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## Foreword

Maria Caterina Baruffi\* and Laura Calafà\*\*

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

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

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

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

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

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

# 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<sup>1</sup>. 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»<sup>2</sup>.

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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<sup>1</sup> 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 International 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.

<sup>2</sup> 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<sup>3</sup>, 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<sup>4</sup>.

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).

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<sup>3</sup> J.S. BERGÉ, *Rethinking Flow Beyond Control. An Outreach Legal essay*, Aix-en-Provence, 2021, pp. 112-113, available [online](#).

<sup>4</sup> To mention some of those national initiatives, the examples of Argentina (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<sup>5</sup>, 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)<sup>6</sup>.

This Convention replaces the procedure of legalisation through a chain of authentication that operates in a single phase<sup>7</sup>, 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)<sup>8</sup>.

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<sup>9</sup>. Thus, favoured by the technology-neutral character of the 1961

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<sup>5</sup> 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.

<sup>6</sup> The [Convention of 5 October 1961](#) Abolishing the Requirement of Legalisation for Foreign Public Documents).

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> P. DIAGO, *La circulación*, cit., p. 129.

Convention<sup>10</sup>, 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»)<sup>11</sup>, 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<sup>12</sup>.

The e-APP basically consists of two main technological elements, e-apostilles and e-registers<sup>13</sup>, 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<sup>14</sup>. 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)<sup>15</sup>.

The categories of the e-registers may vary from 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)<sup>16</sup>.

### 3. Codification efforts at the ICCS/CIEC.

<sup>10</sup> A. BORRÀS, *De la exigencia*, cit., pp. 37-38.

<sup>11</sup> 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. GONZÁLEZ 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. RODRÍGUEZ 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.

<sup>12</sup> A. BORRÀS, *De la exigencia*, cit., p. 39.

<sup>13</sup> 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.

<sup>14</sup> P. DIAGO, *La circulación*, cit., p. 128.

<sup>15</sup> P. DIAGO, *La circulación*, cit., pp. 128-129.

<sup>16</sup> 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<sup>17</sup>. 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<sup>18</sup>, 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<sup>19</sup>.

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)<sup>20</sup> 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)<sup>21</sup>. 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)<sup>22</sup>. Convention (No. 30) on international communication by electronic means (2001)<sup>23</sup>, complemented by the Convention (No. 33) on the use of the International Commission on Civil Status Platform for the international

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<sup>17</sup> A presentation of and reference to the work done by the ICCS/CIEC, is accessible [online](#).

<sup>18</sup> 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.

<sup>19</sup> J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil*, cit., p. 49.

<sup>20</sup> [Recommandation \(n° 8\) relative à l'informatisation de l'état civil](#).

<sup>21</sup> [Recommandation \(n° 4\) relative à la publicité des registres et actes de l'état civil](#).

<sup>22</sup> [Convention \(No. 25\)](#) on the coding of entries appearing in civil status documents.

<sup>23</sup> [Convention \(No. 30\)](#) on the international communication by electronic means.

communication of civil status data by electronic means (2012)<sup>24</sup>. 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<sup>25</sup>, without creating new obligations for Contracting Parties<sup>26</sup>.

Based on the principle of functional equivalence, the Convention establishes that the competent authorities in each Contracting Party (Art. 4<sup>27</sup>) 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)<sup>28</sup>.

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<sup>29</sup>.

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)<sup>30</sup>, 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<sup>31</sup>.

The legal infrastructure relating to the Platform is set out in the Convention (No. 33)<sup>32</sup>. 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<sup>33</sup>.

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<sup>24</sup> [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.

<sup>25</sup> [Annex I](#) to the Convention's Explanatory Report.

<sup>26</sup> [Explanatory Report](#) in relation to Art. 1.

<sup>27</sup> In reference to the authorities or civil registers of the Contracting States, as underlined by the Explanatory Report, cit., in relation to Art. 4.

<sup>28</sup> To «comply with the provisions in force regarding data protection» (Explanatory Report, cit., in relation to Art. 2).

<sup>29</sup> J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil*, cit., p. 52.

<sup>30</sup> [Convention \(No. 34\)](#) on the issue of multilingual and coded extracts from civil-status records and multilingual and coded civil-status certificates.

<sup>31</sup> J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil*, cit., pp. 64-65.

<sup>32</sup> Which was based on the following countries: Belgium, France, Luxembourg and Poland.

<sup>33</sup> 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<sup>34</sup>, 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)<sup>35</sup>; 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)<sup>36</sup>.

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)<sup>37</sup>. The EU has been sensitive to the changes brought about by

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<sup>34</sup> J. MASSIP, F. HONDIUS, C. NAST, F. GRANET, *Commission Internationale de l'État Civil*, cit., pp. 52-53.

<sup>35</sup> A list of which is set out in its [Annex II](#).

<sup>36</sup> Annex I of Convention (No 33), cit., establishes the Platform Rules of Procedure.

<sup>37</sup> Recital 1. See M. GUZMÁN ZAPATER, *La libre circulación de documentos públicos relativos al estado civil en la Unión Europea*, 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<sup>38</sup>, 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<sup>39</sup>, 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<sup>40</sup>. Informed by the principle of mutual trust and functional equivalence<sup>41</sup>, 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<sup>42</sup>) 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)<sup>43</sup> – which have been issued by an «authority» – Art. 3(2) – provided that they aim to establish

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<sup>38</sup> Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, [COM\(2010\) 747 final](#) of 14 December 2010.

<sup>39</sup> [Regulation \(EU\) 2016/1191](#) of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

<sup>40</sup> 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](#).

<sup>41</sup> P. DIAGO, *La circulación*, cit., p. 105; M. GUZMÁN 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 Europeo*, 2017, pp. 162-179, p. 169.

<sup>42</sup> But excluding those issued on the basis of the relevant ICCS/CIEC conventions (Recital 11).

<sup>43</sup> 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<sup>44</sup> –, as well as those provided for in Art. 2(2)<sup>45</sup>.

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<sup>46</sup>. 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)<sup>47</sup> – 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<sup>48</sup> –; Conventions – i.e. from HCCH and the ICCS/CIEC – (Art. 19)<sup>49</sup>; as well as it is without prejudice to the application of other

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<sup>44</sup> 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».

<sup>45</sup> «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».

<sup>46</sup> J. FITCHEN, *The Private International Law of Authentic Instruments*, Oxford, 2022, p. 96; A. CAMUZAT, *La force 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. GUZMÁN ZAPATER, *La libre circulación*, cit., p. 170.

<sup>47</sup> Arts. 13 and 20(1).

<sup>48</sup> Art. 20(2).

<sup>49</sup> 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. GUZMÁN ZAPATER, *La libre circulación*, cit., p. 178.

provisions of the EU – i.e. on legalisation or other formalities<sup>50</sup>, as well as on electronic signatures and electronic identification or other mechanisms of administrative cooperation – (Art. 17)<sup>51</sup>.

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<sup>52</sup>.

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).

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<sup>50</sup> 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.

<sup>51</sup> 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) .

<sup>52</sup> However, Recital 29. The mentioned multilingual standard forms are available [online](#).

Regulation (EU) 2016/1191 may receive some criticisms<sup>53</sup>, 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<sup>54</sup> –; but also relate to its approach to the digitalisation of civil-status records and registers<sup>55</sup>. Consequently, it may represent an unfinished legal regime<sup>56</sup>. 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<sup>57</sup>, or to support more actively and directly the ICCS/CIEC instruments<sup>58</sup>.

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<sup>59</sup>. 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

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<sup>53</sup> N. NORD, *La circulation*, cit., pp. 100-101; M. FONT I MAS, *La libera circolazione*, cit., pp. 120-122.

<sup>54</sup> N. NORD, *La circulation*, cit., pp. 89-91; P. DIAGO, *La circulación*, cit., pp. 119-120.

<sup>55</sup> M. GUZMÁN 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.

<sup>56</sup> N. NORD, *La circulation*, cit., p. 85.

<sup>57</sup> P. DIAGO, *La circulación*, cit., p. 117.

<sup>58</sup> N. NORD, *La circulation*, cit., pp. 100-101.

<sup>59</sup> 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.