörde, der die Urkunde vorgelegt wurde, erhebliche Zweifel an der Echtheit der Unterschrift, des Siegels oder Stempels oder an der Eigenschaft des Unterzeichners, kann sie die ausstellende Behörde um Überprüfung ersuchen. Für diese Zwecke stellt das Übereinkommen ein mehrsprachiges Formblatt bereit, das zusammen mit der Urkunde an die ausstellende Behörde zu übersenden ist (Art. 4). Diese sollte das Ersuchen unmittelbar oder, wenn auf diplomatischem Weg, so schnell wie möglich bearbeiten.

Ihr erstrebtes Ziel einer möglichst weitreichenden Vereinheitlichung konnten die CIEC-Übereinkommen jedoch nicht erreichen, was insbesondere an der geringen Ratifikationsrate liegt. Das Übereinkommen (Nr. 2) haben bisher zehn Staaten ratifiziert, acht davon sind Mitgliedstaaten der EU[36]. Bei dem Übereinkommen (Nr. 17) ist die Lage vergleichbar. Lediglich neun Staaten, davon acht Mitgliedstaaten der EU, haben es ratifiziert[37]. Als Hauptgrund der mangelnden Ratifizierungsbereitschaft wird häufig die Sprachbarriere angesehen[38]. Die Arbeits- und Amtssprache der Kommission ist Französisch und nur die französische Fassung der Übereinkommen ist authentisch. Die Kommission hat zwar mittlerweile ihre Satzung geändert und englische Übersetzungen der Übereinkommen und ihrer Begründungen bereitgestellt, die französische Sprachfassung bleibt jedoch weiterhin die einzige authentische.

3.2.2. Brüsseler Übereinkommen.

Die Initiativen zur Stärkung der Freizügigkeit der öffentlichen Urkunden durch Abschaffung von Echtheitsnachweisen innerhalb der EU gehen bereits auf die Entstehung des Brüsseler Übereinkommens[39] Ende der achtziger Jahre zurück. Dieses Übereinkommen trat jedoch nie in Kraft, da sich lediglich Belgien, Dänemark, Estland,

[35] *Ibidem.*

[36] Die aktuelle Tabelle ist zugänglich *online*.

[37] Die aktuelle Tabelle ist zugänglich *online*

[38] Mehr dazu z.B. G. CERQUEIRA, *Internationale Kommission für das Zivilstandswesen (CIEC) – Eine einzigartige, beispielhafte und notwendige internationale Organisation*, in *Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands*, 2021, SS. 169-170; H. VAN LOON, *Requiem or Transformation?*, oben zitiert, S. 86.

[39] Die niederländische, englische und französische Sprachfassung des Übereinkommens ist zugänglich *online*.

Irland, Frankreich, Italien, Zypern und Lettland zu seiner Ratifikation entschieden[40]. Sein Art. 6(3) sieht jedoch die Möglichkeit einer vorläufigen Anwendung basierend auf Reziprozität vor. Davon haben, bis auf Zypern, die erwähnten Mitgliedstaaten Gebrauch gemacht, sodass das Übereinkommen zwischen diesen Staaten auch Anwendung findet.

Sein sachlicher Anwendungsbereich ist beinahe deckungsgleich mit dem des Apostille-Übereinkommens. Es bezieht sich auf öffentliche Urkunden, die von staatlichen Stellen eines Staates ausgestellt wurden und auf dem Gebiet eines anderen Staates vorgelegt werden müssen (Art. 1(1)). Anders als das Apostille-Übereinkommen gilt es auch für Urkunden der diplomatischen und konsularischen Vertreter (Art. 1(3)). Was unter einer öffentlichen Urkunde zu verstehen ist, definieren beide Übereinkommen identisch.

In dem Übereinkommen ist eine nachträgliche optionale Echtheitskontrolle durch ein Auskunftsersuchen vorgesehen. Dass solche Echtheitskontrollen nur auf absolute Ausnahmefälle beschränkt sind, unterstreicht der Wortlaut des Art. 4. So kann der Adressat der Urkunde ein Auskunftsersuchen nur bei schwerwiegenden und begründeten Zweifeln an der Echtheit der Urkunde an die zentrale Behörde des Staates, aus dem die Urkunde stammt, richten. Das Ersuchen ist zu begründen und das Original oder die Kopie der Urkunde ist, soweit möglich, beizufügen. Solche Anfragen und Antworten sind von jeglichen Gebühren befreit (Art. 4(2)) und ihre Bearbeitung unterliegt keinen Fristen.

3.2.3. EU-Verordnungen: Ausblick.

Als entbehrlich erklären die Echtheitsnachweise für Zirkulation der öffentlichen Urkunden ebenfalls einige Sekundärrechtsakte des Unionsrechts. «[i]m Rahmen dieser Verordnung bedarf es hinsichtlich Urkunden, die in einem Mitgliedstaat ausgestellt werden, weder der Legalisation noch einer ähnlichen Förmlichkeit», bestimmt die Verordnung Nr. 1215/2012[41] in Art. 61 und die Verordnung Nr. 650/2012[42] in Art. 74; diese Regel enthalten ebenfalls die Verordnungen Nr. 2016/1103[43] und Nr. 2016/1104[44]

[40] Die Ratifikationstabelle ist zugänglich *online*.

[41] Verordnung (EU) Nr. 1215/2012 des Europäischen Parlaments und des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen.

[42] Verordnung (EU) Nr. 650/2012 des Europäischen Parlaments und des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und Vollstreckung von Entscheidungen und die Annahme und Vollstreckung öffentlicher Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses.

[43] Verordnung (EU) 2016/1103 des Rates zur Durchführung einer Verstärkten Zusammenarbeit im Bereich der Zuständigkeit, des anzuwendenden Rechts und der Anerkennung und Vollstreckung von Entscheidungen in Fragen des ehelichen Güterstands.

[44] Verordnung (EU) 2016/1104 des Rates zur Durchführung der Verstärkten Zusammenarbeit im Bereich der Zuständigkeit, des anzuwendenden Rechts und der Anerkennung und Vollstreckung von Entscheidungen in Fragen güterrechtlicher Wirkungen eingetragener Partnerschaften.

in Art. 61 und schließlich die Verordnung Nr. 606/2013[45] in Art. 15. Eine ähnliche Regel beinhalten auch die Verordnung Nr. 4/2009[46] in Art. 65 und die Verordnung Nr. 2019/1111[47] in Art. 90.

Der europäische Verordnungsgeber folgt in dieser Hinsicht einer einheitlichen Regelungstechnik. In den relevanten Vorschriften werden die Urkunden nicht einzeln aufgezählt. Vielmehr werden diejenigen erfasst, die «im Rahmen» der jeweiligen Verordnung Verwendung finden[48]. Umstritten ist die Reichweite, die dieser Formulierung zukommt. Konkret geht es um die Frage, ob die Urkunden für die Zwecke der Echtheitserleichterungen in den sachlichen Anwendungsbereich der jeweiligen Verordnungen fallen müssen[49], oder ob alle Urkunden erfasst sind, die nach Maßgabe der Verordnungen vorzulegen sind (wie z.B. Prozessvollmachten)[50]. Konkrete Rechtsfolgen für die innerstaatlichen Rechtsordnungen der Mitgliedstaaten werden durch die Verordnungen nicht geregelt und sie unterliegen dem Prozessrecht des Vorlagestaates[51]. Einen autonomen Überprüfungsmechanismus der Echtheit der Urkunden sehen die Verordnungen nicht vor.

3.2.4. Zwischenfazit.

Die Analyse der Rechtslage vor dem Inkrafttreten der Verordnung zeigt, wie kleinteilig der grenzüberschreitende Urkundenverkehr innerhalb der EU geregelt war. So benötigte eine in Deutschland ausgestellte Geburtsurkunde weder Legalisation noch Apostille, wenn sie in Frankreich vorgelegt wurde (Abkommen zwischen der Bundesrepublik Deutschland und der Französischen Republik über die Befreiung öffentlicher Urkunden von der Legalisation) oder Italien (CIEC-Übereinkommen (Nr. 2)). Eine Apostille wurde jedoch benötigt für ihre Vorlage in Tschechien oder in der

[45] Verordnung (EU) Nr. 606/2013 des Europäischen Parlaments und des Rates über die gegenseitige Anerkennung von Schutzmaßnahmen in Zivilsachen.

[46] Verordnung (EG) Nr. 4/2009 des Rates über die Zuständigkeit, das anwendbare Recht, die Anerkennung und Vollstreckung von Entscheidungen und die Zusammenarbeit in Unterhaltssachen.

[47] Verordnung (EU) 2019/1111 des Rates über die Zuständigkeit, die Anerkennung und Vollstreckung von Entscheidungen in Ehesachen und in Verfahren betreffend die elterliche Verantwortung und über internationale Kindesentführungen.

[48] V. LIPP, *Art. 65 EG-UntVO*, in *Münchener Kommentar zum FamFG*, München, 2019, Rn. 3; T. RAUSCHER, *Art. 74 EU-ErbVO*, in *Münchener Kommentar zum FamFG*, oben zitiert, Rn. 1.

[49] So im Ergebnis C. DORSEL, K. LECHNER, *Art. 74 EuErbVO*, in R. GEIMER, R.A. SCHÜTZE (Hrgs.), *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, 63. EL, Oktober 2021, Rn. 6; P. CALLÉ, *La légalisation*, oben zitiert, S. 65; A. DUTTA, *Art. 74 EuErbVO*, in *Münchener Kommentar zum BGB*, München, 2020, Rn. 3. Siehe auch Grünbuch, *Weniger Verwaltungsaufwand für EU-Bürger*, KOM(2010) 747 endgültig vom 14. Dezember 2010, S. 7.

[50] P. GOTTWALD, *Art. 61 Brüssel Ia-VO*, in *Münchener Kommentar zur ZPO*, München, 2022, Rn. 3; V. LIPP, *Art. 65 EG-UntVO*, oben zitiert, Rn. 3; C. MAYER, *Art. 61EheGÜVO*, in *Münchener Kommentar zum FamFG*, oben zitiert, Rn. 5; T. RAUSCHER, *Art. 74 EU-ErbVO*, oben zitiert, Rn. 1.

[51] S. für Deutschland z.B. B. HESS, *Art. 61 Brüssel Ia-VO*, in B. HESS, P.F. SCHLOSSER (Hrsg.), *EU-Zivilprozessrecht*, München, 2021, Rn. 2; V. LIPP, *Art. 65 EG-UntVO*, oben zitiert, Rn. 1.

Slowakei. Eine französische Geburtsurkunde benötigte weder Legalisation noch Apostille für ihre Vorlage in Irland (Brüsseler Übereinkommen) oder Luxemburg (CIEC-Übereinkommen (Nr. 2)). Eine Apostille benötigte sie aber für ihre Vorlage in Malta.

Bis auf das Apostille-Übereinkommen konnte jedoch keiner der beschriebenen zur Vereinheitlichung bestimmten internationalen Rechtsinstrumente die Gesamtheit der Mitgliedstaaten überzeugen. Trotz der besprochenen Problempunkte genießt die Apostille innerhalb der EU eine hohe Anerkennung und die Mitgliedstaaten scheinen, wenn es um multilaterale Regelungswerke geht, die präventive Echtheitsüberprüfung der nachträglichen Echtheitskontrolle vorzuziehen. Die Mitgliedstaaten akzeptieren die Apostille als Garantie der Echtheit der Urkunde, obwohl in der Praxis ihre Authentizität nur sehr selten überprüft wird. Eine partielle Freizügigkeit der Urkunden existiert jedoch bereits sowohl auf der internationalen Ebene als auch durch die Regelungen des EU-Sekundärrechts, ohne dass dies zum Anstieg der verfälschten Dokumente im Umlauf innerhalb der EU geführt hätte[52].

4. Die Verordnung.

4.1. Die Verordnung und das Apostille- und Brüsseler Übereinkommen.

Die Verordnung und die beiden Übereinkommen haben dasselbe Ziel: den grenzüberschreitenden Urkundenverkehr durch Abschaffung der Legalisation (bzw. Legalisation und Apostille) zu vereinfachen und seine Sicherheit trotzdem nicht in Gefahr zu bringen. Die Verordnung akzentuiert noch eine weitere Komponente: Sie soll die Freizügigkeit der EU-Bürger fördern. Dementsprechend wurde sie auf Art. 21(2) AEUV gestützt. Die Europäische Kommission musste bei der Ausarbeitung der Verordnung daher zwei Interessen Rechnung tragen. Erstens dem Recht der EU-Bürger auf Freizügigkeit, das durch die Forderung der Verwaltungsformalitäten bei Vorlage der öffentlichen Urkunden im inneneuropäischen Rechtsraum beeinträchtigt wurde, volle Geltung zu verschaffen[53]. Und zweitens dem Urkundenverkehr genügende Sicherungen vor Fälschungen zu bieten. Die Stellungnahmen derjenigen Mitgliedstaaten, die sich im Rahmen der Vorbereitungsarbeiten an der Verordnung an den Diskussionen zum Grünbuch von 2010 beteiligten, zeigten ihre Bereitschaft für die ersatzlose Abschaffung der Echtheitsnachweise unter Vorbehalt effektiver und unkomplizierter nachträglicher Kontrollen[54]. In diesem Zusammenhang ist darauf hinzuweisen, dass ihre Stellungnahmen auch Belgien, Dänemark und Frankreich abgegeben haben, zwischen denen das Brüsseler Übereinkommen vorläufige Anwendung findet. Nichts in ihren

[52] So auch P. CALLÉ, *La légalisation*, oben zitiert, S. 69.
[53] Vgl. KOM(2010) 747 endgültig, oben zitiert, S. 3.
[54] Die Stellungnahmen sind zugänglich *online*.

Stellungnahmen deutet darauf hin, dass durch den ersatzlosen Verzicht auf die präventive Echtheitsüberprüfung der Urkundenverkehr zwischen diesen Staaten durch Vorlage gefälschter Dokumente beeinträchtigt würde und dass das Brüsseler Übereinkommen in dieser Hinsicht keine genügenden Garantien biete.

4.2. Sachlicher Anwendungsbereich.

Art. 2(1) der Verordnung bestimmt ihren Anwendungsbereich in sachlicher Hinsicht. Sie gilt danach für öffentliche Urkunden, die mitgliedstaatliche Behörden ausstellen und die in einem anderen Mitgliedstaat vorgelegt werden müssen. Insoweit unterscheidet sich die Verordnung nicht von den beiden Übereinkommen. Die Urkunde muss allerdings gemäß dem «nationalen Recht» des jeweiligen Mitgliedstaates ausgestellt werden. Dies ist in Verbindung mit Erwägungsgrund 11 zu lesen und zielt darauf ab, die Urkunden, die aufgrund der einschlägigen CIEC-Übereinkommen von den mitgliedstaatlichen Behörden ausgestellt wurden, aus dem Anwendungsbereich der Verordnung auszuschließen[55].

Die Kommission konnte ihre ursprüngliche Idee einer europäischen Lösung für alle öffentlichen Urkunden[56] nicht verwirklichen. Der Anwendungsbereich der Urkundenverordnung ist im Gegensatz zu den beiden Übereinkommen auf bestimmte öffentliche Urkunden beschränkt. Der Katalog umfasst dabei personenrechtliche Grundinformationen (Buchst. (a)-(j)), einzelne statusrechtliche Anknüpfungsmerkmale (Buchst. (k)-(l)) und Vorstrafenfreiheit (Buchst. (m))[57]. Die Mitgliedstaaten sind gemäß Art. 24(1)(b) dazu verpflichtet, der Kommission eine informatorische Liste der Urkunden mitzuteilen, die in den Anwendungsbereich der Verordnung fallen[58].

Die autonome Definition einer öffentlichen Urkunde in Art. 3 Nr. 1 ist deckungsgleich mit der in Art. 1 Apostille-Übereinkommen und Art. 1(2) Brüsseler Übereinkommen. Aus den Vorbereitungsdokumenten geht hervor, dass die Definition aus dem Apostille-Übereinkommen aus pragmatischen Gründen übernommen wurde, da die Mitgliedstaaten dieses Übereinkommen seit geräumiger Zeit anwenden und somit über praktische Erfahrungen verfügen[59]. Für die Qualifikation einer Urkunde als «öffentliche» stellt die Verordnung, wie das Apostille-Übereinkommen[60], nicht auf den Inhalt der Urkunde oder auf ihre Form, sondern auf den Aussteller ab[61]. Gemäß Buchst. (a) sind

[55] B. ULRICI, *Art. 2 EU-Urk-VO*, in *Münchener Kommentar zur ZPO*, oben zitiert, Rn. 9; S. SCHLAUß, *Die EU-Urkundenverordnung in der Praxis: Abschied von der Apostille?*, in T. PFEIFFER, Q.C. LOBACH, T. RAPP (Hrsg.), *Europäisches Familien- und Erbrecht*, Baden-Baden, 2020, SS. 209-218.

[56] KOM(2010) 747 endgültig, oben zitiert, S. 8.

[57] J. MÜNCH, *Die Freizügigkeit notarieller Urkunden in Europa – eine Einführung zur EuUrkVO*, in J. MÜNCH, V. LIPP (Hrsg.), *Die Freizügigkeit notarieller Urkunden in Europa*, Bonn, 2017, SS. 1-24, S. 12.

[58] Die Listen sind zugänglich *online*.

[59] Vermerk Ratsvorsitz, Ratsdok. 5940/15 (6. Februar 2015), 5 Fn. 2.

[60] Denkschrift zum Entwurf eines Gesetzes zum Apostille-Übereinkommen, oben zitiert, S. 15.

[61] B. ULRICI, *Art. 3 EU-Urk-VO*, in *Münchener Kommentar zur ZPO*, oben zitiert, Rn. 2.

i.S.d. Verordnung als öffentliche Urkunden solche Urkunden zu qualifizieren, die eine Behörde oder Amtsperson als Organ der Rechtspflege in Ausübung ihrer amtlichen Funktion ausstellen. Wie Art. 1(2) Apostille-Übereinkommen deckt diese Bestimmung in erster Linie Urteile und Beschlüsse staatlicher Gerichte ab[62]. Im Rahmen des Übereinkommens unterliegt die Bestimmung, ob die Urkunde im Einzelfall von einem staatlichen Gericht ausgestellt wurde, dem nationalen Recht der Vertragsstaaten. Mit eingeschlossen werden können daher auch Urkunden kirchlicher Gerichte sein[63], wenn sie nach dem Recht des Ausstellungsstaates als staatliche Gerichte anzusehen sind. Ausgeschlossen sind dagegen Urkunden privater Gerichte, Schiedsgerichte und mit gewissen richterlichen Funktionen betraute nichtrichterliche Kommissionen[64]. Weiterhin sind nach Buchst. (b) Urkunden der Verwaltungsbehörden als öffentliche Urkunden anzusehen. Auch für sie wird nach dem Recht des ausstellenden Mitgliedstaates zu beurteilen sein, ob die Behörde als Verwaltungsbehörde zu qualifizieren ist (in Deutschland z.B. das Standesamt oder das Jugendamt). Buchst. (c) der Verordnung nennt dann noch wie Buchst. (c) des Apostille-Übereinkommens die notariellen Urkunden.

Keine öffentlichen Urkunden sind daher Privaturkunden. Sie fallen nicht in den Anwendungsbereich der Verordnung (Erwägungsgründ 17). Wird eine Privaturkunde jedoch öffentlich beglaubigt, stellt eine solche amtliche Bescheinigung eine öffentliche Urkunde dar. Diese (und nicht die Privaturkunde selbst) fällt dann in den Anwendungsbereich der Verordnung (Buchst. (d)).

Konsularurkunden wurden in den Anwendungsbereich des Apostille-Übereinkommens absichtlich nicht mit aufgenommen, da die Apostille für sie unpraktisch erschien; sie müssten erst in den Entsendungsstaat des Konsuls gesendet werden, um dort apostilliert zu werden, und danach wieder zurück[65]. Durch das System der kompletten Abschaffung der präventiven Echtheitsüberprüfung ist dieser Gesichtspunkt nicht mehr relevant[66], sodass die Verordnung die Konsularurkunden mit einbezieht.

4.3. Zirkulationsfreiheit.

Das Kernanliegen der Verordnung kommt in ihrem Art. 4 zum Ausdruck. Im Anwendungsbereich der Verordnung bedarf eine öffentliche Urkunde keines Echtheitsnachweises. Funktional vergleichbar ist diese Vorschrift mit Art. 2 Brüsseler Übereinkommen, obgleich der Verordnungsgeber für eine leicht modifizierte Umsetzung der Zirkulationsfreiheit optierte. Während das Übereinkommen noch eine alternative

[62] Vermerk Ratvorsitz, Ratsdok. 14049/14 (9. Oktober 2014), 5 Fn. 1.

[63] Denkschrift zum Entwurf eines Gesetzes zum Apostille-Übereinkommen, oben zitiert, S. 15.

[64] W. WEBER, *Das Haager Übereinkommen zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation*, in *Deutsche Notar-Zeitschrift*, 1967, SS. 469-485, S. 477.

[65] Y. LOUSSOUARN, *Explanatory Report*, oben zitiert, Fn. 5; Denkschrift zum Entwurf eines Gesetzes zum Apostille-Übereinkommen, oben zitiert, S. 16.

[66] B. ULRICI, *Art. 3 EU-Urk-VO*, oben zitiert, Rn. 13.

Formulierung der Befreiung «von jeder Art der Legalisation *oder*[67] jeder vergleichbaren oder entsprechenden Förmlichkeit» beinhaltet, hat der Verordnungsgeber durch eine kumulative Formulierung zum Ausdruck gebracht, dass alle Formen der Echtheitsnachweise gemeint sind.

Konkrete Rechtsfolgen, die diese Vorschrift hat, regelt die Verordnung nicht autonom, sie sind vielmehr dem Recht des jeweiligen Vorlagestaates überlassen. Die Abschaffung von Echtheitsnachweisen aufgrund anderer EU-Verordnungen hat z.B. in Deutschland nach allgemein anerkannter Ansicht die Gleichstellung der ausländischen mit einer inländischen öffentlichen Urkunde zur Folge, sodass sie ebenfalls die Vermutung der Echtheit für sich hat[68]. Dies dürfte im Verhältnis zu den Urkunden im Anwendungsbereich der Verordnung nicht anders ausfallen.

Die Verordnung gilt für den Urkundenverkehr zwischen den Mitgliedstaaten und genießt prinzipiell Vorrang vor internationalen Übereinkommen, die denselben Bereich betreffen (Art. 19(2)), d.h. auch gegenüber dem Apostille-Übereinkommen. Sie führt aber nicht dazu, dass für den innereuropäischen Rechtsverkehr die Apostille vollständig abgeschafft wird. Den mitgliedstaatlichen Behörden wird es durch die Bestimmungen der Verordnung zwar verwehrt, bei der Vorlage einer durch die Verordnung gedeckten öffentlichen Urkunde eine Apostille zu verlangen. Innerhalb der EU steht es jedoch allen Bürgern weiterhin frei eine Apostille zu beantragen und die Behörden eines Mitgliedstaates können daraufhin auch weiterhin eine Apostille anbringen. Sie sollten den Antragsteller allerdings darüber unterrichten, dass die Apostille nicht mehr erforderlich ist (Erwägungsgrund 5).

4.4. Nachprüfungsmechanismus.

Der Urkundenverkehr innerhalb der EU kann durch Abschaffung der Echtheitsnachweise nur dann effektiv vereinfacht werden, soweit ausschließlich echte Urkunden zirkulieren[69]. Die Verordnung sieht daher einen zweistufigen Verifizierungsmechanismus vor, der diesem Zwecke dient. Es handelt sich dabei um ein elektronisches Verfahren über das mit der Verordnung 1024/2012[70] errichtete Binnenmarkt-Informationssystems («IMI»), das die mitgliedstaatlichen Behörden bei berechtigten Zweifeln an der Echtheit der Urkunde zu nutzen haben (Art. 14(1)). Welche Intensität die Zweifel erreichen müssen, damit sie als berechtigt i.S.d. der Verordnung anzunehmen sind, wird dort nicht spezifiziert. Der Begriff darf aber nicht so interpretiert

[67] Hervorhebung durch die Autorin.

[68] B. HESS, *Art. 61 Brüssel Ia-VO*, oben zitiert, Rn. 1; V. LIPP, *Art. 65 EG-UntVO*, oben zitiert, Rn. 5; T. RAUSCHER, *Art. 74 EU-ErbVO*, oben zitiert, Rn. 4.

[69] J. MÜNCH, *Die Freizügigkeit notarieller Urkunden in Europa*, oben zitiert, S. 19.

[70] Verordnung (EU) Nr. 1024/2012 des Europäischen Parlaments und des Rates über die Verwaltungszusammenarbeit mithilfe des Binnenmarkt-Informationssystems und zur Aufhebung der Entscheidung 2008/49/EG der Kommission („IMI-Verordnung“).

werden, dass ein nicht apostilliertes Dokument *ipso facto* berechtigte Zweifel hervorhebt und überprüft werden kann[71]. Um den *effet utile* der Verordnung zu wahren und keine «Apostille durch die Hintertür» zuzulassen, dürfen die Behörden auf den Verifizierungsmechanismus daher nur dann zurückgreifen, wenn sie konkrete Anhaltspunkte dafür haben, dass die Urkunde nicht echt ist.

Bei berechtigten Zweifeln an der Echtheit der vorgelegten Urkunde muss sie die mitgliedstaatliche Behörde zunächst anhand der im IMI-Datenspeicher gespeicherten Muster von Urkunden überprüfen (Art. 14(1)(a)). Wurden durch diese Überprüfung die Zweifel ausgeräumt, hat der Verifizierungsmechanismus sein Ziel erreicht und die Behörde muss von der Echtheit der Urkunde ausgehen.

Bleiben die Zweifel danach bestehen (z.B. weil kein Muster abgespeichert wurde)[72], muss die Behörde im zweiten Schritt ein Auskunftsersuchen über das IMI an die ausstellende Behörde oder die zuständige Zentralbehörde stellen (Art. 14(1)(b)). Das Ersuchen ist zu begründen (Art. 14(3)), was erstens die Zusammenarbeit zwischen den Behörden erleichtern soll, da sich die ersuchte Behörde gezielt auf die angesprochenen Punkte fokussieren kann, und zweitens die Erforderlichkeit des Ersuchens rechtfertigt[73].

Die Antwort der ersuchten Behörde hat innerhalb gesetzter Fristen zu erfolgen, die nur in Ausnahmefällen und aufgrund einer Vereinbarung zwischen den Behörden verlängert werden können. Die Ersuchen sind daher innerhalb kürzester Frist, maximal jedoch innerhalb von fünf Arbeitstagen, wenn die Anfrage an die ausstellende Behörde gerichtet wurde, und von zehn Arbeitstagen, bei Ersuchen an die Zentralbehörde, zu beantworten (Art. 14(5)).

Bleibt die Bestätigung der Echtheit der Urkunde aus, muss sie die ersuchende Behörde nicht bearbeiten (Art. 14(6)). Das bedeutet, dass sie von der Echtheit der vorgelegten Urkunde nicht ausgehen muss. Diese Folge tritt unabhängig davon ein, ob die Echtheit seitens der ersuchten Behörde nicht bestätigt wurde oder ob sie auf das Ersuchen nicht geantwortet hat. In solchen Fällen steht es demjenigen, der die Urkunde vorgelegt hat, frei «alle verfügbaren Mittel zur Prüfung oder zum Nachweis der Echtheit (…) zu nutzen», vor allem kann er die Urkunde apostillieren lassen (Erwägungsgrund 39).

Laut Angaben der Europäischen Kommission stellten die mitgliedstaatlichen Behörden im Jahre 2020 über das IMI insgesamt 122 Anfragen. In der ersten Hälfe des Jahres 2021 waren es insgesamt 91. Die Hälfte der Anfragen konnte dabei innerhalb von zwei Wochen bearbeitet werden[74]. Ob auch Fälschungen entdeckt wurden, kann den Informationen nicht entnommen werden.

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[71] So auch B. ULRICI, *Art. 14 EU-Urk-VO*, in *Münchener Kommentar zur ZPO*, oben zitiert, Rn. 2.
[72] S. Vermerk Ratsvorsitz, Ratsdok. 5940/15 (06. Februar 2015), oben zitiert, 13 Fn. 1.
[73] B. ULRICI, *Art. 14 EU-Urk-VO*, oben zitiert, Rn. 24.
[74] Commission Expert Group on Regulation 2016/1191: Public documents (X03488), *Minutes of the 11th Committee meeting on Public Documents*, 9 December 2021, zugänglich *online*.

4.5. Zwischenfazit.

Der europäische Verordnungsgeber hat mit der Urkundenverordnung kein Novum entwickelt (wie z.B. ein «europäisches Echtheitssiegel»). Vielmehr wurden dadurch, wie bereits durch die Regelung im Brüsseler Übereinkommen, die Echtheitsnachweise ersatzlos abgeschafft.

Nahezu wörtliche Parallelen der Verordnung zum Apostille-Übereinkommen lassen erkennen, dass sich der Verordnungsgeber dabei an diesem Übereinkommen orientierte. Laut ihrem Erwägungsgründ 4, S. 2 sollte die Verordnung zwar ein eigenständiges und autonomes Instrument gegenüber dem Apostille-Übereinkommen darstellen. Die vom Verordnungsgeber gewollte Anlehnung daran wird jedoch für die historische und systematische Auslegung zu berücksichtigen sein[75].

Vielversprechend ist das Verifizierungssystem durch das IMI. Das IMI kann in allen EU-Sprachen genutzt werden. Die Nachrichten, Fragen und Antworten samt Formularfelder sind vorübersetzt und die Behörden können sich bei den Ersuchen mit maschineller Übersetzung behelfen. Dadurch sollte das Problem mit Sprachbarrieren, die eines der Hindernisse für eine effektive Überprüfung der Echtheit von Apostille darstellten[76], effektiv vorgebeugt werden, sodass der innereuropäische Urkundenverkehr effektiver geschützt sein sollte.

5. Mehrsprachige Übersetzungsformulare.

Aufgrund des Zeit- und Kostenaufwands, der üblicherweise mit der Besorgung von Übersetzungen verbunden ist, betrachtete der Verordnungsgeber ebenfalls die Übersetzungserfordernisse als Hindernis für die Freizügigkeit der EU-Bürger[77]. In Reaktion darauf ist im Kapitel III der Verordnung als zweite Komponente ihres Vereinfachungssystems die Vereinfachung sonstiger Förmlichkeiten bei Übersetzungen und mehrsprachigen Formularen vorgesehen.

5.1. Übereinkommen der CIEC.

Als Vorbild für die Vereinfachung der Übersetzungserfordernisse innerhalb der EU nahm die Kommission die Regelungswerke der CIEC, vor allem das Übereinkommen (Nr. 16)[78] [79]. Die CIEC hat in diesem Übereinkommen Formblätter ausgearbeitet, gemäß

[75] So auch B. ULRICI, *Art. 1 EU-Urk-VO*, in *Münchener Kommentar zur ZPO*, oben zitiert, Rn. 12.
[76] S. *supra*, Absatz 3.1.1.2.
[77] KOM(2010) 747 endgültig, oben zitiert, S. 10.
[78] S. Fn. 30.
[79] KOM(2010) 747 endgültig, oben zitiert, S. 10.

denen in den Vertragsstaaten mehrsprachige Auszüge aus Personenstandsbüchern in Bezug auf die Geburt, die Eheschließung oder den Tod ausgestellt werden. Der nach diesem Übereinkommen erstellte Auszug stellt eine eigenständige mehrsprachige Personenstandsurkunde dar, welche bei ihrer Vorlage in anderen Vertragsstaaten von Echtheitsnachweisen befreit ist (Art. 8(2)). Das Übereinkommen spricht ihnen ebenfalls rechtliche Wirkungen zu, indem es bestimmt, dass ihnen dieselbe Beweiskraft[80] zukommt wie den Auszügen, die nach dem innerstaatlichen Recht des Errichtungsstaates erstellt werden (Art. 8(1)). Welche Wirkungen den CIEC-Auszügen im grenzüberschreitenden Rechtsverkehr zukommen, bestimmt das *lex fori* des jeweiligen Vorlagestaates. In Deutschland wird ihnen dieselbe Beweiskraft zugemessen wie den inländischen Personenstandsurkunden[81]. Das Übereinkommen findet aktuell Anwendung zwischen 24 Vertragsstaaten, darunter 16 Mitgliedstaaten der EU[82].

5.2. Vereinfachungssystem nach der Verordnung.

Die Verordnung sieht zwei Konstellationen vor, in denen keine Übersetzung verlangt werden darf. Erstens geht es um Fälle, in denen die Urkunde in der Amtssprache oder einer der Amtssprachen des Vorlagemitgliedstaates abgefasst wurde (Art. 6(1)(a)). Zweitens kann keine Übersetzung verlangt werden, wenn der öffentlichen Urkunde ein mehrsprachiges Formular beigefügt wurde und die Behörde, der eine solche Urkunde vorgelegt wird, die Angaben in dem beigefügten Formular für ihre Bearbeitung für ausreichend hält (Art. 6(1)(b)).

Während die erstgenannten Fälle beinahe selbsterklärend sind, benötigen die Übersetzungsformulare bzw. ihre Rechtsnatur einer näheren Betrachtung. Welchen öffentlichen Urkunden ein mehrsprachiges Formular beigefügt werden kann, bestimmt Art. 7 der Verordnung. Es handelt sich um öffentliche Urkunden, die die Mitgliedstaaten der Europäischen Kommission übermittelt hatten und die sich auf die taxativ aufgezählten Sachverhalte beziehen. Diese Vorschrift ist enger gefasst als der sachliche Anwendungsbereich der Verordnung. Dies liegt daran, dass nicht alle unter die Verordnung fallenden Urkunden ohne Weiteres in einem Formular wiedergegeben werden können[83].

Die Formulare werden zwar von mitgliedstaatlichen Behörden ausgestellt, sie tragen das Ausstellungsdatum, die Unterschrift und ggf. das Siegel oder den Stempel der

[80] Das Übereinkommen benutzt zwar den Begriff «valeur» und nicht «force probante», dass damit jedoch die Beweiskraft gemeint ist, wird nicht in Frage gestellt.

[81] B. GAAZ, H. BORNHOFEN, T. LAMMERS, *Personenstandsgesetz – Handkommentar*, Frankfurt am Main-Berlin, 2020, § 54 Rn. 19.

[82] Belgien, Bulgarien, Estland, Frankreich, Deutschland, Italien, Kroatien, Litauen, Luxemburg, Niederlande, Österreich, Polen, Portugal, Rumänien, Slowenien und Spanien. Insgesamt hat es 24 Vertragsstaaten.

[83] B. ULRICI, *Art. 7 EU-Urk-VO*, in *Münchener Kommentar zur ZPO*, oben zitiert, Rn. 5.

jeweiligen Behörde (Art. 7(2)), es handelt sich jedoch um keine eigenständigen Dokumente (Erwägungsgründ 22). Sie sind an die Urkunde gebunden, deren Inhalt sie zum Zwecke der Überwindung von Sprachbarrieren widerspiegeln, und ohne welche sie innerhalb der EU nicht zirkulieren dürfen. Sinn und Zweck der Formulare ist daher einzig und allein die Überwindung von Sprachbarrieren. Jegliche rechtliche Wirkungen, prozessuale- oder materiellrechtliche, spricht ihnen die Verordnung ausdrücklich ab (Art. 8(1)). Die Formulare dürfen ebenfalls nicht mit den beglaubigten Übersetzungen verwechselt werden. Die Übersetzungsformulare sollen zwar eine beglaubigte Übersetzung entbehrlich machen, soweit sie den mitgliedstaatlichen Behörden zur Bearbeitung der Urkunde ausreichen, durch ihre Konstruktion als reine Hilfsmittel ohne Rechtswirkungen können sie jedoch den beglaubigten Übersetzungen nicht gleichgestellt werden.

Das Regelungskonzept der Übersetzungsformulare wurde im Laufe des Legislativprozesses grundlegend verändert. In dem ursprünglichen Entwurf der Kommission wurden sie als eigenständige öffentliche Urkunden konzipiert, die als Alternative zu einer innerstaatlichen Urkunde ausgestellt werden könnten. Außerdem sah er vor, dass den Formularen im Vorlagestaat dieselbe Beweiskraft zukommen sollte, die das innerstaatliche Recht ihres Ausstellungsstaates den entsprechenden öffentlichen Urkunden beimisst.[84] In diesem Sinne wurde in dem Entwurf in Bezug auf die Beweiskraft solcher Urkunden eine Wirkungserstreckung vorgesehen[85]. Den mehrsprachigen Formularen als einer eigenständigen Alternative zu innerstaatlichen öffentlichen Urkunden, denen ebenfalls dieselbe Beweiskraft zukommen sollte, wurde im Rat der EU von zahlreichen Delegationen eine Absage erteilt[86]. Gegen ihre Qualität als einfache Übersetzungshilfe bestanden zwischen den Mitgliedstaaten dagegen keine Bedenken, sodass diese Kompromisslösung schließlich auch angenommen wurde.

5.3. Die Übersetzungsformulare nach der Verordnung und die CIEC-Auszüge.

In ihrer Struktur sind die EU-Formulare und die CIEC-Auszüge gleich[87]. Die Glossare in den EU-Formularen sind *per se* umfangreicher, da sie in allen 24 offiziellen Sprachen der EU verfasst sind. Grundverschieden sind jedoch die Wirkungen, die ihnen zukommen. Das Übersetzungsformular nach der Verordnung ist, wie oben erläutert, als bloßer unselbstständiger Anhang der ursprünglichen innerstaatlichen Urkunde ohne rechtliche Wirkung zu betrachten. Ohne sie ist es nicht zirkulationsfähig. Es ist lediglich ein sprachliches Hilfsmittel, deren Funktion sich auf tatsächliche Vorgänge bei

[84] COM(2013) 228 final vom 24. April 2013, S. 6 sowie Art. 15(1) des Vorschlages.
[85] B. ULRICI, *Art. 8 EU-Urk-VO*, in *Münchener Kommentar zur ZPO*, oben zitiert, Rn. 2.
[86] Ratsdok. 15443/14 (14. November 2014), 4.
[87] So auch CH. KOHLER, W. PINTENS, *Entwicklungen im europäischen Personen-, Familien- und Erbrecht 2018-2019*, in *Zeitschrift für das gesamte Familienrecht*, 2019, SS. 1477-1488, S. 1481.

Übersetzung der Urkunde, der es beigefügt ist, begrenzt. Im Kontrast dazu stellen die CIEC-Auszüge selbstständige öffentliche Urkunden mit Beweiskraft dar. Bei den EU-Formularen und den CIEC-Auszügen handelt es sich daher um zwei vollkommen verschiedene Kategorien von Rechtsinstituten, sodass sich die Übereinkommen mit der Verordnung auch nicht überschneiden können. Die Verordnung kann auf diesem Gebiet daher die CIEC-Übereinkommen nicht verdrängen, was ihr Erwägungsgrund 49 noch ausdrücklich betont. Bei Sachverhalten, die sowohl das CIEC-Übereinkommen als auch die Verordnung regelt, hat der EU-Bürger daher die Wahl, sich einen CIEC-Auszug oder eine nationale öffentliche Urkunde mit dem EU-Formular ausstellen zu lassen.

5.4. Zwischenfazit.

Die kurz umrissene Entstehungsgeschichte der Verordnung lässt erkennen, dass sich der Verordnungsgeber sowohl für die Abschaffung der Echtheitsnachweise als auch für die EU-Formulare an dem existierenden Regelungsrahmen orientieren wollte. Durch ihren strukturellen Aufbau ist dies teilweise geschehen. Die CIEC-Übereinkommen bleiben von der Verordnung unberührt, sodass sie zwischen den EU-Mitgliedstaaten, die gleichzeitig zu ihren Vertragsparteien gehören, weiterhin Anwendung finden können. Ob sich die EU-Formulare gegenüber den CIEC-Auszügen künftig auch durchsetzen, bleibt jedoch ungewiss. Durch ihre rechtliche Natur als bloße Hilfsmittel haben sie jedenfalls einen deutlichen Nachteil.

6. Zusammenfassung.

Seine ursprüngliche Idee einer einheitlichen Lösung des Urkundenverkehrs innerhalb der EU konnte der europäische Verordnungsgeber nicht verwirklichen. Er schaffte allerdings eine Grundlage, auf welcher der freie Verkehr der öffentlichen Urkunden in den kommenden Jahren kontinuierlich aufgebaut werden kann. Dazu dienen die Fortschrittsberichte der Kommission, die sie nach Art. 26(1) der Verordnung in regelmäßigen Abständen vorzulegen hat und in welchen die Ausweitung des Anwendungsbereiches der Verordnung zu überprüfen ist.

Die Umsetzung in der Praxis wird dabei zeigen, ob sich die Verordnung gegenüber dem Apostille- und den CIEC-Übereinkommen durchsetzen kann. Die Übereinkommen haben durch ihre langjährige Anwendung gegenüber der Verordnung vor allem den Vorteil, dass ihre Instrumente in der Praxis bekannt und in den meisten Fällen[88] unproblematisch benutzt werden. Der Zwischenbericht, den die Europäische

[88] Zu den Schwachstellen bei der Durchführung des Apostille-Übereinkommens, s. *supra*, Absatz 3.1.1.

Kommission bis zum 16. Februar 2021 hätte vorlegen sollen, liegt bedauerlicherweise *bis dato* noch nicht vor.

ABSTRACT: The present article gives a brief overview of how cross-border movement of public documents is regulated in different instruments of International and European Civil Procedure. After explaining the role of legalisation, it then focuses on the Regulation (EU) 2016/1191 and compares its dispositions with the 1961 Hague Convention, the Convention of 25 May 1987 abolishing the legalisation of documents in the Member States of the European Union and some relevant conventions of the ICCS.

KEYWORDS: Civil procedure; legalisation; public documents; apostille; multilingual standard forms.

The changing nature of trust: the Apostille Convention, digital public documents, and the chain of authentication

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CONTENTS: 1. Introduction. – 2. The Apostille Convention. – 2.1. History and origins. – 2.2. The Convention approach. – 2.3. A global Convention. – 3. Regulation (EU) 2016/1191. – 4. The e-APP. – 4.1. History and overview. – 4.2. Expansion and insights. – 4.3. Challenges. – 5. Looking ahead. – 6. A common challenge.

1. Introduction.

The formalities associated with authenticating a public document for presentation abroad have long been a source of frustration for individuals, families, and companies involved in cross-border situations. As a result, there have been numerous attempts to abolish or otherwise simplify this process with international instruments, either generally or in specific contexts[1]. The challenge has always been balancing a desire to avoid unnecessary formalities with the need to establish trust in the origin of the document and therefore its content.

One of the most successful multilateral instruments in this space is the HCCH Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents[2] (Apostille Convention), the purpose of which is to abolish the requirement of legalisation for public documents within its scope, introducing an optional, simplified requirement in its place, in the form of a standardised certificate: an «Apostille». Within the European Union (EU), Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement

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[1] In addition to the two instruments discussed in this article, other examples include: the Athens Convention of 15 September 1977 on the exemption from legalisation of certain records and documents; the European Convention of 7 June 1968 on the abolition of legalisation of documents executed by diplomatic agents or consular officers; the Protocol of Las Leñas of 27 June 1992 on judicial cooperation and assistance in civil, commercial, labour and administrative matters.

[2] HCCH, Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents.

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of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012[3] (EU Regulation 2016/1191) goes a step further than the Convention, abolishing not only the requirement of legalisation, but also that of any equivalent formalities (such as Apostilles), for certain categories of public document for use between EU member states.

While the Apostille Convention was negotiated over 60 years ago, an attempt to modernise the Convention began in 2006 with the introduction of the electronic Apostille Programme (e-APP). The e-APP is designed to support the secure and effective operation of the Convention, encouraging contracting parties to digitalise their Apostille issuance and verification processes. This allows electronic public documents, which are most secure in their digital format, to be authenticated in a cross-border context under the Convention. The e-APP has also increased trust in paper public documents by leveraging digital registers and contributes to ensuring that recipients can trust digital public documents, as well as the authorities that are issuing them. By contrast, the comparatively recent negotiation and adoption of EU Regulation 2016/1191 meant that digital public documents and electronic means were expressly contemplated in its text and no supplementary programmes or initiatives have, to date, been required.

Against the background of increasing digitalisation, this paper considers the history and origins of the Apostille Convention and the e-APP, as well as how these ideas intersect with EU Regulation 2016/1191. The paper further considers the potential for technology to provide robust assurances as to the origin of a public document, despite some hesitation among recipients to trust public documents in digital form. The paper concludes that this hesitation presents a common challenge for both the Convention and the Regulation and that this lack of trust must be overcome to harness the full potential of digital transformation in the context of public document authentication.

2. The Apostille Convention.

2.1 History and origins.

The origins of the Apostille Convention can be traced back to a 1951 proposal from the United Kingdom to the Council of Europe, requesting the consideration of possible solutions to address several private international law issues, including through a multilateral convention or a level of harmonisation among bilateral agreements[4]. In

[3] Regulation (EU) 2016/1191 of the European Parliament and of the Council, of 6 July 2016, on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012.

[4] *Mémorandum du Secrétariat concernant les relations entre le Conseil de l'Europe et la Conférence de La Haye*, in *Actes de la Septième session*, 1952, p. 277.

relation to public documents, the proposal was simple: to consider the possibility of presenting documents from courts and administrative authorities abroad without the need for proof or legalisation[5].

Shortly thereafter, the Secretary General of the Council of Europe wrote to the Minister of Foreign Affairs of the Netherlands, inviting observations on the United Kingdom's proposal. The timing was fortuitous, with the Seventh Session of the HCCH to be held later that year. Given the private international law focus of the United Kingdom's proposal[6], the Council of Europe, on the advice of the Dutch Minister, referred the matters raised by the United Kingdom to the Seventh Session of the HCCH[7]. This, in turn, resulted in a decision at the Seventh Session to conduct further work on possible measures «to abolish or simplify the legalisation of official documents»[8].

While the objective was clear from the outset, consideration of the broader historical context offers important insights into the rationale underpinning the proposal and, ultimately, the Apostille Convention. In the 1950s, the world was in the midst of a period of unprecedented change. The aftermath of World War II gave rise to a surge in global migration[9], while the economic prosperity of the «golden age of capitalism» led to an increase in international trade and commerce[10]. The corollary of these developments was a proliferation of the situations in which public documents were required abroad. This reality, together with the renewed trust in international institutions that marked the post-war period[11], meant that by the time the Eighth Session of the HCCH convened in 1956, there was a clear and increasingly pressing need to abolish, or at least simplify, the requirement of legalisation with a multilateral instrument[12].

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[5] *Ibidem.*

[6] See subsequent discussion of whether the proposal was a matter of private international law during the eight session: *Procès-verbal no. 4 de la Quatrième commission*, in *Actes de la Huitième session*, 1957, p. 240.

[7] *Mémorandum du Secrétariat*, cit., p. 280.

[8] Through a study to be conducted by the Commission of State of the Netherlands ahead of the eighth session. See *Actes de la Septième session*, 1952, p. 401.

[9] In 1951, the provisional intergovernmental Committee for the movement of migrants from Europe was born «out of the chaos and displacement of Western Europe following the Second World War». This Committee, following a series of name changes, would eventually become the International Organization for Migration of today. See International Organization for Migration.

[10] See United Nations Department of Economic and Social Affairs, *Post-war reconstruction and development in the Golden Age of Capitalism* in *World Economic and Social Survey 2017: Reflecting on seventy years of development policy analysis*, UN Doc E/2017/50/Rev.1, 2017, pp. 23-48.

[11] As demonstrated by, *e.g.*, the foundation of the United Nations in 1945, of the Council of Europe in 1949, the adoption of the Statute of the HCCH in 1951 to establish it as a permanent organisation in 1955, as well as the signing of the Schuman Declaration in 1950, which would eventually lead to the creation of what is today the EU.

[12] In its special message of 20 May 1954, the Council of Ministers of the Council of Europe referred to the facilitation of the administrative work associated with establishing the validity of official documents and its «hope to see the conclusion of a multilateral Convention to this effect»; *Conseil des Ministres du Conseil de l'Europe*, *Programme d'action du Conseil de l'Europe du 20 mai 1954*, Doc. 238, 1954, para. 93. See also the reference to the need to complete the project «as soon as possible» and the discussion of

The discussions during the Eighth Session did not lead to the adoption of a convention, but the delegates concluded that «the abolition of legalisation for judicial documents could be envisaged» and that for other official documents, such as those issued by administrative authorities or notaries, legalisation formalities should be reduced to a «strict minimum»[13]. This early progress was illustrative of the level of trust between the existing members of the HCCH and their respective authorities.

Work continued with a Special Commission meeting in 1959, where the most significant outcome was the text of a draft convention[14]. With this, the stage was set for the negotiations at the Ninth Session in 1960, by which time the chain of signatures that was part of a typical legalisation procedure was widely acknowledged to be an unnecessary burden and «obstacle to international life»[15]. The question was therefore not whether legalisation should be abolished, or simplified in some way, but what mechanism, if any, should replace it. In short, how could the formal procedure for the presentation of documents abroad be simplified, while retaining the trust in the origin of these documents[16]?

The delegates at the Ninth Session were acutely aware of the level of trust within national systems, whereby recipients have full confidence in public documents presented because they have confidence in the officials who executed them[17]. The difficulty was to replicate this trust in an international context.

One option was to abolish legalisation entirely, providing a base rule exempting all documents from the associated formalities. This would have had the advantage of affording foreign public officials the same level of trust as that enjoyed by public officials within a national system. The delegates considered, however, that it would impose a disproportionate burden on recipients to assess the authenticity of foreign documents. For this reason, it was deemed inappropriate to abolish legalisation without replacing it with another formality, one that was as simple as possible, but that would provide the holder of the document with a sufficient guarantee of its authenticity without overcomplicating the verification process[18].

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the possibility of an extraordinary session of the HCCH: *Procès-verbal no. 5 de la Quatrième commission* in *Actes de la Huitième session*, 1957, p. 250.

[13] *Acte final*, in *Actes de la Huitième session*, 1957, p. 356.

[14] *Avant-projet de convention établi par la Commission spéciale et rapport de M. Yvon Loussouarn*, Preliminary Document no. 2 of December 1959, in *Actes et documents de la Neuvième session*, 1961, pp. 15-32.

[15] *Procès-verbal de la séance plenière*, in *Actes et documents de la Neuvième session*, 1961, p. 159; see also *ivi*, p. 19.

[16] Y. LOUSSOUARN, *Rapport Explicatif*, in *Actes et documents de la Neuvième session*, 1961, pp. 173-185, at p. 174.

[17] G.A.L. DROZ, *La légalisation des actes officiels étrangers*, Preliminary Document no. 1 of March 1959 for the attention of the special Commission, 1959, p. 24.

[18] Y. LOUSSOUARN, cit., p. 174.

Despite this view, earlier drafts of the Convention drew a distinction between certain categories of documents and proposed a full exemption from legalisation for some, including those from judicial authorities and public ministries[19].While this distinction was ultimately abandoned in favour of a uniform approach for all documents within the scope of the Convention[20], the original proposal is a testament to the inherent trust in public institutions and authorities shared by the states negotiating the Convention.

2.2 The Convention approach.

The solution that was adopted by the delegates at the Ninth Session was striking in its simplicity. The new Convention would abolish – for documents within its scope – the requirements of the traditional legalisation chain and in its place, afford contracting parties the discretion to require the issuance of an «Apostille», a certificate conforming to a standard model[21].

By establishing that the Apostille was «the only formality» that could be required[22], the Convention sought to reduce the multiple signatures and authentications of traditional legalisation to, at most, a single step. This would reduce the resource burden on the authorities ordinarily implicated in the legalisation chain, including consular officials, while also reducing time and costs for applicants seeking to present their documents abroad.

The question of which authority or authorities would be competent to issue the Apostille was left to the discretion of each contracting party to the Convention, a decision that was important in accommodating the concerns relating to State sovereignty and the separation of powers[23]. To ensure this flexibility did not undermine the simplicity of the overall approach, the drafters sought to maintain a level of uniformity through the use of the model Apostille certificate annexed to the Convention[24].

With respect to the desire not to overcomplicate the process of verifying the authenticity of both the underlying public document and the Apostille, the Convention addresses this concern in two ways: the limited effect of the Apostille (Art. 5) and the requirement to maintain a register of Apostilles (Art. 7).

First, under Art. 5, the Apostille certifies only the origin of the public document, meaning «the authenticity of the signature, the capacity in which the person signing the

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[19] See Art. 2 of the draft convention: *Avant-projet de convention établi par la Commission spéciale et rapport de M. Yvon Loussouarn*, cit., pp. 16 and 23.

[20] *Procès-verbal no. 3*, in *Actes et documents de la Neuvième session*, 1961, pp. 72-7.

[21] Apostille Convention, Arts. 2, 3, 4.

[22] *Ivi*, Art. 3.

[23] *Ivi*, Art. 6. See also, *Procès-verbal No. 3*, cit.

[24] «It is of little import who legalises, if everyone legalises in the same way»: G.A.L. DROZ, cit., p. 26.

document has acted and, where appropriate, the identity of the seal or stamp which the document bears»[25]. This avoids imposing an additional burden on the designated Competent Authority to assess the authenticity of the content of the public document, relying on the principle that if the origin of the document is authentic, there should be no reason to doubt the authenticity of the document itself[26].

Secondly, by introducing a requirement for an accessible register of Apostilles in Art. 7, the Convention provides a low-threshold mechanism for the verification of any Apostille, reducing the burden on the recipient. Given the wide range of instances in which a public document may need to be presented abroad and therefore the equally wide range of potential recipients of Apostilles, it was considered important that any doubts could be resolved by simply enquiring with the issuing authority.

With these innovations, the Apostille Convention was an important step towards accelerating the international circulation of public documents, at a time when the cross-border movement of people, goods, and services was itself accelerating[27].

2.3 A global Convention.

Over 60 years on, the Apostille Convention has become the most successful Convention adopted under the auspices of the HCCH. Over 120 countries around the world have joined the Convention and millions of Apostilles are issued every year[28]. All continents and major regions of the world are represented among the contracting parties to the Convention, including all members of the European Union[29].

The Convention strikes a delicate balance between, on the one hand, the determination of whether a document is considered a public document for the purposes of the Convention and, if so, how its origin is verified for the purpose of issuing an Apostille, and on the other hand, the determination of the probative value of the underlying public document. Under the framework of the Convention, the former is left to the law of the state of origin and the latter to the law of the state of destination.

At its core, the Apostille Convention is about trust: trust in the official or authority executing a public document, trust in the competent authority issuing an Apostille, and trust that the recipient will give the document its intended effect. The model Apostille provides a level of harmonisation and facilitates recognition across all contracting parties, while the designation of competent authorities represents the need for flexibility to

[25] Art. 5(2) of the Apostille Convention, cit.
[26] G. A. L. DROZ, cit., p. 25; Y. LOUSSOUARN, cit., pp. 173-174.
[27] Y. LOUSSOUARN, cit., p. 174.
[28] HCCH Permanent Bureau, Status Table of the Apostille Convention; HCCH Permanent Bureau, Summary of Responses to the Apostille Questionnaire 2021, Preliminary Document no. 2 REV of February 2022.
[29] Following the ratification of Denmark in 2006.

accommodate different systems and traditions. Although there remain many countries that are yet to join the Convention, its success across such a diverse group is evidence of the enduring nature of the solution negotiated at the ninth session.

3. Regulation (EU) 2016/1191.

EU Regulation 2016/1191 was first proposed by the European Commission in 2013, following a Green Paper on the subject in 2010[30]. The Commission proposal focused on the need to break down barriers and remove red tape in the face of increased mobility of citizens and businesses[31].

The final components entered into force in February 2019[32], meaning that at the time of writing, the Regulation had recently celebrated its third anniversary. By comparison, the Apostille Convention dates from 1961 and entered into force in 1965, and it has therefore been operating for over five decades.

The Regulation goes a step further than the Apostille Convention and prevents member states from requiring any authentication formality. The EU considered the Apostille process – an already simplified version of legalisation – too burdensome. For documents covered by the Regulation, no further authentication is required; that is, a public document within its scope may be presented as it is issued. This is a scenario that was envisioned by the drafters of the Apostille Convention and is enshrined in Art. 3(2), which provides that an Apostille certificate cannot be required if «an agreement between two or more contracting states [has] abolished or simplified it»[33]. In this way, the Regulation complements the Apostille Convention by advancing the goal that the two instruments share: abolishing authentication formalities in an effort to facilitate the circulation of public documents, all the while maintaining trust in the origin of each document.

One of the novel additions to the Regulation is the development of multilingual standard forms. They are created as aids to eliminate the need for translation of documents, so the receiving state cannot (save exceptional circumstances) require a certified translation.

In examining the Regulation as a whole, another modern addition compared with the Apostille Convention is the express incorporation of electronic means. This is not

[30] 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) 1024/2012, COM(2013) 228 final of 24 April 2013, p. 2.

[31] *Ivi*, pp. 2 and 4.

[32] Art. 27(2) of Regulation 2016/1191.

[33] Art. 8 would not apply in this instance as there are no certification formalities proposed in the Regulation.

surprising considering the half century that elapsed between the negotiation of the Convention and the negotiation of the Regulation, but it is nonetheless a difference worth noting. The Regulation refers to electronic versions of public documents and the associated multilingual forms[34], provides for the electronic transmission of requests for additional information in cases of doubt[35], preserves the application of EU law on electronic signatures and electronic identification[36], and invites future consideration on electronic systems for direct transmission of public documents[37]. However, while the Apostille Convention may not benefit from such prescriptive provisions in relation to electronic means, as discussed below, this has not impeded its ability to keep pace with the modern world.

4. The e-APP.

4.1. History and overview.

At the 2003 special Commission on the practical operation of the Apostille Convention, the special Commission noted that there is nothing in the spirit or letter of the Apostille Convention that would constitute an obstacle to the use of modern technology under the Convention[38]. This was endorsed in 2005 by attendees at the «First International Forum on e-Notarization and e-Apostilles» – the predecessor to the International Forum on the e-APP Forum, discussed below – who developed the idea, noting «the application and operation of the Convention can be further improved by relying on such technologies, thus enhancing the mutual confidence as a basic principle for the operation of the Convention».

Following this forum, the e-APP was launched in 2006 to complement and advance the Apostille Convention. It is designed to promote and encourage the implementation of technology in the issuance and verification of Apostilles among contracting parties. Because there was no need to amend the text of the Convention, there is no newer legal basis under which the electronic aspects operate. The programme is therefore best described as an initiative, merely designed as a promotional tool to ensure the Convention's modern operation.

The e-APP comprises two components: the e-Apostille and the e-Register. These components are separate and can be implemented independently, though have complementary operation. The e-Apostille is an Apostille certificate, ordinarily issued

[34] Recital 9 and Art. 12 of Regulation 2016/1191.
[35] Art. 14 of Regulation 2016/1191.
[36] Art. 17(2) of EU Regulation 2016/1191.
[37] Art. 26 of Regulation 2016/1191.
[38] Conclusions and Recommendations of the 2003 Special Commission on the practical operation of The Hague Apostille, Evidence and Service Conventions, 2003, no. 4.

under Art. 3 of the Convention, in electronic form. It is signed by digital signature and may be issued on electronic documents or paper documents that have been scanned into electronic form or otherwise digitised. The main benefit of the e-Apostille is increasing accessibility for users, thereby facilitating the use of documents across borders; e-Apostilles can be requested and issued online, and transmitted electronically, eliminating the need for in-person service[39].

The e-Apostille was envisioned for both paper and electronic documents[40]. Arguably, the added security of a digital signature provides more benefit to a paper public document than an electronic public document. This is because many electronic public documents already incorporate signatures that verify the signatory and are non-repudiable, or include some other means of verification, such as a quick response (QR) code.

With the creation of the e-Apostille, there are four ways in which a document can be authenticated under the Convention: (1) a paper Apostille on a paper public document, (2) a paper Apostille on an electronic public document, (3) an e-Apostille on a paper public document, and (4) an e-Apostille on an electronic public document. The first is the model that has been successfully used throughout the history of the Convention. The second should be considered something of an interim solution for those contracting parties which issue electronic public documents but do not yet have e-Apostilles. It should be approached with caution, as the printing of an electronic public document to allow for the issuance of a paper Apostille undermines the integrity of the original signature (a digital signature which is only valid in digital form). It does, however, provide an important workaround to allow these electronic documents to be presented abroad under the Convention. Of the four means of authentications mentioned above, the third is perhaps the greatest success of the e-APP, allowing paper public documents to circulate more securely and more easily. And finally, the fourth has a role for those contracting parties who are increasingly issuing electronic public documents.

The other component of the e-APP, an e-Register, is an online, publicly accessible register which allows any interested person to verify an Apostille. Just as their traditional paper counterparts, these registers must record information on the number and date of an Apostille, as well as the name of the person signing the public document and the capacity

[39] This became important, for example, during the COVID-19 pandemic. Contracting parties which issued e-Apostilles noted less disruption to their services than those that operated with paper only. These reflections led to the following conclusion: «noting the importance of Apostille services for individuals and businesses, the SC called on contracting parties to ensure the continued availability of Apostille services in challenging circumstances, such as those experienced as a result of the COVID-19 pandemic. It emphasised the benefits of e-Apostilles and online services in addressing many difficulties arising in this context», in *Conclusions and Recommendations of the 2021 Special Commission on the practical of the Apostille Convention*, (hereinafter, «C&R of the 2021 SC»), no. 10.

[40] See *First International Forum on e-Notarization and e-Apostilles*, Las Vegas, 2005, no. 14.

in which they have acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp[41]. E-Registers may record the details of paper and / or e-Apostilles. While Apostille registers are an obligation under Art. 7 and have existed under the paper system, they are rarely (if ever) used[42]. The main benefit of an e-Register is therefore the increased security it provides to the Apostille process by facilitating an accessible, additional check for the recipient.

Contracting parties to the Convention have complete discretion as to whether and how they implement the e-APP components, including which services they provide and which electronic infrastructure they use. This offers great flexibility to governments who have different requirements for – among other matters – cost, security, and internal law aspects. It also has the consequence that each system is different, both in operation and design, which may affect user experience.

Support and facilitation of the e-APP is coordinated from the Permanent Bureau of the HCCH. Most importantly, the Permanent Bureau organises meetings of the International Forum on the e-APP, which are a venue for the exchange of information and experience on the e-APP and related matters, such as electronic notarisation and digital authentication. These meetings generally involve presentations from recent adopters of the e-APP, panel discussions on contemporary topics, and offer a set of conclusions and recommendations (or other form of reflections) to assist contracting parties going forward. Since 2005, the e-APP Forum has been held on 12 occasions in 11 locations. The success of these meetings reflects the importance of information sharing and generating trust between contracting parties in the development of e-APP components, as well as ensuring the e-APP components are used and accepted following implementation.

4.2 Expansion and insights.

At the time of writing, over 25 contracting parties issue e-Apostilles and 50 contracting parties operate an e-Register[43]. This represents approximately 40 per cent of the contracting parties to the Convention.

The early adoption of the e-APP was slower than expected, likely because it was ahead of its time. In 2006, the use and recognition of digital signatures was becoming more prevalent but had not yet reached everyday use. For example, Adobe PDF, which is

[41] Art. 7(1) of Apostille Convention.

[42] In the 2021 Apostille Questionnaire, 9 per cent of respondents reported their Art. 7 register is «never» consulted with a further 11 per cent reporting it is consulted «once a year». By comparison, in 2020, in the 10 states that were able to provide statistics, their e-Registers were consulted over 1,000,000 times. For more information, see *Summary of Responses to the Apostille Questionnaire 2021*, cit.

[43] For a list of contracting parties which have implemented the e-APP, see, HCCH Permanent Bureau, e-APP Implementation Chart.

today a key part of many e-APP solutions, was only published as an open standard in 2008[44].

At the turn of the decade, four years after its launch, only three contracting parties issued e-Apostilles[45], with a slightly larger number operating an e-Register[46].

Despite these humble beginnings, the popularity of the e-APP is steadily increasing, with the second eight years of the programme seeing an additional 34 contracting parties, representing two thirds of those that have now implemented the e-APP. Newer contracting parties are more likely to implement the e-APP, typically integrating systems ahead of the entry into force of the Convention. Of those that have acceded to the Convention since 2006, 21 of 37 have implemented the e-APP[47] a much higher rate than those who joined before 2006. Within the EU, eight member states have implemented the e-Apostille[48] and ten have an e-Register[49].

There are several potential reasons for the recent increase in e-APP adoption, including a growing necessity, accelerating growth, and COVID-19.

With reference to necessity, many contracting parties are shifting towards e-government as part of whole-of-government digitisation agendas. This necessarily includes an increasing number of public documents executed in electronic form. If these documents require authentication, the e-Apostille offers the optimal solution[50]. In addition, authorities that are comfortable with issuing electronic public documents are more likely to be in a position to trust and accept e-Apostilles received from other contracting parties.

With reference to accelerating growth, the increasing development of e-APP solutions creates a greater wealth of knowledge for other contracting parties to leverage. This primarily involves information sharing between contracting parties, which has been recognised as a useful tool by the special commission[51], the key opportunity being the e-APP Forum, with participants able to gather knowledge before undertaking the task in their own jurisdiction. Inter-departmental efforts within a single contracting party have also proven useful, when, for example, there are other government digitisation efforts which are similar to e-APP components and resources, expertise, and experience can be

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[44] See International Standards Organisation (ISO), ISO Standard 32000-1:2008 *Document management – portable document format – Part 1: PDF 1.7*, 2008.

[45] Colombia, New Zealand, and Spain.

[46] Andorra, Belgium, Colombia, Dominican Republic, Guatemala, Moldova (Republic of), and the United States (Rhode Island and Texas).

[47] Bahrain, Bolivia, Brazil, Chile, Costa Rica, Denmark, Dominican Republic, Georgia, Guatemala, Indonesia, Korea (Republic of), Kosovo, Moldova (Republic of), Morocco, Nicaragua, Paraguay, Peru, Philippines, Singapore, Tajikistan, and Uzbekistan.

[48] Austria, Belgium, Bulgaria, Denmark, Estonia, Latvia, Slovenia, and Spain.

[49] Austria, Belgium, Bulgaria, Denmark, Estonia, Ireland, Latvia, Romania, Slovenia, and Spain.

[50] See C&R of the 2021 SC, no. 27.

[51] *Ivi*, no. 18.

shared. Concerns around the rejection of e-Apostilles are also less common with each contracting party that implements the e-APP (with the assumption that those contracting parties who issue e-Apostilles also have the infrastructure to accept them). This rolling adoption is perhaps most clear on a regional level. Looking at a map of e-APP adopters, the Latin American region is significantly ahead and those contracting parties that do not have the e-APP risk being left behind[52].

Finally, the COVID-19 pandemic required many in-person services to shut down. Despite this, documents still needed to circulate. Issuing e-Apostilles removed the need for in-person contact, which was safer, more efficient, and enabled applicants located abroad to access the service.

4.3 Challenges.

The Permanent Bureau circulated a questionnaire to contracting parties to the Apostille Convention in 2021 in preparation for the special commission on the Apostille Convention («2021 Apostille questionnaire»). The information provided by the 79 respondents provides some insight into the operation and challenges of the e-APP.

Approximately 70 per cent of respondents to the 2021 Apostille questionnaire issue some form of public document in electronic form. This is a clear majority and shows a need for complementary advances in electronic services, including through the e-APP. However, of this 70 per cent, it was more difficult to discern what percentage of public documents are electronic. The answers ranged from 5 to 90 per cent, with an average of 25 per cent, though most were not able to provide an accurate estimate.

What is not clear is whether e-Apostilles are being issued for paper public documents or electronic public documents. Unfortunately, there was no question on this subject within the 2021 Apostille questionnaire. This means that it is entirely possible – and in the authors' opinion, likely – that a majority of e-Apostilles are issued for paper public documents which have been converted into electronic form.

The questionnaire also asked about the challenges of e-APP implementation[53]. The greatest reported impediment concerned challenges related to implementation, arguably something that may be overcome at the international level through further promotion and information sharing. However, these implementation challenges could also encompass political will, or more accurately, a lack thereof. Implementation challenges were followed by cost, system operability concerns, and security concerns, matters that are unique to domestic governments.

[52] At present, 15 of the 18 contracting parties from Latin America have implemented one or both components of the e-APP. This represents 30% of the total number of contracting parties to have done so.

[53] Prel. Doc. no. 1 of January 2021, *Questionnaire relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention*).

In addition, it is clear through the slow uptake, as well as through practical experience, that another major challenge for the e-APP is shifting the mindset. For some contracting parties, this is a consequence of convenience and habit; when the system has been operating successfully with paper models for decades, there may be no particular need to revisit infrastructure.

Finally, another nuance that must continue to be respected is the obligation to receive an e-Apostille versus the discretion to receive an electronic public document. While a receiving authority cannot reject an e-Apostille because of its electronic format[54], this does not prevent authorities from rejecting the underlying electronic public document on the basis of their domestic law because the document is required to be produced in paper form[55]. This is similar to the EU Regulation Recital 9 which allows member states to determine «whether and under which conditions public documents and multilingual standard forms in electronic format may be presented».

5. Looking ahead.

The changes driven by advances in technology are not unique to the e-APP. New digital solutions are being studied, developed, and implemented across services, sectors, and regions. The prevalence of these new solutions, together with the number of digital transformation strategies and agencies being established, illustrates the increasing trust in, and reliance upon, technology. This must extend to the issuance and execution of public documents.

In the last decade alone, the EU has begun preparing for a single digital gateway for public services and procedures[56], the Groningen Declaration has encouraged the development of solutions for digital student data portability[57], and the availability of electronic notarial services has expanded[58]. Importantly, these examples encompass the three categories of public documents for which Apostilles are most requested: civil status documents, diplomas, and notarial authentications[59].

The COVID-19 pandemic has also accelerated innovation in the use of public documents abroad, most relevantly through the development of digital health certificates.

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[54] C&R no. 30, cit.

[55] *Ivi*, C&R no. 38.

[56] Regulation (EU) 2018/1724 of the European Parliament and of the Council, of 2 October 2018, establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) 1024/2012.

[57] Groningen Declaration on Digital Student Data Depositories Worldwide (16 April 2012).

[58] For example, the Estonian Chamber of Notaries launched its fully remote, electronic notarisation service in early 2020. For more information, see: B. OYETUNDE, *Estonia's fully remote e-notary service – 1st state e-service of its kind in Europe*, 2021, available *online*.

[59] According to the 2021 Apostille Questionnaire. See *Summary of Responses to the Apostille Questionnaire 2021*, cit.

These certificates allow individuals to present a trusted proof of vaccination or recovery abroad and are often exempt from legalisation or similar formalities[60].

With these developments in mind, the question arises of whether our collective focus on digitising individual authentication steps is distracting us from harnessing technological developments to digitalise the entire authentication process. If technology can facilitate the direct authentication of the origin of a document, there may no longer be a need to impose any additional formality. To again use an example from the COVID-19 pandemic, when vaccination certificates were discussed by the 2021 special Commission, it was concluded that no further guidance was required on the subject, with many contracting parties preferring to rely on authentication means inherent in digital vaccination certificates, rather than imposing the addition of an Apostille certificate[61].

At first, this may appear incompatible with the Apostille Convention. However, upon closer examination, it seems that such an approach is not only compatible with the text, but exactly what the drafters intended. As discussed above, as early as the first proposal in 1951, there was a clear desire to reduce the formalities required for a public document to have its intended effect abroad. Once the formal requirements of legalisation were abolished, the question of whether they should be replaced gave rise to significant discussion[62]. While the solution adopted replaced the requirement of legalisation with the issuance of an Apostille, it is clear from the text of the Convention and the negotiation history that the requirement of an Apostille was only ever conceived as optional – a new maximum formality[63]. Once again, the text of Art. 3(2) reinforces this idea, ensuring that the Apostille could not be required where authentication formalities had been abolished or further simplified by virtue of laws, regulations, practices, or agreements[64]. In addition, Art. 8 addresses this in the context of formal treaties, guaranteeing that the Convention would only override the authentication provisions of other instruments if the formalities required therein were more «more rigorous» than the issuance of an Apostille[65].

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[60] Regulation (EU) 2021/953 of the European Parliament and of the Council, of 14 June 2021, on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, Recital 23. In addition to the 27 EU Member States, over 35 third countries around the world have joined the EU system, pursuant to Art. 8 of the Regulation, demonstrating the level of international trust in the solution, even in the absence of legalisation or equivalent formalities. See also the Report from the Commission to the European Parliament and the Council pursuant to Art. 16(2) of Regulation (EU) 2021/953 of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test, and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, COM(2021) 649 final of 18 October 2021, p. 1.

[61] See C&R of the 2021 SC, cit., no. 11.

[62] Y. LOUSSOUARN, cit., p. 179.

[63] *Ivi*, p. 180; *Procès-verbal no. 3*, cit., pp. 72-77.

[64] The reference to an «agreement» in Art. 3(2), is to be interpreted in the widest possible sense, to cover «all agreements not cast in the form of formal treaties»; Y. LOUSSOUARN, cit., p. 180.

[65] Art. 8 of Apostille Convention.

While there is a certain irony in relying on historical reasoning to accelerate the digitalisation of public document authentication, there is no doubt that the drafters of the Convention sought to encourage further simplification of the process. The abolition of all formalities was their aspiration, yet to avoid creating an unnecessary burden on recipients they were left with no choice but to compromise. The Apostille was that compromise, designed to reduce authentication to a single formality while maintaining confidence in the origin of the document, and by extension, its content.

Over 60 years on, when public documents are executed in electronic form with a secure, digital means of authentication, the addition of a second certificate becomes superfluous. In short, if technology can guarantee absolute trust in the origin of a document without any formality, the authentication procedures traditionally relied upon may no longer be necessary. This is the epitome of trust in the origin of a public document, and rather than being a threat to the Apostille system, is a development that should instead be embraced as the realisation of the Convention's original goal.

6. A common challenge.

One of the main goals of the Apostille Convention is to establish trust between contracting parties. The Convention acknowledges the inherent trust in the origin of a public document that exists at a domestic level and was designed to extend this to the use of public documents in an international context. As the number of contracting parties continues to increase and the cultures and traditions of their respective systems diversify, this trust has become even more important.

By contrast, the EU, as it exists today, has an inherent trust between its member states and therefore has a different starting point. This principle of mutual trust is expressly referenced in the preamble of the Regulation[66]. This foundation explains why the Regulation can go further than the Convention: in principle, there should be no doubts between EU Member States as to the authenticity of their public documents. Practical experience with the Regulation would suggest that there is still a reluctance to relinquish all authentication formalities, though this was foreseen by the drafters of the Regulation, who preserved the right of individuals to request Apostilles for documents covered by the Regulation[67]. The core of the discussion is therefore not how we can increase trust in authentication formalities; it is how we can increase trust in the origin of a public document itself, such that any additional authentication formality is unnecessary.

It is against this background that, despite the Regulation breaking down barriers that the Apostille Convention has not (and possibly never will), there remains a challenge common to both instruments: hesitation around the use of digital public documents. This

[66] Recital 3 of Regulation 2016/1191.
[67] Recital 5 of Regulation 2016/1191.

is because the hesitation has little to do with the processes of a foreign government or understanding how their authorities issue documents, but rather, it is hesitation at a human level around digitisation.

Until we can overcome our hesitation, challenges will remain — no matter how many formalities are abolished by a Convention or Regulation. The focus should therefore be on educating individuals, authorities, and other recipients, to ensure that digital public documents are afforded the same level of trust as their paper counterparts. Together, we need to foster the creation of an environment in which digital public documents are trusted and accepted; only then can we hope to maximise the potential of the technology available to us.

ABSTRACT: The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention) was developed in response to an increasing number of public documents circulating around the world and forged a new path in the authentication of foreign public documents. At its core, the Convention established a simplified mechanism by which contracting parties could trust that the documents they were receiving were authentic. The essence of this solution was the Apostille certificate and the authorities designated as competent for its issuance.

More recently, the European Union (EU) has attempted to further simplify the circulation of public documents between its member states, most notably through Regulation (EU) 2016/1191. While the Regulation relies on the inherent trust between EU Member States to better the approach used by the Convention, its goal is the same: to abolish the authentication requirements for presenting public documents abroad.

Over sixty years on from the adoption of the Apostille Convention, public documents are increasingly executed in digital rather than paper form. This rapidly evolving technological landscape inspired the establishment of the electronic Apostille Programme (e-APP), to promote and encourage the digitalisation of the Apostille process. In comparison, the Regulation has not needed any special programme or initiative to operate in a digital context, as it was developed with the realities of digital public documents in mind.

As the digital transition intensifies, both the Convention and the Regulation face similar challenges in overcoming the hesitation of authorities and individuals with respect to digital public documents. However, as governments and citizens become more comfortable with the technology, and more importantly the security underlying it, the Regulation may be able to reach its full potential and the issuance of Apostilles under the Convention may become entirely unnecessary.

Against this background, this paper considers how the pursuit of trust in the authentication process has shaped the development of the Apostille Convention. The authors also consider the EU Regulation, as it follows in the footsteps of an instrument 50 years its senior. With the digital environment in mind, the paper concludes that technology will eventually enable ultimate trust in the authentication of public documents.

KEYWORDS: HCCH; Apostille Convention; EU Regulation 2016/1191; legalisation; cross-border authentication; digital public documents.