Papers di DIRITTO EUROPEO

www.papersdidirittoeuropeo.eu
ISSN 2038-0461

2023
numero speciale | special issue

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

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

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

2023, numero speciale | special issue

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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,

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

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

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

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

Quo vadis mater? Motherhood, freedom of movement, and the circulation of documents

Marco Poli*

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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

* Joint PhD Researcher in Law, University of Turin (Italy) and University of Antwerp (Belgium).

[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.