

## EU FAMILY LAW AND THE PROTECTION OF TRADITIONAL FAMILY VALUES

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### ABSTRACT

*The EU, a sui generis association of 27 European countries, derives its authority from the competences conferred upon it by its Member States. These competences are enumerated in its Founding Treaties and categorized into three different groups: exclusive, shared and supporting competences. Even though substantive Family law is not included in any of these categories, it is not uncommon for EU institutions to regulate this matter, referring to the proper functioning of the internal market. This happens in particular through soft law instruments and the Court of Justice (the Curia) case-law. Soft law instruments, although being non-binding, have a considerable impact on national legislators, which are seeking inspiration and solutions in external influences. The Curia, whose role is to ensure equal interpretation and application of EU law in all the Member States, more and more often passes judgments which involve substantive Family law institutes, such as marriage and family. It is through the Curia's jurisprudence that the EU is slowly but surely encroaching on the field of substantive Family law. Referring to the right to move and reside freely within the EU, the Curia passes judgments that might have a major impact on national values, traditions and customs. Cases Coman v. Romania and "Pancharevo" are perfect examples which display a conflict between the right to move and reside freely within the territory of the EU and the right of the Member States to protect their national identity.*

**Key words:** EU, substantive Family law, jurisdiction, encroachment, Curia, right to move and reside freely, traditional values, soft law instruments.

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## 1. INTRODUCTION

Family law, as a branch of law which regulates social relationships between members of the family in a society, is profoundly influenced by customs, tradition and religion of that society. Those customs, tradition and religion vary from country to country even within the EU, an association of countries which rest on the same values.<sup>1</sup> Motivated by those differences, the EU has chosen “*united in diversity*” as one of its fundamental slogans.<sup>2</sup> But in spite of that, there is a growing tendency to reduce (or even eliminate) those diversities through harmonisation, especially in the field of Family law.

While harmonisation in the area of Private International law and procedural Family law is more than welcome, whereas it is aimed to standardise the rules and to simplify procedures applicable to family relationships with cross-border implications, the same thing cannot be stated in the case of substantive Family law. Substantive Family law is an area in which the Member States haven't transferred their competences to the EU, but this does not prevent its institutions from occasional intervention, particularly “*when domestic Family rules interact with the community freedoms*”.<sup>3</sup> By referring to the proper functioning of the internal market, EU institutions, and the Curia in particular, have slowly been encroaching on the field of substantive Family law for the last two decades.

The views taken by the Curia on the meaning and content of certain institutes that fall within the scope of European Family law, indirectly affect national Family law legislations of the Member States. Family law cases brought before the Curia frequently involve conflict between the right of the Member states to protect their national identity and public order, and the right of EU citizens and their family members to move and to reside freely within the territory of the EU.

This article will try to lay out how the EU, through the actions of its institutions, has exceeded the limits of its competences, and has encroached on the field of substantive Family law, justifying it with the proper functioning of the internal market and questioning the long-standing tradition and customs of its Member States.

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<sup>1</sup> Kruger, T.: Partners limping across borders, in: Kunda, I. (ed.): *Family and children: European expectations and national reality*, Rijeka: Faculty of Law, University of Rijeka & Croatian Comparative Law Association, 2014, p. 186.

<sup>2</sup> Majstorović, I.: Obiteljsko pravo kao različitost u jedinstvu: Europska unija i Hrvatska, in: Korać Graovac, A., Majstorović, I. (eds.): *Europsko obiteljsko pravo*, Zagreb: Narodne novine d.d., 2013, p. 3.

<sup>3</sup> Antokolskaia, M.: Harmonisation of substantive family law in Europe: Myths and reality, *Child and Family Law Quarterly*, 22(4) 2010, p. 412.

## 2. WHAT IS EU?

“The EU is a creation based on the transfer of competences from the Member States to the European level.”<sup>4</sup>

The EU, a product of the common European countries’ agreement, represents a primarily economic and political community which includes 27 countries situated on the territory of Europe.<sup>5</sup> Although its predecessors, the European Coal and Steel Community (ECSC), established in 1951, European Economic Community (EEC) and the European Atomic Energy Community (EURATOM), established in 1957 in Rome, had mainly economic character, the EU took a step forward and became both an economic and political, which seeks to strengthen peace, stability and economic progress.<sup>6</sup>

Formally, the foundations of the EU as we know it today, were laid down in 1993 with the entry of the Maastricht’s Treaty into force, which led to a closer connection between European nations.<sup>7</sup> Although in 2004 there was an attempt to achieve an even closer connection by establishing a federation, that attempt failed since the Constitutional Treaty was not ratified by all Member States. Thus, with the failure to establish a federation came the creation of the association *sui generis*, with elements of a federation, state, and international organization, but being none of them.<sup>8</sup>

Significant legal and institutional changes occurred in 2009, with the Treaty of Lisbon. Comprised of two treaties, the Treaty on EU (TEU) and the Treaty<sup>9</sup> and Treaty on the functioning of the EU (TEFU),<sup>10</sup> the Treaty of Lisbon introduced disappearance of the three pillars (by merging the third with the first pillar and subjecting it to the supranational method of cooperation between states), establishment of two new institutions (High representative of the Union

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<sup>4</sup> Čapeta, T.: Europska unija po Lisabonskom ugovoru, *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave*, 10(1) 2010, p. 43.

<sup>5</sup> Hrabar, D.: Prava djece u Europskoj unij – pravni okvir, in: Korać Graovac, A., Majstorović, I. (eds.): *Europsko obiteljsko pravo*, Zagreb: Narodne novine d.d., 2013, p. 53.

<sup>6</sup> Altaras Penda, I.: Temeljne vrijednosti Europske Unije – od utopije do stvarnosti, *Politička misao: časopis za politologiju*, 42(3) 2005, p. 158.

<sup>7</sup> Fact Sheets on the European Union: The Maastricht, and Amsterdam Treaties, n.d.

<sup>8</sup> Hrabar, D.: Posredni utjecaj Vijeća Europe na Europsku uniju u svjetlu obiteljskopравnih vrijednosti, *Godišnjak Akademije pravnih znanosti Hrvatske*, 10(1) 2019, p. 140.

<sup>9</sup> Treaty on European Union: *Consolidated version of the Treaty on European Union*, Official Journal of the European Union, C 326, 2012, pp. 13-45.

<sup>10</sup> Treaty on European Union: *Consolidated version of the Treaty on European Union*, Official Journal of the European Union, C 326, 2012, pp. 13-45.

for Foreign Affairs and Security Policy and European President) and acquiring of legal subjectivity on the level of the international community.<sup>11</sup>

Today, being a community comprised of states “*in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*”,<sup>12</sup> the EU puts a special emphasis on the promotion of common values, in particular respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.<sup>13</sup>

### 2.1. GUIDING PRINCIPLES: CONFERRAL, PROPORTIONALITY AND SUBSIDIARITY

Being an association of states which transferred their competences, the EU does not have competences which have appertained to it originally, but they are *de facto* competences of the Member States.<sup>14</sup> That is *the principle of conferral*, which found its place in the Article 5 of the Treaty of EU (TEU).<sup>15</sup> It represents the basic principle for determining the limitations of EU’s jurisdiction and it means that the EU has only those competences that were conferred upon it by the Founding treaties, which have been ratified by all Member States.<sup>16</sup>

Thus, on the basis of Article 5 and the principle of conferral, it follows that the EU should act only within the framework of what the Member States have authorized and only to attain goals set out in Article 3 of the TEU, but sometimes that is not the case. Namely, as per *doctrine of implied powers*, which is sometimes used to justify the EU’s activity in areas in which the Member States have exclusive competences, the EU has not only those competences which have explicitly been conferred upon, but also the competences that derive from them. Thus, every EU’s activity is justified if it is proven as necessary for the functioning of the internal market.<sup>17</sup>

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<sup>11</sup> Čapeta, *op. cit.*, note 4, p. 38.

<sup>12</sup> Art. 2 of the TEU.

<sup>13</sup> *Ibid.*

<sup>14</sup> Čapeta, *op. cit.*, note 4, p. 43; Duić, D.: Migracijsko pravo EU-a i prava djeteta, in: Župan, M. (ed.): *Prekogranično kretanje djece u Europskoj uniji*, Osijek: Pravni fakultet, Sveučilište Josipa Jurja Strossmayera, Osijek, 2019, p. 131.

<sup>15</sup> Art. 5 para. 2 of the TEU reads as follows: “*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*”

<sup>16</sup> European Commission: Areas of EU action, n.d.

<sup>17</sup> Majstorović, *op. cit.*, note 2, p. 14.

This standpoint, within the framework of Family law, can be perceived from two different perspectives: through the prism of procedural and through the prism of substantive Family law. On the one hand, it can be acceptable that such interference is needed in order to create common procedural rules, and that those common procedural rules are necessary and even vital for the proper functioning of the EU and its internal market, but on the other hand, it should be different when it comes to substantive Family law.<sup>18</sup>

Substantive Family law is one of the legal fields in which the EU does not have competences at all, but in spite of that, the Union sometimes intervenes in this field, justifying it as necessary for the proper functioning of the internal market. Here, we could ask ourselves several questions. First, can the EU in this way intervene in every substantive Family law issue that appears? Can every EU's interference in existing (substantive Family law) issues be justified by ensuring proper functioning of the internal market? If so, what is the role of the national legislators? The answers to all these questions can be found in a simple conclusion provided by Majstorović: "*The Union does not have the competences to regulate substantive Family law, and it still must be in 'jealous hands of national legislators.'*"<sup>19</sup>

This conclusion has its foundations in the existence of two other main principles contained within Article 5 of the Treaty of EU, *the principle of propor-*

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*; See also: Lowe, N.: Where in the world is international family law going next?, in: Lowe, N., Douglas, G. (eds.): *The Continuing Evolution of Family Law*, Bristol: Family Law Jordan Publishing, 2009, p. 283; Antokolskaia, *op.cit.*, note 3, p. 412; Rutgers, J. W.: European competence and European civil code, a common frame of reference or an optional instrument, in: Hartkamp, A., Hesselink, M., Hondius, E., Mak, C., Perron, E. (eds.): *Towards a European civil code*, Alphen an den Rijn: Kluwer Law International, 2011, p. 315; Martiny, D.: Is unification of family law feasible or even desirable?, in: Hartkamp, A., Hesselink, M., Hondius, E., Mak, C., Perron, E. (eds.): *Towards a European civil code*, Den Haag: Kluwer Law International, 2010, pp. 429-457, 432-433, 436-437, 451-452; Boele-Woelki, K.: Family law in Europe: past, present, future, in: Kunda, I. (ed.): *Family and children: European expectations and national reality*, Rijeka: Faculty of Law, University of Rijeka & Croatian Comparative Law Association, 2014, p. 26; Tomljenović, V., Kunda, I.: Uredba Rim III: treba li Hrvatskoj?, in: Kunda, I. (ed.): *Obitelj i djeca: europska očekivanja i nacionalna stvarnost*, Rijeka: Pravni fakultet Sveučilišta u Rijeci & Hrvatska udruga za poredbeno parvo, 2014, p. 231; Čurić, I., Šimović, I.: Europska unija i obiteljsko pravo međunarodnoprivatnopravni, procesnopravni i materijalnopravni aspekti, *Ljetopis socijalnog rada*, 22(2) 2015, p. 175; Winkler, S.: Obiteljski odnosi, in: Mišćenić, E., Kunda, I., Petrić, S., Butorac Malnar, V., Vrbljanac, D., Winkler, S., (eds.): *Europsko privatno pravo – posebni dio*, Zagreb: Školska knjiga, 2021, pp. 443, 446, 455 and 465; Marino, S., Carrascosa González, J.: Marriages across borders within the European Union: Private international law vs. Mutual recognition perspectives, *Cuadernos de Derecho Transnacional*, 16(1) 2024, p. 419.

*tionality* and *the principle of subsidiarity*, which relate to the execution of the jurisdiction of the EU. While *the principle of proportionality* means that actions undertaken by the EU, when it comes to its content and form, should not exceed what is necessary to achieve objectives set out in the Founding treaties,<sup>20</sup> *the principle of subsidiarity* means that in all those areas where the EU does not have exclusive competences, it can intervene only if the Member States cannot effectively achieve goals either on local, regional or national level and therefore they have to be achieved on the European level, that is, actions performed by the EU could be more effective then.<sup>21</sup>

## 2.2. DIVISION OF COMPETENCES WITHIN THE EU

Based on these principles, the division and categorisation of EU competences into three groups was conceived. The first category of exclusive EU competences includes all those competences that the Member States once transferred to the EU, thereby relinquishing their ability to decide independently on these matters for as long as they remain within the EU.<sup>22</sup> Areas such as customs union, common commercial policy, establishment of competition rules necessary for the functioning of the internal market, monetary policy for euro-area countries and conservation of marine biological resources under the common fisheries policy are areas in which the EU today has exclusive competence and is able to legislate and adopt binding acts.<sup>23</sup> On the other hand, Member States can legislate and adopt binding acts only if the power to do so is given to them by the EU.

The second category includes all those competences that are being shared between the EU and the Member States. This implies that a Member State can exercise its own competences when the EU has either chosen not to exercise its competences, or has not yet exercised them.<sup>24</sup> Thus, both the EU and the Member States can legislate and adopt binding documents in areas such as internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, common safety concerns in public health matters, research, technical development and space, development cooperation and humanitarian aid.<sup>25</sup>

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<sup>20</sup> Majstorović, *op. cit.*, note 2, p. 15.

<sup>21</sup> More about it in Fact Sheets on the European Union: The principle of subsidiarity, n.d.

<sup>22</sup> Čapeta, *op. cit.*, note 4, p. 44.

<sup>23</sup> Art. 3 of TFEU.

<sup>24</sup> European Commission: Areas of EU action, n.d.

<sup>25</sup> Art. 4 of the TFEU.

Finally, the third category of supporting competences, according to Article 6 of the TFEU includes all those actions of the Member States in which the EU can intervene either supporting, coordinating or complementing them.<sup>26</sup> Areas in which the EU has supporting competences are protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection, and administrative cooperation.<sup>27</sup>

Upon examining these three categories of EU competences, it is clear that substantive Family law does not fall under any of them. The EU has neither exclusive, shared, nor supporting competences concerning this field of law. As Article 5 para. 2 of the TEU states, competences not conferred upon the EU in the Treaties remain within the Member States. In this context, Josipović explained: “*For anything not explicitly designated as an individual competence of the Community, it is presumed to remain the competence of the individual Member States*”.<sup>28</sup> Advocate General Juliane Kokott reached the same conclusion, stating that EU acts only within the scope defined by the Member States to achieve the goals established in Founding treaties, and that the Member States retain those competences not conferred to the EU.<sup>29</sup> Therefore, substantive Family law remains within the exclusive jurisdiction of the Member States. Nevertheless, as previously mentioned, more and more often, referring to the proper functioning of the internal market, EU institutions are dealing with issues that fall within the scope of substantive Family law. This is particularly evident in the case-law of the Court of Justice of the EU (Curia), which will be discussed in the following chapters.

### 3. LEGAL ACTIVITY OF THE EU IN THE FIELD OF FAMILY LAW

In its early stages, the EU focused primarily on economic matters rather than private law issues. In fact, “*one could say that, for decades after the establishment of the European Community, the European legislator was extremely cautious in its approach to traditional areas of private law*”.<sup>30</sup> However, the need to regulate private law issues arose as a result of the movement of work-

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<sup>26</sup> European Commission: Areas of EU action, n.d.

<sup>27</sup> Art. 6 of the TFEU.

<sup>28</sup> Josipović, T.: *Načela europskog prava u presudama Suda Europske Zajednice*, Zagreb: Narodne novine d.d., 2005, p. 10.

<sup>29</sup> Ćurić and Šimović, *op. cit.*, note 19, p. 179.

<sup>30</sup> Majstorović, I.: *Harmonizacija i unifikacija europskoga obiteljskog prava*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2009, p. 94.

ers and their family members. By adopting regulations to ensure mobility of workers, the EU also granted certain rights to their family members, such as the right of residence in the Member State where their family member works, along with other social rights.<sup>31</sup> It was the issue of free movement of family members that marked the EU's first intervention in Family law.<sup>32</sup>

A significant transformation occurred with the Treaty of Amsterdam (1999).<sup>33</sup> After its entry into force, judicial cooperation in civil matters, including Family law issues, was transferred from the third pillar, characterized by intergovernmental cooperation, to the first pillar, which encompasses common policies. Consequently, judicial cooperation in civil matters was no longer regulated by international agreements, as it had been previously, but instead became part of EU law, governed by EU secondary legislation.<sup>34</sup>

It was not until the Treaty of Nice (2001) that Family law issues were mentioned in the Founding treaties.<sup>35</sup> Until the Treaty of Lisbon came into force, Article 67 of the Treaty of Nice<sup>36</sup> was the only provision in the Founding treaties that mentioned Family law. Its paragraph 5 referred to Family law solely as an exception to the Council's competence to adopt measures regarding judicial cooperation in civil matters with cross-border implications.<sup>37</sup>

More significant changes occurred in 2009, with the Treaty of Lisbon, which introduced "*the new concept that included Family law issues within European*

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<sup>31</sup> Ćurić and Šimović, *op. cit.*, note 19, p. 166.

<sup>32</sup> Majstorović, *op. cit.*, note 30, p. 95.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*; *Međunarodno privatno pravo*, Zagreb: Narodne novine d.d., 2005, pp. 68, 345-347; McEleavy, P.: The Brussels II Regulation: How the European Community has moved into Family Law, *International and Comparative Law Quarterly*, 51(4) 2002, pp. 896-897; Garašić, J.: Uvod u europsko građansko procesno pravo, in: Garašić, J. (ed.): *Europsko građansko procesno pravo – Izabrane teme*, Zagreb: Narodne novine d.d., 2013, pp. 6-7; Sikirić, H.: Uredba Europskog vijeća br. 1347/2000 od 29. svibnja 2000. o nadležnosti i priznanju i ovrsi odluka u bračnim predmetima i predmetima roditeljske odgovornosti za zajedničku djecu bračnih drugova – polje primjene i pravila nadležnosti, *Zbornik Pravnog fakulteta u Zagrebu*, 53(6) 2003, p. 1505; Medić Musa, I.: Komentar Uredbe Bruxelles II bis u području roditeljske skrbi, in: Rešetar, B. (ed.): *Pravna zaštita prava na (zajedničku) roditeljsku skrb*, Zagreb: Pravni fakultet Osijek, 2012, pp. 21, 29-30.

<sup>35</sup> Ćurić and Šimović, *op. cit.* note 19, p. 173.

<sup>36</sup> Treaty on European Union & Treaty establishing the European Community: *Consolidated versions of the Treaty on European Union and the Treaty establishing the European Community*, Official Journal of the European Union, C 321, 2006.

<sup>37</sup> Ćurić and Šimović, *op. cit.*, note 19, p. 174.

*jurisdiction*".<sup>38</sup> Under Article 81, paragraph 3 of the TFEU, it is stipulated that the Council of the EU, following a special legislative procedure, shall establish measures concerning Family law with cross-border implications. Additionally, the Council, acting on a proposal from the Commission, may adopt a decision determining which aspects of Family law with cross-border implications can be addressed through acts adopted by the ordinary legislative procedure. In both cases, the Council can only act unanimously, after consulting with the Parliament.

Although these changes could justifiably give rise to concerns that "*European institutions intend to gradually bring Family law within their own jurisdiction*",<sup>39</sup> the prevailing consensus (*communis opinio*) at that time was that their effect was limited to procedural law and conflict-of-law rules, rather than impacting substantive Family law rules. Majstorović, for instance, observed that with these new provisions, "*in terms of harmonising substantive Family law solutions of the Member States, nothing has changed*". Similarly, Antokolskaia argued that Article 81 cannot be broadly interpreted to provide a legal basis for the harmonisation of Family law, as such an interpretation would be contrary to the principle of subsidiarity.<sup>40</sup> Martiny shared this view, stating that while the EU has competence to harmonise national laws as necessary for the proper functioning of the internal market, this competence primarily relates to the economic sphere, emphasizing that "*no mention is made of a harmonisation of substantive civil law as such and certainly not of Family law*".<sup>41</sup>

With that in mind, it is worth noting that, to date, the EU has not issued any binding legal document governing substantive Family law,<sup>42</sup> and "*it could be said that the Union's legislative activity in the sphere of Family law has remained within the framework of Private International and Procedural law*".<sup>43</sup> Therefore, in primary law sources, Family law and its institutes are mentioned only in the context of common values and judicial cooperation with cross-bor-

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<sup>38</sup> *Ibid.* pp. 174-175.

<sup>39</sup> Majstorović, *op. cit.*, note 30, p. 97.

<sup>40</sup> A similar opinion was expressed by McEleavy, who, on the one hand, questioned the validity of such a broad interpretation of Article 65 (now Article 81 of the TFEU) in relation to the principle of subsidiarity, and on the other hand, stated that the literal interpretation of that Article would undermine the goals of those advocating for Europeanization in all fields. Čurić and Šimović, *op. cit.*, note 19, p. 180.

<sup>41</sup> Martiny, *op. cit.*, note 19, p. 437.

<sup>42</sup> Majstorović, *op. cit.*, note 30, p. 94.; Majstorović, *op. cit.*, note 2, pp. 13-16; Antokolskaia, *op. cit.*, note 3, pp. 409-411; Rutgers, *op. cit.*, note 19, p. 315; Martiny, *op. cit.*, note 19, pp. 432-433, 436-437, 451-452.

<sup>43</sup> Čurić and Šimović, *op. cit.*, note 19, p. 176.

der implications. However, the situation is slightly different when it comes to secondary law. Although binding secondary law sources contain only procedural and conflict-of-law rules, there are still some *soft law* instruments through which the EU is slowly encroaching upon substantive family rights.<sup>44</sup> Despite their non-binding nature, these *soft law* instruments have a considerable impact on national legislators which seek inspiration and solutions in external influences. This reliance can lead to the adoption of new institutes that may disregard the traditions and customs of national legal systems and jeopardize their very core.<sup>45</sup>

In the following subchapters, both primary and secondary law, and both binding and non-binding sources of EU Family law will be analysed.

### 3.1. PRIMARY LAW

Primary law is the supreme and fundamental law of the EU, primarily derived from the Founding treaties (Treaty on the EU and Treaty on the Functioning of the EU), along with declarations, protocols, amending treaties, accession treaties, supplementary agreements.<sup>46</sup> <sup>47</sup> In 2000, it was further enriched with the Charter of Fundamental Rights of the European Union (Charter),<sup>48</sup> which, in terms of legal effects, holds the same status as the Founding treaties.<sup>49</sup> While the EU Founding treaties mention Family law issues only in the context of judicial cooperation in civil cases with cross-border effects, the Charter, among other things, has brought to light the question of different European approach to the terms *family*, *marriage* and *Family law*.<sup>50</sup> Its Article 7 guarantees everyone the right to respect for private and family life, while Article 9 prescribes that the right to marry and the right to start a family should be guaranteed in accordance with national laws.

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<sup>44</sup> Winkler, *op. cit.*, note 19, p. 452.

<sup>45</sup> Marino and Carrascosa González, *op. cit.*, note 19, p. 412.

<sup>46</sup> Mišćenić, E.: *Europsko privatno pravo – opći dio*, Zagreb: Školska knjiga, 2019, p. 17.

<sup>47</sup> In legal theory, there is a lack of consensus on what primary law encompasses. While some authors claim it only includes those legal acts which the Member States accept directly, without the involvement of the EU institutions, for others it also encompasses case-law of the Curia, general principles, customary law and international treaties. *Ibid.*, p. 19.

<sup>48</sup> Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities*, C 364/1, 2000.

<sup>49</sup> Mišćenić, *op. cit.*, note 46, p. 18., Majstorović *op. cit.*, note 30, p. 98.

<sup>50</sup> Majstorović, *op. cit.*, note 2, p. 8; Župan, M.: Dijete u međunarodnom privatnom pravu, in: Župan, M. (ed.): *Prekogranično kretanje djece u Europskoj uniji*, Osijek: Pravni fakultet, Sveučilište Josipa Jurja Strossmayera u Osijeku, 2019, p. 266.

Unlike Article 12 of the European Convention on Human Rights and Fundamental Freedoms (ECHR),<sup>51</sup> the Charter does not prescribe that *men and women* have a right to conclude marriage, and to start a family, but rather omits heterosexuality as an element of the institute of marriage.<sup>52</sup> For this reason, such a solution was criticized as possibly opening the Pandora's box and leading to the necessity of introducing same-sex marriages in all the Member States. However, in the Explanation of the Charter, it was indicated that this Article was modernized in order to include cases in which national legislation recognises agreements other than marriage in connection with forming a family.<sup>53</sup>

The Charter dedicates a special provision to the rights of the child (Article 24), which practically repeats everything already contained in the UN Convention on the Rights of the Child (UNCRC).<sup>54</sup> Every child is guaranteed the following: the right to protection and care as is necessary for the child's well-being, the right to express his or her views freely and that those views are taken into consideration in accordance with the child's age and maturity, the right to have his or her best interests taken as a primary consideration, and lastly, the right to maintain personal relationships and direct contact with both of his or her parents on a regular basis.<sup>55</sup> Finally, in Article 25, the Charter stipulates that "*the Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.*"

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<sup>51</sup> Council of Europe. *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*, Official Gazette of the Republic of Croatia – International Treaties, 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.

<sup>52</sup> Since the Charter does not specify whether a right to marry is limited to a man and woman, or extends to two individuals irrespective of their sex, some couples have turned to the Curia seeking for the broader interpretation of the relevant provisions (Article 7 and 9). Thus, cases regarding family reunification, social security or status of the EU's institutions staff have been brought before the Curia. Marino and Carrascosa González, *op. cit.*, note 19, p. 408.

<sup>53</sup> Hoško, T. Majstorović, I., Šimović, I.: *Obiteljsko pravo*, in: Josipović, T. (ed.): *Privatno pravo Europske unije – posebni dio*, Zagreb: Narodne novine d.d., 2022, pp. 765-806; Marino and Carrascosa González, *op. cit.*, note 19, p. 41., Majstorović, *op. cit.*, note 30, p. 99.

<sup>54</sup> United Nations. *Convention on the Rights of the Child*, Official Gazette of the SFRY, 15/1990; Official Gazette of the Republic of Croatia – International Treaties, 12/1993 and 20/1997.

<sup>55</sup> Hoško *et al.*, *op. cit.*, note 53, pp. 773-774; Winkler, *op. cit.*, note 19, pp. 469-470.

### 3.2. SECONDARY LAW

Secondary law relates to the legal acts which were adopted by EU institutions, and which are based on primary law.<sup>56</sup> According to Article 288 of the TFEU, those legal acts are regulations, directives, decisions, opinions and recommendations. While regulations are generally<sup>57</sup> and directly<sup>58</sup> applicable, and binding in its entirety, directives are binding only as to the result that needs to be achieved, but not as to the forms and methods that are being used.<sup>59</sup> <sup>60</sup> Decisions are binding only for those to whom they are being addressed, while opinions and recommendations are of a non-binding nature (so called *soft law*). But this list is not complete since it does not mention all types of acts that EU institutions use to perform their tasks, such as agendas, strategies, guidelines (so called acts *sui generis*<sup>61</sup>).<sup>62</sup>

As mentioned before, Article 81 of the TFEU suggests that the EU shall establish judicial cooperation in civil matters (among which are Family law mat-

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<sup>56</sup> See more in: Gavella, N.: O europskom privatnom pravu, in: Hrabar, D (ed.): *Europsko privatno pravo*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2002, p. 23.

<sup>57</sup> Its general application was explained by Curia in its judgment C-101/76, *Koninklijke Scholten Honig v. Council and Commission*, EU:C:1977:70, para. 21.: “*It in fact applies to objectively determined situations and produces effects with regard to categories of persons regarded generally and in the abstract.*” Mišćenić, *op. cit.*, note 46, p. 87.

<sup>58</sup> The direct application of regulations was explained by the Curia in its judgment C-34/73, *Fratelli Variola Spa v. Amministrazione delle finanze dello Stato*, EU:C:1973:101, para. 10.: “*The direct application of a Regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law.*” *Ibid.*, p. 88. The direct application of the regulation results in the situation in which it is the regulation that takes precedence over the provisions of domestic law in the case of a conflict between them. *Ibid.*, p. 89.

<sup>59</sup> The flexibility of the Member States as regards to the choice of forms and methods to be used, was supported by the Curia in its decision C-48/75, *Royer*, EU:C:1976:57, para. 69/73: “*... The Member States are consequently obliged to choose, within the bounds of the freedom left to them by Article 189, the most appropriate forms and methods to ensure the effective functioning of the directives, account being taken of their aims.*” *Ibid.*, p. 94.

<sup>60</sup> Unlike directives, regulations are not only applicable to relations which exist between the state and individuals, (so-called vertical relations) but also to relations between private individuals (so-called horizontal relations). *Ibid.* See more about the differences between regulations and directives: Majstorović, *op. cit.*, note 30, pp. 30-31.

<sup>61</sup> *Ibid.*, p. 31.

<sup>62</sup> As in the case of the primary law, there is no consensus as to what should be subsumed under the term secondary law. While some authors believe that interinstitutional agreements, international agreements that the EU concludes with third states or international organizations, and acts of states on mutual cooperation should also be considered as secondary law sources, others place them between primary and secondary law. Mišćenić, *op. cit.*, note 46, p. 20.

ters) with-cross border implications, and that the European Parliament and the Council of the EU shall adopt measures to ensure proper functioning of the internal market. Due to this reason, EU has adopted several regulations regarding jurisdiction, applicable law, recognition and enforcement of decisions in civil matters with cross-border implications, including regulations containing procedural rules and conflict-of-law rules applicable in Family law matters.

One of them is the Regulation on jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction<sup>63</sup> which is commonly referred to as Regulation Brussels II *ter*. Its scope involves civil cases which include divorce, legal separation and marriage annulment, as well as disputes about parental responsibility with international element.

There is also the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations,<sup>64</sup> which was adopted in 2008 but entered into force in 2012.<sup>65</sup> It applies to maintenance obligations arising from family relationships, consanguinity, marriage or from affinity and it aims to facilitate the maintenance creditor in one Member State to obtain a decision that is immediately enforceable (without further formalities) in another Member State.<sup>66</sup> Unlike other regulations addressing Family law issues, this Regulation also contains provisions on applicable law.<sup>67</sup>

Furthermore, there is the Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation<sup>68</sup> or so-called

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<sup>63</sup> European Parliament and Council of the European Union: *Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction*, Official Journal of the European Union, L 178, 2019, pp. 1-115.

<sup>64</sup> Council of the European Union: *Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, Official Journal of the European Union, L 7, 2009, pp. 1-79.

<sup>65</sup> It is applied in all the Member States with certain differences regarding Denmark, which accepts the Regulation only insofar as it applies the Regulation Bruxelles I. Accordingly, relations between Denmark and other Member States will not be subject to provisions from Chapter II (Applicable Law) and Chapter VII (Cooperation Between Central Authorities). Župan, M.: *Udržavanje u Europskoj uniji*, in: Korać Graovac, A., Majstorović, I. (eds.): *Europsko obiteljsko pravo*, Zagreb: Narodne novine d.d., 2013, p. 270.

<sup>66</sup> *Ibid.*, p. 267.

<sup>67</sup> Čurić and Šimović, *op. cit.*, note 19, p. 172.

<sup>68</sup> Council of the European Union: *Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*, Official Journal of the European Union, L 343, 2010, pp. 10-16.

Regulation Rome III, which contains conflict-of-law rules that determine which law should be applied in the case of divorce or legal separation with international element. Finally, there are two regulations which establish set of rules that enable cross-border couples to choose which court will decide or which law will be applied on their property in the case of a legal divorce<sup>69</sup> or in the case of termination of the registered partnership.<sup>70</sup>

In December 2022 the Commission issued a Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood.<sup>71</sup> The aim of this Regulation would be to facilitate parenthood established in one Member State to be recognized in another Member State, irrespective of how the child was conceived or born, or irrespective of the type of the child's family. Therefore, it prescribes that it also refers to the recognition of the parenthood of a child with same-sex parents and parenthood of a child who was adopted domestically in a Member State. It highlights that the EU already requires the Member States to recognize parenthood established in another Member State for the purposes of the rights that child derives from EU law, especially under EU law on free movement, but that it still does not require the recognition for other purposes. It indicates that its key aim is to ensure that a child enjoys the same rights guaranteed under the legislation of the one Member State in another Member State, referring to the principles of universality, non-discrimination, and primacy of the best interests of the child. Hence, it proposed a certificate of parenthood that would need to be accepted throughout Europe.

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<sup>69</sup> Council of the European Union: *Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, Official Journal of the European Union, L 183, 2016, pp. 1-29.

<sup>70</sup> Council of the European Union: *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships*, Official Journal of the European Union, L 183, 2016, pp. 30-56.

<sup>71</sup> European Commission: *Proposal for a Council Directive on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(2022) 695 final)*, 2022; See also: Van Hof, T., Kilimcioğlu, B., Kruger, T. (2024): *The European Parliament's last plenary session & Private International Law*, *ConflictofLaws.net*, 2024, pp. 1-5; Meeusen, J.: *Functional recognition of same-sex parenthood for the benefit of mobile Union citizens – Brief comments on the CJEU's Pancharevo judgment*, ECJ (14 December 2021, C-490/20), European Group for Private International Law, 2024, p. 4.

Even though the Commission itself highlighted that this Regulation would not lead to the harmonisation of substantive Family Law, and that it would still remain “in hands” of national legislators, we believe that by its adoption, the EU would encroach into the field of substantive Family law in two situations: 1. a Member State which does not provide a possibility for the same-sex couples to adopt, with adoption of this Regulation would have to recognize this type of parenthood established in another Member State;<sup>72</sup> 2. a Member State which prohibits surrogacy<sup>73</sup> would need to recognize parenthood which was accomplished through surrogacy in another Member State which allows it.<sup>74</sup> Bearing this in mind, it is no surprise that it has been the target of criticism.

Considering the necessary steps for its adoption,<sup>75</sup> the ‘controversial Proposal’ probably will not be adopted in the near future. While it was supported by the Members of the European Parliament - with 366 votes in favour, 145 against and 23 abstentions -<sup>76</sup> the next step will be even more challenging. Specifically, a unanimous decision by the Council of the EU is required, meaning that all

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<sup>72</sup> Most Central Eastern European countries (such as Hungary, Romania, Bulgaria, Poland, Slovakia, Croatia and the Czech Republic) do not allow same-sex couple to jointly adopt a child. See more about it: Barzó, T.: Family Protection in Central European Countries, in: Barzó, T., Lenkovic, B. (eds.): *Family Protection from a Legal Perspective, Analysis on Certain Central European Countries*, Budapest & Miskolc: Ferenc Mádl Institute of Comparative Law & Central European Academic Publishing, 2021, pp. 287-322. As of now, full joint adoption by same-sex couples is possible only in 15 Member States: the Netherlands, Sweden, Spain, Belgium, Denmark, France, Malta, Luxembourg, Austria, Ireland, Portugal, Finland, Germany, Slovenia and Greece. The data was found in De Groot, D.: The rights of LGBTI people in the European Union, May 2023.

<sup>73</sup> For example, surrogacy is explicitly banned in Germany, France, and in Italy. Italy has recently extended existing prohibition – on October 16, 2024 – making it clear that couples seeking surrogacy abroad may face legal consequences, such as fine or imprisonment, ranging from three months to two years. More about it: Legge 169/2024: Perseguibilità del reato di gestazione per altri (4 Novembre 2024). <<https://www.biodiritto.org/Biolaw-pedia/Normativa/Legge-169-2024-Perseguibilita-del-reato-di-gestazione-per-altri>>, last accessed on 13/12/2024.

<sup>74</sup> Regarding the question of freedom and legitimacy of the Member States’ choice not to recognise the legal effects of surrogacy arrangements (especially the commercial ones) because of their exclusive competence to regulate national substantive family law (e.g. the question of the origin of children), see: Čulo Margaletić, A., Preložnjak, B., Šimović, I.: Presumption of motherhood on the crossroad of surrogacy arrangements in EU, in: Duić, D., Petrašević, T. (eds.): *EU and comparative law issues and challenges series*, 3 2019, p. 793.

<sup>75</sup> That procedure is prescribed in the Article 81, para. 3 of the TFEU, which states: “... measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.”

<sup>76</sup> On its plenary session held on 14 December 2023. See more about it at European Parliament: *Recognition of Parenthood: MEPs want children to have equal rights*, 14.12.2023.

EU governments must agree, which seems highly unlikely. While the former Secretary of State at the Ministry of Justice of Poland announced that Poland would be against it, the upper houses of the Italian ('Senato della Repubblica') and French ('Sénat') parliaments ('Parlamento italiano' and 'Parlement français') submitted opinions arguing that the Proposal does not comply with the principle of subsidiarity. Meanwhile, the Dutch Senate ('Eerste Kamer der Staten-Generaal') has aimed to assess how many cases involving the recognition of parental responsibility, right of access, succession rights, and name faced some legal obstacle.<sup>77</sup> However, it remains to be seen what the future will bring.

Lastly, we should mention *soft law* instruments that, despite being of a non-binding nature, have a certain impact on national legislators.<sup>78</sup> While some of them could be more acceptable for all the Member States, such as the EU Strategy on the Rights of the Child (2021),<sup>79</sup> the EU Agenda for the Rights of the Child (2011),<sup>80</sup> the Council Recommendation on High-Quality Early Childhood Education and Care Systems,<sup>81</sup> and the EU Guidelines for the Promotion and Protection of the Rights of the Child,<sup>82</sup> etc., with some other instruments that is not the case. For example, the 2020-2025 LGBTIQ Equality Strategy, adopted by the European Commission in 2020, among others, mentions building LGBT-inclusive societies in a way of undertaking measures to improve legal protection for "rainbow families" in cross-border situations. But the Strategy itself indicates that seven Member States (Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland and Slovakia) have constitutional provisions which are not allowing same-sex marriage. Moreover, by this document, the EU Commission invites the Member States to intensify their efforts when it comes to legal protection of the "rainbow families" with cross-border implications, even though some Member States don't provide the same protection for these types of families for their own citizens.

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<sup>77</sup> Marinkás, G.: Some remarks on the CJEU's 'Pancharevo' decision with special regard to the nexus between the primacy of EU law and the national identity of Member States, *Szilágyi, Law, identity and values*, 3(1) 2023, p. 181.

<sup>78</sup> Winkler, *op. cit.*, note 19, p. 472.

<sup>79</sup> European Commission: *EU Strategy on the Rights of the Child (COM(2021) 142 final)*, 2021.

<sup>80</sup> European Commission: *EU Agenda for the Rights of the Child, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2011) 60 final, 2011.

<sup>81</sup> Council of the European Union: *Council Recommendation of 22 May 2019 on high-quality early childhood education and care systems*, Official Journal of the European Union, C 189, 2019, pp. 4-14.

<sup>82</sup> Council of the European Union: *EU guidelines for the promotion and protection of the rights of the child*, European External Action Service, 2007.

Another *soft law* instrument that at the time was not quite accepted was the Resolution on the Equal Treatment of Homosexuals and Lesbians, adopted by the European Parliament in 1994, in which it was stressed that there is an urgent need to adjust the law of the Community with the reality, and reality is that there are some other forms of community, apart from heterosexual.<sup>83</sup> It should be noted that in the mid-90's only two European countries (Denmark and Norway) were allowing registered partnership, and none of them was recognizing same-sex marriage. Today, the situation is different, with fourteen Member States allowing same-sex marriage and seven recognising unions similar to it.<sup>84</sup>

#### 4. THE ROLE OF THE CURIA IN THE DEVELOPMENT OF EU FAMILY LAW

The Court of Justice of the EU, or the so-called Curia, is an EU institution whose role is to ensure that EU law is equally interpreted and applied in all the Member States. Its importance for the further development of EU law is reflected in the fact that many of the principles (such as the principle of supremacy and principle of direct effect), on which the EU is being based today, have first been developed in the Curia's judgments.<sup>85</sup> While some perceive it as a "*relentless and steady motor of European integration*", others refer to it as biased.<sup>86</sup> However, it is through the Curia's jurisprudence that the EU *acquis* has been extended into new fields of law, such as field of civil procedure and fundamental rights. Likewise, it is through the Curia's jurisprudence that the EU has "stepped foot" into the field of substantive Family law by passing judgments which involve institutes of marriage and family, referring to the rights of EU citizens and their family members to move and to reside freely within the EU.<sup>87</sup>

Conflicts between the right to move and to reside freely within the territory of the EU (which represents exclusive competence of EU) on the one hand, Family law issues and the protection of traditional values and national identity (which represents exclusive competence of the Member States) on the other.<sup>88</sup>

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<sup>83</sup> Antokolskaia, *loc. cit.*

<sup>84</sup> De Groot, D.: The rights of LGBTI people in the European Union, May 2023.

<sup>85</sup> Wallerman Ghavanini, A.: The EU Court of Justice as a relational actor: an introduction, *European Law Open*, 2(2) 2023, p. 233.

<sup>86</sup> Bobek, M.: The Court of Justice of the European Union, in: Arnall, A., Chalmers, D. (eds.): *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press 2015, p. 153.

<sup>87</sup> See more in: Boele-Woelki, K., *op. cit.*, note 19, p. 23.

<sup>88</sup> Marinkás, *op.cit.*, note 77, p. 178.

While in the first case, *Coman and others v. Romania*, a Member State chose to give priority to the protection of traditional values and national identity in the question of marriage, the second case, so-called “*Pancharevo case*”, is about the protection of traditional values regarding the question of family. After analysing these two judgments, a brief overview will be presented of what it would look like if those cases occurred in the Republic of Croatia.

#### 4.1. CASE COMAN AND OTHERS V. ROMANIA (C-673/16)<sup>89</sup>

One of the most important Curia’s judgments in the Family law context is case C-673/16, or so-called *Coman and others v. Romania*. The compatibility of Romanian law with Eu law was analysed regarding the question of the right of EU citizens and their family members (considering same-sex marriages in this context) to move and reside freely within the EU. To be more precise, in the given case, the Curia established guidelines for the Member States how to interpret relevant provisions of EU law, whether those of primary law (which guarantee EU citizens right to move and reside freely) or those of secondary law (which provide a definition of a family member of the EU citizen) “*in the case when provisions of national Family law potentially contradict the provisions of the TFEU on the right of residence within the territory of a Member State (in this case, Romania) on the grounds that they do not prescribe same-sex marriages nor do they recognise same-sex marriages concluded abroad.*”<sup>90</sup>

Namely, in this case, two men, R.A. Coman (who holds U.S. and Romanian citizenship) and R.C. Hamilton (who holds U.S. citizenship) met in New York in 2002 and got married in Bruxelles in 2010. In 2012, they made a request for Romanian authorities to inform them under which conditions could Mr. Hamilton, a non-EU citizen, as a member of Mr. Coman’s family, reside lawfully within the territory of Romania for a period of more than three months. That request was based on the Directive 2004/38/EC on the right of EU citizens and their families to move and to reside freely within the EU (hereinafter referred to as Directive 2004/38), more precisely on its Article 2 para. 2 which defines family members of the EU citizen.<sup>91</sup>

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<sup>89</sup> Court of Justice of the European Union: *Case C-673/16, Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (Judgment of June 2018), 2018.

<sup>90</sup> Hoško *et al.*, *op. cit.*, note 53, p. 784.

<sup>91</sup> European Parliament and Council of the European Union: *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,*

Romanian authorities rejected their request stating that Mr. Hamilton has a right to legally reside in Romania only during the period of three months. They justified their decision with a fact that Mr. Coman cannot be qualified as a “spouse”, since the Romanian Civil Code<sup>92</sup> not only does not recognize marriage between persons of the same sex, but also explicitly excludes the recognition of same-sex marriages concluded abroad. Hence, Mr. Coman and Mr. Hamilton decided to file a lawsuit before the Romanian court due to alleged discrimination based on the sexual orientation in the question of the right to move and to reside freely within the EU. In addition to that, they raised a plea of unconstitutionality against the Romanian Civil Code, indicating that non-recognition of same-sex marriages which are concluded abroad, for the purpose of exercising the right of free movement, represents a violation of the provisions of the Romanian Constitution which protects the right to personal, private and family life.

As per the Constitutional Court, this was an issue involving the interpretation of the Directive 2004/38 in relation to the prohibition of discrimination based on sexual orientation. Hence, it stayed the proceedings and referred four questions for a preliminary ruling to the Curia. These questions were primarily related to the interpretation of the term “spouse” and whether it applies to Mr. Hamilton, that is, whether the case in which a non-EU-citizen married an EU citizen under the law of the Member State different from the host Member State, can be included under this definition.<sup>93</sup>

In its judgement, the Curia stated that the spouse of the EU citizen is considered as a family member, noting that *“the term ‘spouse’ within the meaning of Directive 2004/38 is gender-neutral... (and) may therefore cover the same-*

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72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Official Journal of the European Union, L 158, 2004, pp. 77-123.

<sup>92</sup> *Codul civil al României (Civil Code of Romania), Act No. 287/2009*, Monitorul Oficial al României, 2009.

<sup>93</sup> The following questions were posed: 1. Does the term “spouse” in Article 3(2)(a) of Directive 2004/38 include a citizen of a non-EU country who is of the same sex as an EU citizen with whom he/she legally entered into marriage in accordance with the laws of an EU Member State that is not the host state? 2. If the answer is affirmative, do Articles 3(1) and 7(2) of the Directive require the host Member State to grant a right of residence on its territory for a period exceeding three months? 3. If the answer is negative, can such an individual be considered an “other family member” under Article 3(2)(a) of the Directive, or as a partner with whom the EU citizen has a stable relationship, as per Article 3(2)(b) of the Directive? 4. If the answer to the third question is affirmative, is the host Member State obligated to grant such a person the right to reside for a period longer than three months? Petrović, M.: *Odluka Suda EU u slučaju Coman: Indirektno priznanje istopolnog braka?*, *Revija Kopaoničke škole prirodnog prava*, (2) 2021, p. 81.

*sex spouse of the Union citizen concerned*”<sup>94 95</sup> It stated that even though the aforementioned Directive only prescribes conditions for the movement and residence of EU citizens in a Member State of which they are not nationals and does not establish a derived right of residence for third-country nationals who are family members of EU citizens, such a right can be derived from Article 21 of the TFEU.<sup>96</sup>

Namely, the Curia has previously acknowledged that Article 21 should be interpreted in a way that a non-EU citizen of the same sex as the EU citizen to whom he or she is married has the right to reside freely for more than three months in the territory of the Member State of which the EU citizen is a national.<sup>97</sup> In order to make it happen, the Curia emphasized that a Member State has an obligation to recognise (individual) legal effects of the marriage performed in another Member State, “*for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law*” and that such recognition “*does not undermine the national identity or pose a threat to the public policy of the Member State concerned.*”<sup>98</sup> Moreover, it does not impose an obligation on the Member State to regulate the institute of same-sex marriage in its own national law.<sup>99</sup>

Furthermore, the Curia clarified that even though matters of a person’s status (including marriage) fall within the competence of the Member States, the Member States still must comply with EU law while exercising that competence, particularly with provisions which are granting EU citizens right to move and reside freely within the territories of the Member States.<sup>100</sup> Lastly, it emphasized that the refusal of the Member State to recognize (individual) legal effects of thus performed marriage, “*may constitute an obstacle to the right to free movement and residence enjoyed by that person under Article 21*

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<sup>94</sup> Court of Justice of the European Union: *Case C-673/16, Coman*, para. 35.

<sup>95</sup> With this judgment—the Curia confirmed the case law of the European Court of Human Rights on this issue. See: European Court of Human Rights: *Schalk and Kopf v. Austria* (Application No. 30141/04), 2010, para. 94; *Vallianatos and Others v. Greece* (Applications Nos. 29381/09 & 32684/09), 2013, para. 73; *Orlandi and Others v. Italy* (Applications Nos. 26431/12, 26742/12, 44057/12, & 60088/12), 2017, para. 143.

<sup>96</sup> Court of Justice of the European Union: *Case C-673/16, Coman*, para. 20.

<sup>97</sup> Court of Justice of the European Union: *Case C-673/16, Coman*, para. 23. See: Court of Justice of the European Union: *Case C-673/16, Lounes*, November 2017, para. 46.

<sup>98</sup> Court of Justice of the European Union: *Case C-673/16, Coman*, para. 45-46; Such approach of the Court of Justice of the European Union is often characterised as ‘a strictly functional approach’. See: Meeusen, *op. cit.*, note 71, pp. 4-5.

<sup>99</sup> Court of Justice of the European Union: *Case C-673/16, Coman*, para. 46.

<sup>100</sup> Winkler, *op. cit.*, note 19, p. 460.

TEFU”<sup>101</sup> and that no Member State can deny to grant entry or residence to the spouse of an EU citizen.<sup>102</sup>

This judgment was delivered six years ago and drew the attention of the legal community across Europe. While some greeted it with enthusiasm and others with scepticism, all could agree on one point: it was “*a landmark case ... having the potential to propel forward legal recognition of same-sex relationships across the EU Member States.*”<sup>103</sup> But the real question is: what did this judgment actually mean for Romania?

Firstly, it meant that Romania was obliged to recognize Mr. Hamilton as Mr. Coman’s spouse, but solely and exclusively for the purpose of moving and residing freely within the territory of the EU. Secondly, it also meant that there was no such obligation regarding maintenance, pension, filiation, succession, tax return, and hospital visitation rights, still leaving those questions open and unaddressed.<sup>104</sup> However, it is difficult to imagine that this recognition will not eventually impact other areas, and it is only a matter of time before these issues are brought before the (national) courts.<sup>105</sup> Thirdly, it meant that even though family relationships (which include marriage) fall under the jurisdiction of a Member State (in this case, Romania), a Member State “*cannot invoke national identity and public order to protect and preserve the traditional family.*”<sup>106</sup> The Curia stated that the concept of public policy has to be interpreted strictly

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<sup>101</sup> Tryfonidou, A.: Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne (C.J.E.U.), *International Legal Materials*, 58(4) 2019, p. 824.

<sup>102</sup> “*To allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist.*” Court of Justice of the European Union: *Case C-673/16*, Coman, para. 39.

<sup>103</sup> Lima, D.: Towards cross-border recognition of same-sex parenthood, *The Cambridge Law Journal*, 81(2) 2022, p. 240.

<sup>104</sup> Petrović, *op. cit.*, note 93, p. 79; Lorenzo Villaverde, J. M.: Same-Sex Couples and EU Private International Law after Coman, in: Duden, K., Wiedmann, D. (eds.): *Changing Families, Changing Family Law in Europe*, Cambridge, Antwerp & Chicago: Intersentia, 2024, p. 165; Meeusen, *op. cit.*, note 71, p. 4.

<sup>105</sup> Thus, Winkler stated that the plurality of legal frameworks for couples across different EU Member States can pose a risk that the personal and property rights a person enjoys in his/her native Member State may not be recognized when they move to another Member State. Winkler, *op. cit.*, note 19, p. 457.

<sup>106</sup> Petrović, *op. cit.*, note 93, pp. 89-90.

and can only be invoked “if there is a genuine and sufficiently serious threat to a fundamental interest of society.”<sup>107</sup>

Lastly, this judgment made it clear that Romania is not obliged to regulate the institute of same-sex marriage in its national law. However, it was also made clear that Romania will have to respect the right of same-sex couples to reside freely on its territory, because “the enjoyment of the right to free movement and residence in another Member State cannot, under any circumstances, lead to the loss of the marital status of a Union citizen that has been lawfully acquired in the Member State...”<sup>108</sup>

#### 4.1.1. COMAN AND OTHERS V. ROMANIA IN THE CONTEXT OF CROATIAN FAMILY LAW LEGISLATION

In Croatia, the institute of marriage is defined and protected both at the legislative and constitutional level. Article 62 para. 1 of the Constitution of the Republic of Croatia<sup>109</sup> prescribes that “marriage is a living union between a woman and a man”. This definition was incorporated into the Croatian Constitution after the first citizens’ referendum held in 2013, thus preventing the extension of the institute of marriage to same-sex couples.<sup>110</sup> Hence, persons of the same sex cannot conclude a marriage, but can enter into a registered life partnership (or live in an informal life partnership). The abovementioned institute was introduced into the Croatian legal system in 2014 with the adoption of the Life Partnership Act of Persons of the Same Sex,<sup>111</sup> which provided the possibility of its registration, and recognized almost identical legal effects to those of marriage.<sup>112</sup>

On the other hand, the Romanian Constitution<sup>113</sup> mentions ‘marriage’ only in the context of the family, prescribing that “the family is founded on the freely

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<sup>107</sup> Court of Justice of the European Union: *Case C-673/16, Coman*, para. 44.

<sup>108</sup> Petrović, *op. cit.*, note 93, p. 89.

<sup>109</sup> Narodne novine: *Ustav Republike Hrvatske*, Zagreb: Narodne novine d.d., 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14

<sup>110</sup> Hrabar, D. et al.: *Obiteljsko pravo*, Zagreb: Narodne novine d.d., 2021, p. 43 and pp. 347-354; Winkler, *op. cit.*, note 19, pp. 458-459.

<sup>111</sup> Narodne novine: *Zakon o životnom partnerstvu osoba istog spola*, Zagreb: Narodne novine d.d., 92/14, 98/19.

<sup>112</sup> Hrabar et. al., *op. cit.*, note 110, p. 340.

<sup>113</sup> *Constituția României (Constitution of Romania)*, Official Gazette of Romania, Part I, No. 233 (21 November 1991), as amended by Law No. 429/2003, 1991.

*consented marriage of the spouses...*”, but it does not provide its definition.<sup>114</sup> Such a definition is provided in the Romanian Civil Code, which prescribes (Article 259 para. 1): “*Marriage is the union freely consented to of a man and a woman, entered into in accordance with the conditions laid down by law.*” More importantly, the Romanian Civil Code not only prohibits marriage between persons of the same sex (Article 277 para. 1) but also prohibits the recognition of marriages between persons of the same sex performed abroad by Romanian citizens or by foreigners (Article 277 para. 2).

Given the fact that these provisions clarify Romania’s position regarding (same sex) marriage and that they represent a certain reflection of the long-lasting Romanian tradition and customs, we should ask ourselves: “What about Romania’s right, as a sovereign state, to decide on this (contentious) issue independently?” It seems that, although each Member State is a sovereign state, “*the sovereignty of one Member State to regulate same-sex marriage nevertheless has a (restrictive) influence on the sovereignty of other Member States, which do not regulate this institution or recognize its legal effects. Although it follows from the judgment that the Curia cannot compel a Member State to regulate the institute of same-sex marriage, it can still oblige it to recognize certain legal effects of those marriages performed in another Member State.*”<sup>115</sup> The question is whether there is a fundamental difference, taking into account that the legal effects of a certain institute are recognized only when the legal order of a Member State aspires to recognize and regulate the institute in question.<sup>116</sup>

With that being said, we should ask ourselves whether it would have been the same if this case were to be decided by the competent authorities in Croatia, and not in Romania. While the Romanian legal system does not allow persons of the same sex to marry nor to be in any kind of a registered union, the Croatian legal system allows them to enter into a registered life partnership, which basically enables them to enjoy the same rights as married couples, with the exception of joint adoption of an unrelated child<sup>117</sup> and medically assisted

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<sup>114</sup> In 2018, following the Coman judgment, a referendum was held to amend the Constitution by restricting marriage only to heterosexual couples, but it was not successful. The turnout was only 21.1%, which was below the required voter turnout threshold of 30%. Lorenzo Villaverde, *op. cit.*, note 104, p. 160.

<sup>115</sup> Hoško *et al.*, *op. cit.*, note 53, p. 783.

<sup>116</sup> Thus, Hrabar argued that the Curia’s interpretation is too broad, as one Member State, by recognizing the legal effects of a marriage concluded in another Member State, indirectly recognizes the marriage itself. Hrabar, *op. cit.*, note 8, p. 153.

<sup>117</sup> Croatian legal order prescribes the possibility that the same sex life partner of the biological parent acquires “partnership care” over the minor child, but only if the other biological par-

reproduction.<sup>118</sup> That means that under Romanian law, Mr. Hamilton could not be a husband nor a life partner of the Mr. Coman. But how would his status be defined in Croatia?

The Croatian Act on European Economic Area (EEA) Nationals and Members of Their Families,<sup>119</sup> which transposed the Directive on the right of EU citizens and their families to move and to reside freely within the EU into the domestic legal system, prescribes that the family member of the EEA citizen is, among others, his or her marital and extra-marital spouse (Article 4). Taking into consideration the fact that Mr. Hamilton and Mr. Coman concluded a same-sex marriage in Belgium, which institute is not recognized within the Croatian legal system, they could not directly refer to the provision of Article 4 of the Croatian Act on European Economic Area (EEA) Nationals and Members of Their Families.

Thus, in the authors' opinion, in such a case the Croatian competent authorities would need to allow Mr. Hamilton to reside freely within Croatian territory for more than three months, however, not as the marital spouse of Mr. Coman (relying on Article 4 of the Croatian Act on European Economic Area (EEA) Nationals and Members of Their Families), but as his life partner (referring to Article 73 para. 1 and Article 74 of the Life Partnership Act between Persons of the Same Sex), being the only legal solution that could be considered in the Croatian legal system.<sup>120</sup> This is because the Act on Life Partnership between Persons of the Same Sex prescribes equality between same sex life partnership and heterosexual marriage in terms of freedom of movement of EU citizens, equalizing same sex life partnership between EEA citizens (or an EEA citizen

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ent of the child is not known or has been divested of parental care. In that way, based on a court decision, the same sex life partner of the biological parent becomes "the partner-guardian" of the child and acquires parental care including all the rights, responsibilities and obligations arising from it (Articles 44-49 of *Zakon o životnom partnerstvu osoba istog spola*, Zagreb: Narodne novine d.d., 92/14, 98/19). This is nothing else than simple adoption of the biological child of the same sex life partner, only with the use of different legal terminology. See also: Hoško, T.: Recognition of a status acquired abroad: Croatia, *Cuadernos de Derecho Transnacional*, 14(1) 2022, pp. 1205-1206.

<sup>118</sup> Jakovac-Lozić, D.: Hrvatsko pravo u procijepu između tradicionalna poimanja i međunarodnih očekivanja, *Godišnjak Akademije pravnih znanosti Hrvatske*, 8(1) 2017, p. 10. In this regard see also: Kruger, T., *op. cit.*, note 1, p. 188 and pp. 195-196.

<sup>119</sup> Narodne novine: *Zakon o državljanima država članica Europskog gospodarskog prostora i članovima njihovih obitelji*, Zagreb: Narodne novine d.d., 66/19, 53/20, 144/20, 114/22.

<sup>120</sup> If the marriage is concluded between a same sex couple, it will be transposed into the domestic legal system by its transformation into same sex partnership – Article 32, para 1 and Article 39 para. 2 of the Narodne novine: *Zakon o međunarodnom privatnom pravu*, Zagreb: Narodne novine d.d., 101/17, 67/23.

and a third country national) validity concluded in an EEA Member State with heterosexual marriage in the freedom of movement area.<sup>121</sup>

By recognizing the status of same sex life partners to Mr. Hamilton and Mr. Coman, the legal path for the application of the provisions of Articles 73 and 74 of the Life Partnership Act would be opened. Article 73 para. 1 prescribes that life partners who entered into and registered a life partnership or marriage in accordance with the regulations of the country where the partnership or marriage was entered into, have the right to submit an application for approval of temporary residence in the Republic of Croatia, in accordance with a special law (subsidiary application of the provisions of the Croatian Act on European Economic Area (EEA) Nationals and Members of Their Families). After submitting such an application, the Croatian competent authorities would be obliged to apply the provision of Article 74 para. 1, which prescribes as follows: *“In order to guarantee fundamental freedom of movement, in accordance with the TFEU, a life partnership or marriage between persons of the same sex who are citizens of the Member States of the EEA, that is, those in which one of the persons has the citizenship of a country outside the EEA, entered into and registered in accordance with the regulations of the Member State in which the union was concluded, enjoys the same possibility of access to rights and privileges that are included in the scope of the guarantee of fundamental freedom of movement within the EEA as the marriage union concluded in the Republic of Croatia.”*

#### 4.2. “PANCHAREVO CASE” (C-490/20)<sup>122123</sup>

The case C-490/20, also known as “*Pancharevo case*”, was described as “*the next logical step after Coman*” illustrating “*that status and Family law of the Member States, at least as regards its choice-of-law aspects, can no longer be seen as separate from the impact of EU law.*”<sup>124</sup> This case involves two women, V.M.A., a Bulgarian national, and K.D.K., a United Kingdom national,

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<sup>121</sup> Hoško, *op. cit.*, note 117, p. 1198.

<sup>122</sup> Court of Justice of the European Union: *Case C-490/20, V.M.A. v Stolichna obshtina, rayon “Pancharevo”* (Judgment of 14 December 2021), 2021.

<sup>123</sup> The vast impact of the Courts of Justice judgment in the “*Pancharevo case*” (C-490/20) is evident when analysing the most recent jurisprudence. For example, in the “*Rzecznik Praw Obywatelskich case*” (C 2/21, 24 June 2022) the Court of Justice reaffirmed its previous position and deduced its preliminary ruling from the existing case-law, that is from the “*Pancharevo case*” (par. 31-32, 36, 38-42, 45-46, 49, 51).

<sup>124</sup> Rusinova, N.: Bulgarian Supreme Court Judgement on Pancharevo - Correct Answer to a Wrong Question, *The European Association of Private Law Blog*, 11.05.2023.

who got married in 2018 in Gibraltar and had a daughter S.D.K.A., born in 2019, in Spain. There, their daughter was issued a birth certificate which refers to both of them as the “Mother” of the child. In an effort to obtain an identity card for her daughter S.D.K.A., V.M.A. applied for the birth certificate to the competent Bulgarian authority, whereas a birth certificate is a prerequisite for the issuance of an identity card. As a support to her application, V.M.A. submitted her daughter’s translated and legalised birth certificate issued in Spain. Sofia municipality requested her to provide them with the name of the child’s biological mother, but she refused, stating that she was unable to submit it.

In light of such circumstances, Sofia municipality denied her application referring to the lack of information concerning the child’s biological mother and to the fact that the birth certificate issued in Spain refers to two women as mothers of the child, which is contrary to the Bulgarian public policy. Namely, Article 46 para. 1 of the Constitution of the Republic of Bulgaria<sup>125</sup> prescribes that a “*matrimony shall be a free union between man and woman*”, from which it clearly arises that any other union cannot be qualified as a marriage. Moreover, the Bulgarian Family Code<sup>126</sup> incorporated an ancient Roman legal rule “*mater semper certa est*” prescribing that mother of the child is the woman who gave birth to the child (including in the case of assisted reproduction).<sup>127</sup>

Dissatisfied by this outcome, V.M.A. brought an action against the aforementioned decision before the Administrative Court of the City of Sofia (*Administrativen sad Sofia-grad*). The referring court decided to turn to the Curia and seek for its interpretation of the relevant provisions. The Court raised certain questions such as whether this decision, by which Bulgarian authorities decided to refuse to register the birth of a Bulgarian national born in another Member State, which was attested by a birth certificate issued in that Member State and which refers to two women as child’s mother, infringes the rights that are conferred on that Bulgarian national by Articles 4(2) of the TEU, 20 and 21 of the TFEU and by Articles 7, 24 and 45 of the Charter? Additionally, the referring Court posed a question whether there would be a violation of Bulgarian national identity in the case of the registration of two women as mothers of the child, in order to comply with the relevant EU provisions.<sup>128</sup>

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<sup>125</sup> *Constitution of the Republic of Bulgaria* (promulgated SG No. 56/13 July 1991; amended SG No. 85/26 September 2003; SG No. 18/25 February 2005; SG No. 27/31 March 2006; SG No. 78/26 September 2006 – Constitutional Court Judgment No. 7/2006; SG No. 12/6 February 2007; SG No. 100/18 December 2015).

<sup>126</sup> *Family Code of the Republic of Bulgaria*, Promulgated State Gazette, 41/28.05.1985, Amended State Gazette 11/1992, State Gazette 15/1992, 63/200.

<sup>127</sup> Family Code of the Republic of Bulgaria, Art. 60 para. 2.

<sup>128</sup> Marinkás, *op. cit.*, note 77, p. 191.

In its judgment, the Curia indicated that Bulgarian authorities, like those of any other Member State, must recognize the child-parent relationship established in another Member State, so the child can exercise the right to move and to reside freely within the territory of the Member States, with both parents.<sup>129</sup> Accordingly, the Member State of which the child is a national – in this case the Republic of Bulgaria (the child acquired citizenship at birth) – has an obligation to: a) issue an identity card or a passport to the child without requiring that the birth certificate, which is a prerequisite for obtaining these documents, be issued by its own national authorities, b) recognize the birth certificate issued in another Member State.<sup>130</sup>

The Curia also stated that the obligation of the Member State to issue an identity document to a child who is a Bulgarian national and who was born in another Member State in which her birth certificate was issued, and the obligation to recognize parent-child relationship in order for a child to move and reside freely within the EU, does not undermine the national identity nor possesses a threat to the public policy of that Member State. The Curia reiterated that the concept of public policy has to be interpreted strictly when it is used as justification from a fundamental freedom.<sup>131</sup> Lastly, it emphasized that the obligation to recognize parent-child relationship solely for the purpose of ensuring the right to move and reside freely does not represent an obligation for a Member State to regulate the issue of same-sex parenthood in its national legislation.<sup>132</sup> However, it remains to be seen what will happen in other areas, such as child maintenance, inheritance rights, child health, education, etc.<sup>133</sup>

Following the Curia's judgment, the proceedings continued in Bulgaria, where the Bulgarian Supreme Court (hereinafter referred to as "the Supreme Court") reassessed the facts of the case. As the Curia's judgment was based on the assumption that S.D.K.A. had acquired Bulgarian nationality by birth, the Court firstly examined whether S.D.K.A. was indeed a Bulgarian national.<sup>134</sup> This question was critical because if it were established that S.D.K.A. did not acquire Bulgarian nationality, there would be no obligation under Article 4 para.

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<sup>129</sup> The Curia indicated that K.D.K. and S.D.K.A. should be recognized, by every Member State, as V.M.A.'s spouse and descendant, in accordance to the Article 2(2)(a) and (c) of Directive 2004/38 and that they are therefore "beneficiaries" with the derived right of free movement and residence. Meeusen, *op. cit.*, note 71, pp. 2-3.

<sup>130</sup> *Ibid.*, p. 3.

<sup>131</sup> Court of Justice of the European Union: *Case C-490/20*, "Pancharevo", para. 55.

<sup>132</sup> *Ibid.*, para. 57.

<sup>133</sup> Meeusen, *op. cit.* note 71, p. 4.

<sup>134</sup> Rusinova, *op. cit.*, note 124.

3 of the Directive 2004/38/EC<sup>135</sup> for Bulgarian authorities to issue her an identity card or a passport.

In its decision, the Supreme Court referred to the relevant provisions of the Bulgarian Constitution, the Law on Bulgarian nationality (*Zakon za bălgarskoto graždanstvo*),<sup>136</sup> and the Family Code. The Court cited Article 25 para. 1 of the Bulgarian Constitution, which states that a person is a Bulgarian national if at least one of his or her parents is a Bulgarian national or if the person was born on the territory of the Republic of Bulgaria and does not acquire any other nationality by parentage. Additionally, the Supreme Court referenced Article 8 of the Law on Bulgarian nationality, under which a person acquires Bulgarian nationality by parentage if at least one of his or her parents is a Bulgarian national. Based on these provisions, the Supreme Court raised a question whether, under Bulgarian law, V.M.A. could be legally considered the child's mother, as this is a prerequisite for a child to acquire Bulgarian nationality.<sup>137</sup>

The Supreme Court also referred to Article 60 paras. 1 and 2 of the Bulgarian Family Code, which stipulates that the parentage by the mother is established through birth, and that a child's mother is the woman who gave birth to the child. As V.M.A. refused to submit proof of a biological relationship with the child, a legal child-parent relationship could not be established. Consequently, the child could not acquire Bulgarian nationality by parentage under Bulgarian law. The Supreme Court concluded: *“After it was established in the case that the child (...) is not a Bulgarian citizen, in the sense of the applicable law, there is no obligation for the Republic of Bulgaria (...) to draw up a birth certificate.”*<sup>138</sup>

Finally, the Supreme Court considered the possibility of statelessness, as the child could not acquire British nationality either. This was because K.D.K. could not pass her nationality to the child, since the child was born outside the territory of the United Kingdom. To avoid the risk of statelessness, the Court referred to the Spanish law and stated: *“Given the facts established in the case, that the national legislation of either of the parents named in the child's birth certificate drawn up in Spain, where it was born, does not grant citizenship, it (the child) should, by virtue of the said provision, be a citizen of Spain,*

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<sup>135</sup> Article 4, para. 3 prescribes: *“Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.”*

<sup>136</sup> *Zakon za bălgarskoto graždanstvo* (eng. Law on Bulgarian nationality), DV No. 136 of 18 November 1998, p. 1.

<sup>137</sup> Rusinova, *op. cit.*, note 124.

<sup>138</sup> *Ibid.*

*member of the European Union. (...) its applicability, in the present case, was expressly confirmed by the Spanish Government (...) as the Advocate General points out, there is no danger of the child being stateless.*"<sup>139</sup>

#### 4.2.1. "PANCHAREVO CASE" IN THE CONTEXT OF CROATIAN FAMILY LAW LEGISLATION

This subchapter will analyse what the outcome might have been if the Croatian competent authorities had faced the same situation – that is, if the same Curia's decision had been rendered against the Republic of Croatia. The issues that need to be examined are whether S.D.K.A. had acquired Croatian nationality and accordingly, whether there is an obligation for Croatian authorities to issue her an identity card or another travel document.

To address the question of nationality, Articles 3 and 41 of the Croatian Private International Law Act will be examined, as this case would involve a cross-border situation. The provision of Article 3 para. 1 prescribes that a natural person's nationality is determined by the law of the country in question – in this case, Croatian law. Furthermore, Article 41 stipulates that the applicable law for determining or contesting motherhood or fatherhood, at the time the proceeding is initiated, is either the law of the child's habitual residence, or if it is in the best interests of the child, the law of the country of the child's nationality, or the law of the country whose nationals are the individuals whose motherhood or fatherhood is being determined or challenged – again, Croatian law.

In the Croatian legal system, the determination of motherhood is governed by the Croatian Family Act.<sup>140</sup> The provision of Article 58a prescribes that the mother of the child is a woman who gave birth to the child. Additionally, Article 82, which addresses medically assisted reproduction, prescribes that the mother of the child conceived with a donated egg or embryo is the woman who gave birth to the child.<sup>141</sup> In this case it would also be unclear whether a woman of Croatian nationality gave birth to the child, which is a prerequisite for the child to acquire Croatian nationality. Namely, under Article 5

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<sup>139</sup> *Ibid.*

<sup>140</sup> Narodne novine: *Obiteljski zakon*, Zagreb: Narodne novine d.d., 103/15, 98/19, 47/20, 49/23, 156/23, 103/15, 98/19, 47/20, 49/23, 156/23.

<sup>141</sup> This is in accordance with the old Roman principle *mater semper certa est* under which the mother of the child is always known, and motherhood is determined by the fact of child's birth. See more in: Petrak, M.: Pravne regule "Mater semper certa est" i "Pater is est quem nuptiae demonstrant" u suvremenom kontekstu, in: Šalković, J. (ed.): *Kanonsko pravo i medicina: izabrana pitanja*, Zagreb: Glas Koncila, 2013, pp. 181-189.

of the Croatian Citizenship Act<sup>142</sup>, a person born abroad acquires Croatian citizenship by origin “if (at least) one parent is a Croatian citizen at the time of the person’s birth (...)”. However, it remains uncertain whether this same requirement applies in the case of the birth registration as there is no explicit obligation to submit proof of a biological relationship. However, this issue will be discussed later.

The second question is whether Croatian authorities would have an obligation to issue S.D.K.A. an identity card or another travel document. The provision of Article 1 of the Croatian Act on Travel Documents for Croatian Citizens<sup>143</sup> stipulates that a Croatian national has the right to a travel document under the conditions prescribed by that Act. Furthermore, Article 4 specifies that the term “travel documents” includes passport, diplomatic passport, official passport, travel document, as well as travel documents issued based on an international agreement. Similarly, the Act on Identity Card<sup>144</sup> stipulates that every Croatian national has a right to have an identity card (Article 3), which is defined as an electronic document used to verify a Croatian citizen’s identity, Croatian nationality, gender, date of birth, and residence in the Republic of Croatia (Article 1).

Both the identity card (pursuant to Article 10 paras. 1, 2, 4 and 5 of the Act on Identity Card) and travel documents (pursuant to Article 33 paras. 1 and 2 and Article 34 paras. 1, 3 and 4 of the Act on Travel Documents for Croatian Citizens) will be issued based on an application submitted by the individual concerned. However, in the case of a child being an applicant, the application must be submitted by the child’s legal representative – either a parent, guardian or a person who exercises parental responsibility (either fully or partially) in accordance with a court’s decision.<sup>145</sup> Furthermore, to issue an identity card, it is necessary to submit, in addition to the application, the previously issued identity card or another document that verifies the person’s identity (Article 11 of the Act on Identity Card). Similarly, for the issuance of travel documents, an identity card or another document that verifies person’s identity and nationality must be provided (Article 37 of the Act on Travel Documents for Croatian

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<sup>142</sup> Narodne novine: *Zakon o hrvatskom državljanstvu*, Zagreb: Narodne novine d.d., 53/91, 70/91, 28/92, 113/93, 4/94, 130/11, 110/15, 102/19, 138/21.

<sup>143</sup> Narodne novine: *Zakon o putnim ispravama hrvatskih državljana*, Zagreb: Narodne novine d.d., 77/99, 133/02, 48/05, 74/09, 154/14, 82/15, 42/20, 10/23.

<sup>144</sup> Narodne novine: *Zakon o osobnoj iskaznici*, Zagreb: Narodne novine d.d., 62/15, 42/20, 114/20, 114/22, 18/24.

<sup>145</sup> See more in: Guštin, M.: Zaštita procesnih prava djeteta u upravnim postupcima s posebnim osvrtom na postupanja u vezi s osobnim stanjima građana, *Dijete i obitelj u suvremenom društvu*, 1(1) 2024, pp. 46-48.

Citizens). In our hypothetical case, the relevant document would be a birth certificate, given that any other identification cannot be provided.

To issue a birth certificate, the birth must be recorded in the state registries which are governed by civil registrar officers and regulated by the State Registries Act.<sup>146</sup> The provision of Article 40 of the State Registries Act prescribes that the registration of the facts of birth, marriage or death of Croatian citizens occurring abroad is carried out on the basis of an extract from the official registry of the foreign authorities and Article 17 of the Instruction on the Implementation of the State Registries Act<sup>147</sup> stipulates that the fundamental registration of the fact of birth is entered into the birth registry, including, among other things, on the basis of a foreign document. This raises the question of whether proof of biological relationship is required, given that such an obligation is not explicitly stated in the relevant provisions?

The answer to this question can be found in Article 25 of the abovementioned Act, from which it arises that in the case of a reasonable suspicion that certain data being entered into the state registry are not accurate, or if data from other official records indicate inaccuracy, the civil registrar is obliged to verify the accuracy of the data before proceeding with the entry. Since in this case the foreign document (Spanish birth certificate) that serves as the basis for the birth registration indicates two women as mothers of the child, the civil registrar officer should verify the accuracy of that data. More precisely, the civil registrar officer should require V.M.A. to provide a proof of biological relationship between herself and S.D.K.A before proceeding with the registration. Given that V.M.A. is not able to submit the proof of biological relationship and the only document she has submitted is a Spanish birth certificate indicating two women as mothers, which is contrary to the Croatian legal system, available Croatian legal solutions should be further analysed.

Namely, the Croatian legal system, just like the Bulgarian, does not allow persons of the same sex to conclude marriage. Instead, it kept the traditional form of marriage as a living union between a man and a woman which found its protection at the constitutional level (Article 61 para. 2). Furthermore, under the Croatian national law currently in force, joint adoption by same-sex couples is not allowed.<sup>148</sup> A child can be jointly adopted either by marital or extra-marital

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<sup>146</sup> Narodne novine: *Zakon o državnim maticama*, Zagreb: Narodne novine d.d., 96/33, 76/13, 98/19, 133/22.

<sup>147</sup> Narodne novine: *Naputak za provedbu Zakona o državnim maticama*, Zagreb: Narodne novine d.d., 117/2021.

<sup>148</sup> Although the Croatian legal order prescribes the possibility that the same-sex life partner of the biological parent acquires “partnership care” over the minor child if certain precondi-

spouses. Also, a child can be adopted by one marital or extra-marital spouse if the other one is the child's biological or adoptive parent, or by one marital or extra-marital spouse if the other one gives his or her consent, or by a single (heterosexual or homosexual) person that is not married nor in an extra-marital union.<sup>149</sup> On that account, the Croatian legal system, just as Bulgarian, does not provide the possibility of two women being registered on the birth certificate as mothers of the child. Birth certificate form drawn up by Croatian authorities has only one field for the "mother" and one field for the "father", and only one name can be written in each field. Accordingly, there is no possibility for both of these women to be registered as the child's mothers.

In light of everything that has been stated, it can be concluded that Croatian competent authorities would have good grounds for passing the same decision as the Bulgarian Supreme Court. Same as in Bulgaria, S.D.K.A. would not acquire Croatian nationality by parentage, since there is no proof of biological relationship between her and V.M.A. and a foreign document, which could be a basis for birth registration, indicates two women as her mothers. As already mentioned, same-sex parenthood (and possibly surrogacy) would be contrary to the public policy of the Republic of Croatia.<sup>150</sup> Consequently, Croatian authorities would not have an obligation to issue S.D.K.A. an identity card or any other travel document.

## 5. CONCLUSION

The EU is an association of states with different tradition, customs, cultures and religions. On these differences different national legislations rest. Even though the EU sometimes celebrates those differences, referring to its slogan "*united in diversity*", other times it seems like it tends to reduce (or even eliminate) them. This tendency especially becomes evident in the field of Family law. Despite the fact that the Member States did not transfer their competences

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tions are met, in that way making possible to adopt the biological child of the same-sex life partner. See detailed explanation in note 117.

<sup>149</sup> Narodne novine: *Obiteljski zakon*, Art. 185.

<sup>150</sup> In the context of the same-sex parenthood Hoško stated: "*It is thus possible that the effect atenué of the public policy exception would allow recognition of joint same sex adoption of foreign nationals. In case of Croatian nationals, public policy would have to be safeguarded more rigorously.*"

<sup>1n</sup> the context of surrogacy Hoško stated: "*There is no express provision that would allow a public policy defence in that situation, but legal theory argues that public policy can be used when evidentiary purpose of public document is recognized.*" Hoško, *op. cit.*, note 117, p. 1206.

in the field of substantive Family law, after everything being said, the conclusion is that there is a growing tendency of EU institutions “to slowly bring substantive Family law closer to their own jurisdiction.”<sup>151</sup>

This is particularly apparent in the context of certain *soft law* instruments and in the Curia’s case-law.<sup>152</sup> *Soft law* instruments, even though non-binding, have a certain impact on national legislators. By dealing with issues that fall within the scope of substantive Family law, they give a clear idea of the direction that the EU plans to take in protecting human rights. While most of these *soft law* instruments are acceptable to all the Member States, others could be characterised as controversial, whereas they propose legal solutions which are in domain of national legislators.

A similar situation is with the Curia. From its case-law, it clearly arises that in cases which involve cross-border situations and substantive Family law institutes (such as marriage and family), the Curia justifies its interference with the necessity of the proper functioning of the internal market, that is, with the rights of EU citizens to move and reside freely within the EU. Sometimes, the emphasis on these rights leads to the conflict with the right of the State to protect its national identity and its tradition. That is exactly what happened in two landmark cases: *Coman and others v. Romania* and in “*Pancharevo case*”. While in the first case, the Curia obliged Romania to recognize legal effects of the same-sex marriage concluded in another Member State, in the second case, it obliged Bulgaria to recognize child-parent relationship established in another Member State. In both cases, the Curia stated that the obligation to recognize either the legal effects of a same-sex marriage or a child-parent relationship does not infringe on national identity or pose a threat to the public order of the Member State. It reiterated that the concept of public order needs to be interpreted strictly when used as justification. Although in both of its judgments, the Curia clarified that these obligations do not require the Member States to include provisions in their national legislation for the same-sex marriage or parenthood, nor to recognize such relationships for other purposes, we can state that these rulings have undoubtedly “paved the way” for potential changes in the conservative societies of Romania and Bulgaria, as well as in the similarly conservative Member States.<sup>153</sup>

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<sup>151</sup> Šimović and Ćurić, *op. cit.*, note 19, p. 175.

<sup>152</sup> In this regard see: Meeusen, *op. cit.*, note 71, pp. 4-5.

<sup>153</sup> Thus, Lima stated: “With its milestone judgment in *Pancharevo*, the CJEU has played its own part in facilitating EU-wide recognition of same-sex parenthood and further paved the way for the Commission proposals.” Lima, *op. cit.*, note 103, p. 242.

In conclusion, even though the EU has shown certain ambitions to expand its influences and to take over the competences in the field of substantive Family law, the Member States, especially those that are perceived as more conservative, continue to show their resistance.<sup>154</sup> Accordingly, we believe that the Member States will not easily hand over the regulation of substantive Family law to EU institutions and that it will stay in “(jealous) hands of national legislators.”<sup>155</sup>

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<sup>154</sup> In this regard Lima concluded: „The ‘Pancharevo case’ should instead be viewed not as addressing a purely technical issue of the scope of Directive 2004/38, but within the strained relationship between the EU’s official stance on full respect for LGBT+ rights, and the push-back from specific EU Member States that view this as an unwelcome external influence which runs contrary to their traditional values.” *Ibid.*, p. 241.

<sup>155</sup> Majstorović, *op. cit.*, note 2, p. 14.

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