

The EU Proposal and EU Primary Law: A Match Made in Heaven?

EAPIL Webinar Series –
Analyzing the EU Parenthood Proposal

Overview

1. EU Primary Law
2. Relationship Between Proposal – EU Primary Law
3. Reading the Proposal in the Light of EU Primary Law
4. A Match Made in Heaven?

EU Primary Law

Primary Law

Article 21 TFEU (ex Article 18 TEC)

Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
[...]

Article 18 — (ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, **any discrimination on grounds of nationality shall be prohibited.**
[...]

Article 20 — (ex Article 17 TEC)

Citizenship of the Union is hereby established. **Every person holding the nationality of a Member State shall be a citizen of the Union.** Citizenship of the Union shall be additional to and not replace national citizenship.



Article 18 TFEU (non-discrimination)

Article 20 TFEU (EU citizenship)

Article 21 TFEU (free movement of persons)

C-148/02 - Garcia Avello

C-353/06 - Grunkin-Paul

C-208/09 - Sayn-Wittgenstein

C-391/09 - Runevič-Vardyn

C-438/14 - Bogendorff von Wolffersdorff

C-541/15 - Freitag

C-673/16 - Coman et al.

C-490/20 'Pancharevo'

C-2/21 Rzecznik Praw Obywatelskich

Names

(Same-sex) Marriage

(Same-sex) Parenthood

Article 8 ECHR (family live)
Article 12 ECHR (marriage)

Wagner & J.M.W.L., no. 76240/01
Negropontis-Giannisis, no. 56759/08
Mennesson, no. 65192/11
Labassee, no. 65941/1
Paradiso u. Campanelli, no. 25358/12
Orlandi et al., nos. 26431/12; 26742/12;
44057/12 and 60088/12
...

International Company Law

Daily Mail, C-81/87
Centros, C-212/97
Überseering, C-208/00
Inspire Art, C-167/01
Cartesio, C-210/06
VALE, C-378/10
Polbud, C-106/16)
...



Article 21 TFEU (free movement of persons)

C-148/02 - *Garcia Avello*

C-353/06 - *Grunkin-Paul*

C-208/09 - *Sayn-Wittgenstein*

C-391/09 - *Runevič-Vardyn*

C-438/14 - *Bogendorff von Wolfersdorff*

C-541/15 - *Freitag*

C-673/16 - *Coman et al.*

C-490/20 '*Pancharevo*'

C-2/21 *Rzecznik Praw Obywatelskich*

- Different names in two Member States = different official documents in Member States

= impediment to free movement

Exception: public policy of second Member State

- Within EU free movement law: same-sex marriage = marriage
- **Obstacles to free movement have to be abolished**



Article 21 TFEU (free movement of persons)

C-148/02 - *Garcia Avello*

- Obstacles have to be removed

C-353/06 - *Grunkin-Paul*

C-208/09 - *Sayn-Wittgenstein*

- Different status documents in different Member States always create obstacles
→ limping status = obstacle

C-391/09 - *Runevič-Vardyn*

C-438/14 - *Bogendorff von Wolffersdorff*

= impediment to free movement

C-541/15 - *Freitag*

C-673/16 - *Coman et al.*

→ different status registrations have to be abolished

C-490/20 '*Pancharevo*'

C-2/21 *Rzecznik Praw Obywatelskich*

Exception: public policy

Consequences

Perspective of courts:

- Obligation to “recognize” or “accept” and transcribe a status in a second State

Perspective of EU Commission

- Harmonization of substantive law (company law)
- Harmonization of private international law (family law)

Consequences

Harmonization of private international law (family law)

= transformation of CJEU case law into private international law rules to avoid obstacles to free movement

→ EU proposal = transformation of “Pancharevo” into private international law

Relationship Between Proposal – EU Primary Law

EU proposal = transformation of “Pancharevo“

- EU primary law = higher hierarchy
- result: no frictions or overlaps

Art. 2 EU Parenthood Proposal

Article 2

Relationship with other provisions of Union law

1. This Regulation shall not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, including Directive 2004/38/EC. [...]

Art. 2 EU Parenthood Proposal

- **Interpretation 1:** If a Member State has already a better method to enhance free movement, it still can.

Art. 2 EU Parenthood Proposal

- **Interpretation 2:** The proposal is not exhaustive regarding the transformation of EU primary law in parenthood matters

Establishment of parenthood

= Defining scope of application (parenthood established in another EU Member State)

But: where is a status established?

1. By Court decision → Recognition of Court decisions
2. By Public Authority → Authentic Acts with Binding Effect
3. By the law → ?

Establishment of parenthood

Established by the law → in theory everywhere

CJEU: recognition can be refused in case of abuse/circumvention (*Centros; Cadbury Schweppes*) → if no connection to the Member State

- usually: competence for status registration sufficient
- exception: EU citizenship + registration outside of EU

Art. 2 EU Parenthood Proposal

– **Interpretation 2:** The proposal is not exhaustive regarding the transformation of EU primary law in parenthood matters

→ EU primary law applies, as proposal does not

Other possible interpretation: Case of EU citizen is included (interpretation in the light of free movement)

Reading the Proposal in the Light of EU Primary Law

1. Art. 17 (2) (Applicable Law)

2. Public Policy

3. Recognition via conflict of laws

Art. 17 (2) – Applicable Law

Article 17

1. The law applicable to the establishment of parenthood shall [...].
2. Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent, the law of [...] or of [...], or the law of [...], may apply to the establishment of parenthood as regards the second parent.

Article 17

1. The law applicable to the establishment of parenthood shall [...].
2. Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent, **the law of [...] or of [...], or the law of [...], may apply to the establishment of parenthood as regards the second parent.**

Article 17 – Applicable Law

Art. 17 (2): discretion of the court

(“the law of the State of nationality of that parent or of the second parent, or the law of the State of birth of the child, **may** apply to the establishment of parenthood as regards the second parent.”)

→ no solution if more than one second parents can be established

Article 17 – Applicable Law

Universal application (Article 16)

→ includes EU citizens and others establishing parenthood

Possible solution: Free movement-friendly use of discretion

→ **EU parent has to be the second one**

But: not really clear whether this is feasible and in the best interest of the child

→ maybe one (more) reason to rethink Art. 17 (2)

Ordre public

ordre public

Article 22 Public policy (*ordre public*)

1. The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.
2. Paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination.

ordre public

Recital (14) Under Article 21 TFEU and secondary legislation relating thereto as interpreted by the Court of Justice, **the respect of a Member State's national identity under Article 4(2) TEU and a Member State's public policy cannot serve as justification to refuse to recognise a parent-child relationship between children and their same-sex parents** for the purposes of exercising the rights that a child derives from Union law.

ordre public

Pancharevo/Coman:

- obligation to accept the status only limited to EU free movement law
- no obligation to recognize (directly) a same-sex parenthood/marriage

→ National identity can justify refusal to recognize a status as such

Recognition via Conflict of Laws

Method of Recognition

- 1. Recognition of Court Decisions**
- 2. Extension of Recognition of Court Decisions (to authentic instruments)**
- 3. Recognition via conflict of laws**

Recognition via conflict of laws

Recognizing authority applies her conflict of laws rules

→ if result is the same as the status that is supposed to be “recognized”

→ “Recognition” (+)

Problem if national conflict of laws rules differ (*Grunkin Paul*)

→ Harmonization of conflict of laws rules as a possible solution

Problem: Sahyouni I & II

Can a national authority use Art. 17 to accept a status ‘established’ in another State?

CJEU: (-) in case of Rome III (Sahyouni I & II)

Problem: Sahyouni I & II

Can a national authority use Art. 17 to accept a status ‘established’ in another State?

Interpretation in the light of free movement:

Possible if it enhances recognition

More feasible: rule clarifying that recognition via conflict of laws is not excluded/
Sahyouni I & II do not apply

A Match Made in Heaven?

A Match Made in Heaven?

- Match yes, but not in heaven
- Different possibilities to clarify relationship between primary law and proposal
- Helpful to have some clarifications

Thank you for your attention!

sgoessl@uni-bonn.de