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Families without borders - The recognition of adoptions made by same-sex couples in the European Union

TEAM ROMANIA

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Family means nobody gets left behind.
- Lilo and Stitch

Introduction

The European space was redesigned through the four essential principles of the internal market – the free movement of goods, services, capital and persons – and, consequently, family life inside the EU has developped a larger cross-border dimension based on the ease of EU cross-border mobility. Often, family life is created outside national borders and/or it is transferred from one Member State to another.

Moreover, society itself has gone through notable changes as to how family life is defined. A growing concern throughout the EU is granting same-sex couples the right to a family life in similar conditions as those provided for opposite-sex couples.

The present paper will focus on the exercise by a same-sex couple of parental responsibility resulting from an adoption order made in a Member State of the EU when the said couple tries to move to a different Member State whose national law refuses to recognise such adoption orders under public policy reasons. This is frequently the case of Member States which have a traditional view over the notion of family life and whose domestic law provisions reserve a set of prerogatives to opposite-sex couples, adoption included. Challenges raised by adoptions made by same-sex couples are far from being hypothetical, seeing that, for example, in the UK, in 2018, 1 out of 8 adopted children were placed under the care of same-sex adoptive parents[1].

Nevertheless, although falling into the Member State's margin of appreciation, with family law being a particularly sensible area, such a refusal to recognise a family status legally acquired in a different Member State could interfere with European citizens' right to move and reside freely inside the EU; as a result, they could be discouraged to exercise the aforementioned rights and create a family life in the state of residence when facing the risk of being unable to have the new family status recognised in their state of. In fact, the Court of Justice of the European Union has fairly recently analysed the right to move and reside freely inside the UE in relation to the right to a normal family life for same-sex couples[2].

Consequently, we will focus our analysis on identifying the current European instruments providing a potential solution for this particular situation. Furthermore, we will try to determine to which extent the freedom of movement could represent in itself grounds in compelling a

1 https://www.pinknews.co.uk/2018/11/16/same-sex-adoptions-england-2018/
2 Judgment of 5 June 2018, Coman, C-673/16, EU:C:2018:385

Member State to recognise an adoption order made in another Member State in order to guarantee the effective exercise of rights resulting from EU citizenship. Lastly, an examination of the child's best interest is in order considering that the exercise of parental responsibility is centred on ensuring his welfare.

I. General notions

I.1.Adoption and parental responsibility

Parental responsibility means all rights and obligations towards a child and its assets. Although this concept varies between the Member States of the EU, it usually covers custody and visiting rights.[3] Putting it in very simple terms, parental responsibility gives its holder the right to make decisions for the child's care and upbringing. In general, parental responsibility is directly linked to biological parenthood. Nevertheless, this is not the only source of parental responsibility and a number of other scenarios can be imagined. For instance, an also frequent hypothesis is the acquirement of parental responsibility in relation to a child through an adoption process.

Adoption normally takes place after a judicial procedure. Different states have distinct procedures involving specific authorities. In general, the judicial procedure implies a verification of the requirements provided by the national law. If the court confirms the compliance with the formal and material conditions imposed by the law, it adopts an order through which a child's legal ties with his biological parents are usually severed and the approved adopters become his legal parents and sole holders of all the rights and obligations deriving from the newly established parental responsibility.

Despite the fact that it seems easy to define at first glance, with adoption being a notion allegedly well-known, in a global context the situations are rarely as simple as described, considering that cross-border elements often get involved. Taking only the European Union as a point of reference, after the creation of the free market inside its borders, alongside with the freedom of movement as a fundamental right of EU citizens, adoptions presenting cross-border elements became very frequent.

For the coherence of this paper, we will limit our analysis to defining domestic adoption as opposed to intercountry adoption.

3 https://e-justice.europa.eu/content_parental_responsibility-302-en.do

I.2.Intercountry adoptions

When the adopters and the adopted child usually reside in different countries the adoption is considered to be intercountry and, given that those countries are parties[4] to Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993[5] (hereinafter the 1993 Hague Convention) its provisions will govern not only the procedure for the adoption, but also the recognition of the adoption. In fact, one of the fundamental advancements brought by the 1993 Hague Convention in this area of family law is the automatic recognition[6] in other convention countries of an adoption complying with the conditions it sets.

However, despite it being a powerful instrument in the efforts to simplify cross-border adoptions, the 1993 Hague Convention fails to include under its scope domestic adoptions, a more frequently occurring situation at EU level. In terms of scale, the UN has estimated that domestic adoptions outnumbered intercountry adoptions, a pattern that also applies to Europe as a whole. *Exempli gratia,* between 2004 and 2014, domestic adoption represents 57% of the total adoptions in the EU, intercountry adoption between EU Member States only 3% and 40% intercountry adoption from non-EU countries.[7]

I.3. Domestic adoptions

An adoption has a domestic dimension when it is governed exclusively by the national law of a certain country, ”in circumstances where the 1993 Hague Convention does not apply”[8]. Nevertheless, it would be incorrect to assume that such an adoption excludes any cross-border element. On the contrary, inside the EU area of free movement it so often happens that, following an adoption that took place in a Member State where both the adopters and the adopted child usually reside, the newly created family decides to move to another Member State (whose national one of the adoptive parents is, for example); even though it implies an international

4 All 28 Member States of the EU have adopted and ratified the 1993 Hague Convention.

5 Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, 33, available at: https://www.refworld.org/docid/3ddcb1794.html

6 Article 23 (1) of the 1993 Hague Convention states that “An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States.”

7 Briefing of June 2016 Adoption of children in the European Union available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS_BRI(2016)583860_EN.pdf

8 *Cross border recognition of adoptions*, p. 30, a research paper by Ruth Cabeza, Claire Fenton-Glynn and Alexander Boiché, for the European Parliament, EPRS, European Added Value Unit, Cross-border recognition of adoptions, European Added Value Assessment (EAVA), 30 November 2016 that can be accessed here http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581384/EPRS_STU(2016)581384_EN.pdf

component, the adoption is still considered a domestic one considering that the abovementioned criteria is met.

Taking into account that such a situation is not covered by the provisions of the 1993 Hague Convention, the recognition of domestic adoption orders from one Member State to another is not automatic, situation which can have potentially harmful consequences for the lawful exercise of parental responsibility derived from the adoption procedure.

II. The current status of recognition procedures in the EU

II.1. Recognition of adoption orders according to the national law of Member States

Although the recognition of domestic adoption orders issued in another Member State is not automatic, it can be attained when following the procedure provided by the national law of the Member State where the recognition is sought. More often than not, this procedure proves to be a mere formality and it usually takes the form of an exequatur, a judicial procedure through which a foreign judgment is provided with enforceability in the national legal order allowing its legal effects to produce outside the state of origin.

Although Regulation (EU) No 1215/2015[9] abolishes exequatur for judgments resulting from procedures concerning civil and commercial matters in consideration of the EU's objective stated in paragraph (3) of the Regulation's preamble[10], adoption is not covered by this instrument as it falls under the notion of the status of a person[11]. Moreover, a Member State is still in right to refuse recognition under certain conditions[12] (one of the main reasons for refusal remains the public policy of the Member State addressed).

Refusal to recognise a domestic adoption order made in another Member State remains not only possible, but also probable, in the event that the conditions under which the adoption took place prove to be in contradiction with the public policy of the Member State addressed. Such is frequently the case of joint adoptions made by same-sex couples or of adoptions of the other spouse's child by the same-sex partner, seeing that at EU level there is currently no consensus

9 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

10 "The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through **the principle of mutual recognition of judicial and extra-judicial decisions in civil matters**. For the gradual establishment of such an area, the Union is to adopt measures relating to **judicial cooperation in civil matters having cross-border implications**, particularly when necessary for the proper functioning of the internal market."

11 Article 1(2) a of the Regulation (EU) No 1215/2015

12 Article 45 of the Regulation (EU) No 1215/2015

regarding the way Member States decide to define a status for same-sex relationships alongside with all the rights that normally derive from said status.

II. 2. Regulation (EC) No 2201/2003[13]

The recognition of judgments relating to parental responsibility is subject to the Regulation (EC) No 2201/2003. Paragraph (5) of its preamble states that "In order to ensure equality for all children, this Regulation covers **all decisions on parental responsibility**, including measures for the protection of the child, independently of any link with a matrimonial proceeding."

However, under article 1 par (3) letter (b), decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption are expressly excluded from the Regulation's scope. As a result, the rights and obligations arising from an adoption decision whose recognition is not mandatory according to the Regulation appear to be excluded as well from the Regulation's scope.

In light of the previous analysis, at EU level, as there is currently no legal instrument which regulates the recognition of an adoption order made in another Member State, the recognition of domestic adoption orders falls under the competence of each Member State, according to its own national law. Consequently, a difference of treatment is inevitable when a family exercises its right to free movement inside the EU considering that national adoption laws touch to a particularly sensitive matter and thus imply significant variations from one Member State to another, according to each state's public policy and traditions.

Under those circumstances, adopters moving to another Member State can find themselves in a position where their right to make decisions for the child is not acknowledged. This situation presents multiple inconveniences and raises serious questions as to the extent to which the child's best interests are taken into account considering that this leaves a large margin of appreciation for the Member States in recognising such adoption decisions which results into a lack of uniformity inside the EU.

II.3. A brief overview of EU Member States' national law provisions on adoption by same-sex partners

At the moment, it is possible for same-sex partners to adopt a child in Belgium, Luxembourg, the Netherlands, Spain, Germany, France, Finland, Portugal and the UK, independent of their civil

13 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

status as a couple. Married or legally registered same-sex partners can also adopt in Denmark, Ireland, Malta, Austria and Sweden; step-child adoption is possible in Estonia, Italy, Slovenia.

As it can be observed, Member States' national law provisions on adoption by same-sex couples are yet to reach a higher level of reconciliation and intra-EU conflicts are bound to occur when such a couple as well as the child in question try to have the family status awarded by a certain Member State recognised when moving to another Member State.

A number of potential risks spring immediately to mind, particularly the obstacle such a discrepancy represents for the creation of an area of freedom, security and justice (as one of the main objectives of the EU) as well as the potential conflict of status with human rights as guaranteed by both the values of the EU and the ECHR.

For a better grasp of the situation, let us consider the following fictional example.

Felicity and Julia met in 2010 in Townsville where Julia moved from Pandora following a promotion as headmistress of Hogwarts. Townsville and Pandora are two of the 28 member states of Westeros. Felicity and Julia got married in Townsville in 2012 and later on they also adopted little Oliver Twist, a 7 year old boy who was a Townsville national, just as Felicity. The order of adoption made by the judicial authorities of Townsville was dated 21st of March 2014.

However, due to cutbacks at Hogwarts and also in order to provide the best education for Oliver, in the spring of 2019, Felicity and Julia decided to move to Pandora where some of the most prestigious schools in Westeros were located.

When submitting the application form to sign up Oliver to Xavier's Academy, Felicity and Julia were confronted with a refusal on the grounds that their adoption order could not be recognised according to Pandora's national law and that they could not lawfully exercise parental responsibility on Pandorian territory.

Seeing that the adoption process took place in Townsville, which is also a member state of Westeros, Felicity and Julia brought an action against Xavier's Academy requesting the Tribunal of District 1 of Pandora to recognise the order of adoption issued by the Townsville court and, subsequently, to also recognise their right to exercise parental responsibility. Arguing public policy reasons, the Tribunal declines their request, seeing that its national law precluded it from issuing adoption order for same-sex couples as well as to recognise such orders made in any other state. An appeal was formed and the Court of appeal must now render a judgment

analysing potential grounds of recognition of the adoption order in consideration of Westeros law, despite the restrictions incident in the Pandorian national law.

Considering that Westeros is the EU, Townsville is the equivalent of the UK and Pandora that of Romania, an analysis of potential solutions can be developed when taking this hypothetical example as a starting point.

Therefore, as it can be noticed, this family finds itself in the situation that falls under the current legal gap EU law is confronted with. The adoption is a domestic one – both Felicity and Julia were usual residents of Pandora at the time of the adoption, as was Oliver, the adopted child – and, consequently, the 1993 Hague Convention does not apply; they cannot argue the automatic recognition of their adoption order. Moreover, their problem cannot be surmounted by invoking an EU instrument such as the Regulation 2201/2003 considering that its scope excludes mandatory recognition of such adoptions as well. As a result, they have to demand the recognition of their adoption order through the procedure provided by Pandora's national law. When doing so, they are faced with a refusal of recognition due to public policy reasons. Hence, Felicity and Julia are unable to exercise parental responsibility in regards to their child Oliver, even though their family status was lawfully awarded in another Member State.

II. 4. An EU analysis of the potential consequences of the current legal gap

Following the European Parliament's Resolution of 19 January 2011 on international adoption in the European Union[14], in 2015, the European Parliament's Committee on Legal Affairs (JURI) began work on a legislative initiative report on cross-border recognition of adoptions with specific recommendations to the Commission (rapporteur, Tadeusz ZWIEFKA, EPP, Poland). The European Added Value Assessment (EAVA)[15] accompanying the report identifies the following potential risks determined by the absence of EU instruments to regulate the recognition of domestic adoptions.

"This situation is highly problematic and generates economic, social and legal costs for adopters as well as for public administrations, and most importantly, puts the best interest of the child at stake. It can be argued that the current legislative gap creates a situation where the best interest of adopted children (who are the most vulnerable children in society) is not adequately protected

14 European Parliament, Resolution of 19 January 2011 on international adoption in the European Union, 2010/2960(RSP)

15 The European Added Value Assessment from 30 november 2016 accompanying the European Parliament's legislative own-initiative report that can be accessed here http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581384/EPRS_STU%282016%29581384_EN.pdf

in the EU. The lack of domestic legal recognition of adoptions may harm children's right, including their right to family life, non-discrimination, inheritance rights and right to nationality. The current legal gap also creates an unjustified distinction between legal effects of Hague Convention adoptions and domestic adoptions with a foreign element. Whilst Hague Convention adoptions are subject to automatic recognition, domestic adoptions are not automatically recognised in another EU Member State. This more specifically impacts negatively on families that exercise their rights to free movement under EU law."[16]

All things considered, including the current status of EU law as interpreted by the CJEU's case-law, we will focus on examining to which extent the recognition of an adoption decision rendered by a Member State can be required for the other Member States of the EU.

III. The freedom of movement as a potential ground for the mandatory recognition of adoption orders – the Coman case

III.1. Brief overview of the facts

Less than a year ago, on the 5th of June 2018, the Grand Chamber of the Court of Justice of the European Union ruled that '*In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, […], in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life […] Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex*.'

Evidently, the aforementioned judgment had a direct impact on the right of Union citizens to move and reside freely in the territory of the Member States. Nevertheless, following the Grand Chamber's reasoning one cannot help but notice that the consequences of this evolution of EU law are yet to be fully explored. Provided that the Court's arguments can be transferred to other family law matters than same-sex marriage, the national law of the Member States (recognition of adoption orders included) can find itself strongly influenced by this recent judgement.

In the present case, Mr Coman, a Romanian national residing in Brussels, married Mr Hamilton, an American citizen, in Belgium in 2010. Wanting to take up residence in Romania, they addressed a demand to the local authorities. Consequently, they were faced with the refusal to

16 Idem, page 4.

grant a right of residency on the grounds that the Romanian national law does not recognise marriage between people of the same sex and that such a marriage does not fall under the notion of family reunion. A civil action on the grounds of sexual discrimination was brought against the authorities.

Subsequently, considering the elements of the main action, a demand for a preliminary ruling was addressed to the Court of Justice of the European Union. The Romanian judge inquired whether the Directive 2004/38/EC[17] requires the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union, providing the term ”spouse” used by the directive includes the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State.

III.2. The freedom of movement as grounds for the mandatory recognition

Firstly, according to its constant case-law, the Court stated that the Directive 2004/38 cannot represent grounds for Mr Hamilton, as a third-country national, to gain a derived right of residency. However, in certain cases, **such a right can be granted on the basis of Article 21(1) TFEU** (the right to move and reside freely within the territory of the Member States) and, in the light of its context and objectives, the provisions of the Directive 2004/38 are applicable by analogy to the present case. Therefore, they may not be interpreted restrictively and they must not be deprived of their effectiveness (paragraph 24 of the Attorney General’s conclusions in the Coman case).

The freedom of movement for persons is one of the four principles of the EU and a fundamental right of a citizen of the Union. Moreover, the Court highlights the fact that the „citizenship of the Union is intended to be the fundamental status of nationals of the Member States” (Coman, paragraph 30) and **in consideration of that status, a citizen of the Union may rely on the right on the right of free movement and residency provided for in Article 21(1) TFEU „including, when appropriate, against his Member State of origin”** (Coman, paragraph 31).

17 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34)

Furthermore, paragraph 32 of the judgement states that „***The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State."***

Whereas this paragraph could seem less relevant than those clearly stating the obligation for a Member State to recognise the effects of a marriage lawfully concluded in another Member State, between people of the same sex, in order to grant the spouse who is a third-country national the right of residency, it is nonetheless an argument of great value that could open a whole range of possibilities considering that it refers to family life and family members in general and that it is not limited to same sex marriage.

For instance, taking into account the topic of this paper, the question arises whether the right of free movement could represent grounds forcing Member States to also recognise other civil procedures such as a second parent adoption or a joint adoption by same-sex couples, with the premise being that the Member State in question refuses to recognise the procedure in itself through its national law provisions. And furthermore, would this recognition also be limited to granting a right of residency for the child or could it be extended to other matters as well, such as the exercise of parental responsibility in front of the local authorities of the Member State concerned? The Court's reasoning is more subtle than that.

Rather than stating that the recognition of a civil status acquired in another Member State should be automatic, the Court merely pleads for a mandatory recognition of the effects deriving from that status in order to guarantee the full effectiveness of the rights an EU citizen has according to primary law, more precisely the freedom of movement in this given case. However, although the Court limits its analysis to the object of the questions submitted to its attention, the reasoning could be further developed.

In other words, the Court states that the refusal of recognition "for the sole purpose of granting a derived right of residence to a third-country national", based on the fact that the national law does not recognise the procedure concerned, is contrary to EU law. Nevertheless, the Grand Chamber also implies that the freedom of movement comprises a form of 'portability of personal status'[18] of the EU citizen; in absence of recognition of such a right, the freedom of movement

18 This notion was used in the paper *Differrent families, same rights? Freedom and Justice in the EU: Implications of the Hague Programme for Lesbian, Gay, Bisexual and Transgender Families and their Children* by Dr. Matteo Bonini Baraldi for ILGA-Europe, December 2007 available at https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/different-families-same-rights-implications-hague.

would be severely limited with the risk being that it becomes voided of its content. Otherwise, citizens would be discouraged to exercise their right to move freely inside the EU and create a family life in a Member State, knowing the family status acquired in the said Member State could be deprived of its effects when moving to another Member State.

It is from this point of view that the following mechanism could be imagined, seeing that a case similar to the hypothetical one chosen as an example could be submitted to the Court's attention in the foreseeable future. Taking into account the fact that Felicity, Julia and Oliver were awarded a family status according to Townsville's national provisions, the non-recognition of this personal status in Pandora due to public policy reasons interferes with the right to move and reside freely in the Westeros area. It is not unreasonable to assume that Julia would not have left Pandora and created a family in Townsville knowing that she would be unable to transfer that acquired status alongside with its legal effects when returning to her national state. In addition, Felicity and Oliver would also be strongly dissuaded to leave Townsville in order to establish their residence in Pandora, seeing that their family relationship would not be recognised.

Consequently, both parents would be unable to ensure the best upbringing and care for the adopted child considering that the exercise of their parental responsibility would be denied in the state of destination based on reasons pertaining solely to the latter's traditions and public policy provisions. But could the freedom of movement be a potential ground for the automatic recognition of adoption orders made in another Member State?

III.3. Limitations to Member States' competence in this field

In the Coman case, the Court emphasises on the fact that although a person's status is a matter that falls within the competence of the Member States, in exercising that competence, Member States must comply with EU law[19]. A different interpretation would result into a non-uniform application of EU law, thus affecting the rights of citizens of the Union depending on the national law of the Member State in question.

For that reason, in the Coman case, the Court stated that a Member State's refusal to recognise „*for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may*

19 Judgment of 2 October 2003, Garcia Avello, C-148/02, EU:C:2003:539, paragraph 25; judgment of 14 October 2008, Grunkin and Paul, C-353/06, EU:C:2008:559, paragraph 16; judgment of 2 June 2016, Bogendorff von Wolffersdorff, C-438/14, EU:C:2016:401, paragraph 32.

interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States" (par. 40). Such a restriction, follows the Court, can only be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law[20].

Several governments having submitted observations showed that such a restriction is justified on grounds of public policy and national identity, considering the fundamental nature of the institution of marriage and the intention of a number of Member States to maintain a conception of that institution as a union between a man and a woman, which is protected in some Member States by laws having constitutional status. A similar reason can be brought regarding adoption by same-sex couples, seeing that several Member States' national laws forbid such procedures on their territory and refuse to recognise their effects when concluded in other countries.

Nonetheless, the Court stands by the rules set in its previous interpretations of the notion of public policy and it states that „that the concept of public policy as justification for a derogation from a fundamental freedom **must be interpreted strictly,** with the result that **its scope cannot be determined unilaterally by each Member State without any control by the EU institutions**. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society"[21] As a result, the Court concludes that an obligation to recognise such marriages does not undermine the national identity or pose a threat to the public policy of the Member State concerned[22].

Moreover, as illustrated with the fictional case as well as with part of the analysis developed up to this point, problems can arise especially relating to adoptions made by same-sex couples, as it is in relation to these situations that Member States are more likely to argue public policy reasons in order to refuse recognition of the adoption orders. Needless to say that such a situation creates all the premises for discrimination based on sexual orientation and it is in strong disagreement with human rights as guaranteed by both the ECHR as well as the Charter of Fundamental Rights of the European Union[23] (hereinafter the Charter).

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20 Judgment of 14 October 2008, Grunkin and Paul, C-353/06, EU:C:2008:559, paragraph 29; judgment of 26 February 2015, Martens, C-359/13, EU:C:2015:118, paragraph 34; judgment of 2 June 2016 Bogendorff von Wolffersdorff, C-438/14, EU:C:2016:401, paragraph 48.

21 Judgment of 2 June 2016, Bogendorff von Wolffersdorff, C-438/14, EU:C:2016:401, paragraph 67; judgment of 13 July 2017, E, C-193/16, EU:C:2017:542, paragraph 18; judgment of 5 June 2018, Coman, C-673/16, EU:C:2018:385, paragraph 44.

22 Judgment of 5 June 2018, Coman, C-673/16, EU:C:2018:385, paragraph 46.

23 European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union (2007/C 303/01)*, 14 December 2007, C 303/1, available at: https://www.refworld.org/docid/50ed4f582.html

IV. The protection of family life

IV.1. The European standard

In the Coman case, the Grand Chamber's efforts to balance the interests at stake are easily noticeable when following its reasoning. Hence, towards the end of its judgment, the Court also refers to its role to ensure that, when implementing EU law, Member States also respect the fundamental rights as they are provided by the Charter. Consequently, the Court states that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with those fundamental rights guaranteed by the Charter[24].

Furthermore, in order to ensure an even stronger protection of the rights in question, the Court takes another step in that direction and brings up the ECtHR's case-law, seeing that *the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950,* as is apparent from the Explanations relating to the Charter of Fundamental Rights in accordance with Article 52(3) of the Charter[25].

As to the scope of the ECHR, the ECtHR's role in the interpretation of the Convention is a fundamental one, seeing that the ECHR is a living instrument whose scope is subject to variation under present day conditions. Hence, as the ECtHR itself shows "*the State, […] must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact* ***that there is not just one way or one choice when it comes to leading one's family or private life".***[26]

According to the ECtHR's case-law, the right to a family life may involve the recognition by the state of the family life already established.[27] This would be in accordance with the ECtHR's solution in X, Y, Z vs. UK[28] where for the first time the Court has recognized the existence of a family even without a blood tie. Moreover, it was stated that it is essential for the members of a family to live together in order for them to develop normally. [29]

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24 Judgment of 13 September 2016 Rendón Marín, C-165/14, EU:C:2016:675, paragraph 66; judgment of 5 June 2018, Coman, C-673/16, EU:C:2018:385, paragraph 47

25 Judgment of 5 June 2018, Coman, C-673/16, EU:C:2018:385, paragraph 49

26 Kozak v. Poland, no. 13102/02, § 98, 2 March 2010, ECtHR

27 Harris, O'Boylle, & Warcbrick, Law of the European Convention of Human Rights, Oxford University Press, Oxford, 2009, pp. 372.

28 X, Y and Z v. The United Kingdom, 75/1995/581/667, 25 April 1997, ECtHR

29 Marckx v. Belgium, no. 6833/74, 13 June 1979, paragraph 31, ECtHR

As far as adoption is concerned, what is essential to keep in mind is that adoptions are not made for parents to have a child, but for a child to have a family[30]. Therefore, the recognition of a family status acquired through an adoption procedure should ensure the safeguarding of the child's best interest. In fact, the ECtHR very recently gave priority to the best interest of the child while expressing its opinion that the superior interest of the child and the right to respect for private life, as guaranteed by article 8 of the ECHR, are reasons strong enough to justify the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.[31]

IV.2. The best interest of the child

IV.2.a. Notion

As it was pointed out in doctrine, the child's welfare is determinant in the assessment courts make with other relevant factors being taken into consideration only if they have a direct bearing to the best child's interest. Therefore, "welfare" is seen mostly as an objective notion which includes inter alia physical, emotional, educational needs, the likely effect on the child of any change in circumstances, any harm he could risk, ascertainable and conscious wishes and opinions of the child implied.[32]

IV.2.b. EU mechanisms of protection for the child's best interest

Legal instruments

The protection of the child has to be seen as one of the essential objectives of the European Union as stated in the Treaty on The European Union at the article 3 par.3 after mentioning the internal market which constituted the first step in its formation: *"It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and* ***protection of the rights of the child****."*

Furthermore, article 24 paragraph (2) of the Charter makes the child's best interests a primary consideration in all actions relating to children taken by public or private institutions.

Therefore the protection of the child's rights is one of the EU's priorities. This objective was strongly reiterated and seen as actual on the 12th European Forum on the rights of the child where

30 Fretté v. France, no. 36515/97, § 42, 26 February 2002, ECtHR

31 Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, P16-2018-001, 10 April 2019, paragraph 46

32 S. Harris-Short, J. Miles, Family Law. Text, Cases, and Materials, Oxford University Press Inc. New York, 2007, pp. 587-588,

it was stated that *"The principle of best interests of the child must be the primary consideration in all actions or decisions concerning children"*[33] This idea shall be regarded not only as a declared ambition with no practical implications, as the European Union has truly developed a major system on protecting rights of children, The Commission adopted for this purpose 'An EU Agenda for the Rights of the Child' in order to step up the efforts in protecting and promoting the rights of children in all relevant EU policies and actions. These actions follow the adoption of the Lisbon Treaty where new legal provisions create an obligation for the EU to take measures focusing on the realisation of children's rights.[34]

As it can be observed from the abovementioned facts, each and every action of the European Union takes into consideration in an extremely serious manner the idea of the best interest of the child and this idea is powerfully reiterated in the case-law of the CJEU that can provide insights in how the problem addressed by this paper could be solved by the Court.

Therefore, the child's best interest can justify in this case the prevalence of the child's right to reside in Member State, even though the state would de facto restrict this right on grounds of public policy taking into consideration its perspective on traditional family.

Relevant Case-law

Two cases envisage the CJEU's point of view regarding the best interest of the child. By placing the spotlight differently in each of the cases, the CJEU creates a unique portrait of what the best interest of the child consists of and of the means Member States should use for its safekeeping.

Importance. In the first of these cases[35] Dynamic Medien had argued that Avides Media should be precluded from selling a certain type of image storage media by mail order due to the fact that the German Law on the protection of young persons[36] prohibits the sale under those conditions.

In the present case, the Court has stated that in principle such a provision in the law of a member state constitutes a measure having equivalent effect and examined the possible justification of such a measure. Afterwards, the Court has observed that public morality and public policy (which are grounds that can justify such a measure) have a direct link to the protection of young people as an objective, being closely related to ensuring respect for human dignity (paragraphs

33 12th European Forum on the rights of the child, "Where we are and where we want to go",, from Albert Broschette Conference Center, 2-3 April 2019, pp. 3

34 EU Framework of Law for Children's Rights, Directorate General for Internal Policies, Citizen's Rights and Constitutional Affairs, 2012

35 Judgment of 14 February 2008, Dynamic Medien Vertriebs GmbH v Avides Media AG, C-244/06, EU:C:2008:85 paragraph 41

36 Gesetz zum Schutze der Jugend in der Öffentlichkeit (Act to Regulate the Public Protection of Young Persons)

36, 37). The Court has also acknowledged that in the absence of harmonization of legislation in such a matter, Member States can determine at a discretionary level to which extent they intend to protect the interest concerned (paragraph 44) and has examined the importance of the protection of the child's best interest.

The Court has examined whether the best interest of the child is a legitimate objective which can justify the restriction of the free movements of goods, one of the fundamental freedoms on which European Union is based on and stated that a measure having equivalent effect can be justified under the scope of protection of the child, as a legitimate interest. The child's welfare was seen as a priority and the measure designed to protect the child from material and information injurious to their well-being; therefore, it would seem that in this particular case the child's best interest was considered important enough to justify such an exception to EU rules ensuring the free movement of goods.

Interpretation. On the other hand, when it comes to interpretation, in the case J.McB v L.E.[37] the CJEU was clear in its appreciation and stated that the Charter itself has to play a role in the interpretation of EU law and, that Article 7 of the Charter must be read in a way which respects the obligation to take into consideration the child's best interests, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents.

One of the first significant aspects of this judgement is that it introduces the idea that the best interest of a child implies the child's right to have personal relationships and direct contact with both of his parents. Therefore, the national legislation should allow parents to effectively exercise their rights and obligations regarding the child. This perspective of the CJEU over the best interest of the child has an early echo in the case-law of ECtHR[38] stating that it is fundamental for a parent to maintain strong relationship with the child, this being mostly the essence of the family life; therefore, the measures which limit these relationships have to be exceptional. Moreover, the rights of the parents can be restricted if this is in accordance to the best interest of the child, but not vice versa.[39]

Secondly, the judgment underlines that the Regulation has to be interpreted in accordance with the Charter, as it implies respecting fundamental rights. Therefore, it can be stated that the child's

37 Judgment of 5 October 2010, J. McB. v. L.E., C-400/10, EU:C:2010:582

38 Olsson v Sweden, no 10465/83, A/130, 24th March 1988, ECtHR

39 Les grands arrets de la Cour europeene des Droits de l'Homme, F. Sudre, J-P Marguenaud, A. Guttenoire, M. Levinet, ed. Rosetti International, București, 2011, pp.434

right to reside in EU would be subject to an unjustified restriction following the refusal of recognition of an adoption of a child by a same-sex couple on grounds of public policy. In order to guarantee child's right to reside in EU this right has to be interpreted in accordance with Charter, and therefore with child's best interest, a reasoning similar to the Coman case, showing the Court's attachment to these principles.

In point of fact, very recently[40], the Court decided, in accordance with its well established case-law[41] that even when exercising their discretion in complying with EU law (more precisely provisions related to the right of entry and residence for EU citizens' family members), Member States' authorities are to "make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interest in play and, **in particular of the best interest of the child concerned**" (paragraph 68). In other words, as long as a family ties are established, in consideration of the child's best interests, Member States have the obligation to create legal mechanisms in order to effectively guarantee the child's right to a normal family life.

V. Solutions for the EU

V.1. The European Certificate of Adoption

Through the European Parliament Resolution No. 2015/2086, 2 February 2017 an instrument was proposed in order to simplify the recognition of adoption procedures concluded in a Member State seeing that this currently falls under the Member State's competence in absence of EU law provisions. Article 11 states that an European Certificate of Adoption will be issued by the authorities of the Member State where the adoption was made.

However, in its present form, as resulting from the aforementioned Resolution, this future Regulation could still present a series of shortcomings seeing that it seems to leave Member States a considerable margin of appreciation as to the recognition of adoption orders.

We would suggest that the Preamble of the Regulation should stipulate the importance of the mutual recognition of adoptions between Member States no matter the sex and the sexual orientation of the parents, in order to protect the child's best interest. In such a situation, it would

40 Judgment of 26 March 2019, SM, C-129/18, EU:C:2019:248

41 Judgments of 27 June 2006, Parliament v Council, C 540/03, EU:C:2006:429, paragraph 58; of 23 December 2009, Detiček, C 403/09 PPU, EU:C:2009:810, paragraph 54; of 10 May 2017, Chavez-Vilchez and Others, C 133/15, EU:C:2017:354, paragraph 70; of 6 December 2012, O and Others, C 356/11 and C 357/11, EU:C:2012:776, paragraph 81; of 13 September 2016, Rendón Marín, C 165/14, EU:C:2016:675, paragraph 85; of 13 September 2016, CS, C 304/14, EU:C:2016:674, paragraph 41

be difficult for Member States to refuse the recognition of an adoption made by a same-sex couple on basis of public policy reasons.

V.2. The (potential) modification of the Regulation No 2201/2003

An alternative version would be modifying Regulation No 2201/2003 in order to include in its scope of application judgements relating to parental responsibility resulting from adoptions as well. As a result, automatic recognition of adoption order made in another Member State would represent the rule and the refusal of recognition the exception, under article 23 of the Regulation. As this article mentions public policy reasons as potential ground for non-recognition, the risk of a refusal of recognition based on public policy reasons pertaining to the adoptive parents' sexual orientation remains. However, the child's best interest should also be considered when making use of this provision and seeing that the child's right to a normal family life could be affected, the Member States' margin of appreciation is therefore limited.

V.3. Limits to automatic recognition

On the other hand, an automatic recognition of an adoption order made in another Member State, under any conditions, is not an appropriate option no less considering that family law is an area traditionally falling under Member States' competence, with the EU's intervention being a limited one, in accordance with article 81 par. 3 of the TFEU.

If Member State were to be deprived of any possibility to refuse the recognition of an adoption order, their national sovereignty would be severely influenced. As a result, legal tourism could be encouraged and EU citizens would formally conclude adoptions in a different Member State only to have it immediately recognised in their state of origin and thus eluding their national law provisions.

Therefore, when such is the case, a Member State should be able to decline a request of recognition of an adoption made under those conditions and demand that a set of criteria be met in order to recognise an adoption order such as the period of time that has passed since the adoption took place (the adoption should not have been only recently concluded) or adoptive parents' connection with the state where the adoption was made (at least one of the parents should be a resident of the said state as to avoid only a formal presence of the parents on that state's territory in the sole purpose of concluding the adoption).

Concluding remarks

All things considered, the EU is currently faced with a seriously problematical situation. Due to a legal gap, domestic adoptions made in a Member State are not automatically recognised in another Member State, seeing that neither the 1993 Hague Convention, nor the existing EU regulations are incident in this matter. Accordingly, the recognition of such adoption orders falls under the competence of each Member State with significant costs for the EU. [42]

Moreover, differences of treatment can inevitably occur from a Member State to another as a result of the state's large margin of appreciation in regulating this area of family law according to its own traditional view over the notion of family life.

However, seeing that the recognition proves to be a mere formality in most cases, situations that are susceptible of interfering with a state's public policy are more problematic considering that refusal is often based on this particular reason. Such is the situation of adoptions by same-sex couples where Member States' legislations are yet to reach common ground regarding the possibility of concluding such an adoption and to its effects. This situation can have a negative impact for both the adopters and the adopted child who would be unable to lead a normal family life under the same conditions in each and every Member State of the EU.

Therefore, in a broader context, taking into account the undeniable tendency for globalization, a common solution should be considered, especially considering that the freedom of movement is an essential right deriving from EU citizenship. As a consequence, the refusal of recognition of an adoption order issued in a Member State could interfere with the right to move and reside freely inside the EU of same-sex couples and of their adoptive children seeing that they would be unable to fully exercise the prerogatives attached to the family status acquired in a Member State, thus leaving their lawfully established status without any legal effects when moving to another Member State whose legislation refuses recognition.

Taking into consideration that a comparable hypothesis was analysed by the CJEU in the Coman case regarding recognition of a marriage concluded by a same-sex couple in a Member State, we strongly believe that the Court's reasoning could be transferred to this situation as well in order to reach a similar solution. In other words, the freedom of movement, as established through EU primary law and interpreted by the CJEU, could represent grounds compelling a Member State to

42 Approximately €1.65 million per annum, according to the EAVA cited above.

recognise a form of portability of the personal status lawfully attained according to another Member State's legislation in order to ensure the respect of EU law. A different conclusion would seriously affect the exercise of the right to move freely inside the Union due to the fact that EU citizens could be strongly discouraged to exercise that right knowing they incur the risk of having the recognition of their new family status refused in their Member State of origin or even in a different Member State they would consider residing in.

On the other hand, the refusal of recognition of an adoption order made under those terms should mainly be considered from the child's point of view. In other words, even in the absence of any EU rules under which the Member State's margin of appreciation as to the refusal reasons would be limited, the fact that the national provisions forbid an adoption by same-sex couples and its recognition when concluded in a different state could not represent grounds for that state's authorities to refuse to recognise the effects of the lawfully established family status since it would severely harm the child's best interest. Differently put, when refusing to recognise the effects of such an adoption order, the state in question refuse to acknowledge the exercise of parental responsibility by the adoptive same-sex parents although, following the adoption procedure, these are the only established legal ties the child has. Would then the child be left with no one to exercise that parental responsibility and make all the decisions in order to ensure his welfare? Clearly, such a situation cannot be considered and the refusal of recognition under those terms would be contrary to the child's best interest, a vital principle for all Member States under both EU law as well as the ECHR to which all Member States are party.

Nonetheless, to prevent these risks and their negative impact on EU citizens' family life, we strongly believe that an EU instrument regulating the automatic recognition of adoptions made in another Member State would be highly useful in establishing a common standard regarding adoption procedures which would thus guarantee the respect of the same set of basic principles in all Member States and which could eventually result into a reconciliation of national legislations in this area of family law.