



ARTICLES

PARENT IN ONE MEMBER STATE, PARENT IN ALL MEMBER STATES: THE GOOD, THE BAD AND THE UGLY

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ABSTRACT: The EU is known for its commitment to protecting the fundamental rights of same-sex couples as outlined in art. 10 TFEU and the Charter of Fundamental Rights of the EU (Charter) within its value-driven principles. Nevertheless, same-sex couples still face discrimination in forming families. Only 14 out of 27 Member States allow same-sex marriage, seven offer some form of recognition, and the other six offer no recognition at all. To address this issue, the European Commission has proposed a legal instrument which would introduce uniform rules for jurisdiction and applicable law in matters of parenthood, with the goal of ensuring recognition of parental rights for rainbow families across the EU. While the European Court of Human Rights and the Court of Justice of the European Union have made significant efforts to legally protect LGBTIQ individuals, the EU's ability to act in the face of anti-LGBTIQ legal and social climates is still being questioned. This *Article* will examine the contents of the Commission's legislative proposal, its political strategy, and the practical obstacles to its adoption, including legal mechanisms and political situations in certain Member States. The effectiveness, practicability, and sustainability of the proposal will also be evaluated. The goal is to provide a comprehensive analysis of the Commission's efforts to promote and protect the rights of same-sex couples in the EU.

KEYWORDS: LGBTIQ parenthood rights – rainbow families – EU fundamental values – legislative initiative – jurisdiction – applicable law.

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I. INTRODUCTION

In the European Union, rights of same-sex couples as worthy of respect and recognition are clearly guaranteed by the principle of equality and the prohibition of discrimination on the basis of sexual orientation with an extensive legal basis in art. 10 TFEU,¹ also complemented by the Charter of Fundamental Rights of the EU (hereafter the Charter).²

However, in reality same-sex couples are not similarly treated as different-sex couples with respect to forming families given the legal and social discriminations. According to a report of European Parliament from 2022,³ only 14 out of 27 Member States currently allow same-sex marriage.⁴ Seven Member States afford some form of legal recognition to same-sex unions,⁵ whereas some countries like Hungary and Croatia have constitutional provisions against same-sex marriage, defining marriage restrictively, as the union “between a man and a woman” under national law.⁶ Further, six countries do not offer any legal recognition to same-sex relationships,⁷ which means that a child cannot legally have “two women, or two men” recognised as parents.⁸

Under these circumstances, following the State of the European Union address by the President of the European Commission, Ursula von der Leyen who stated that “if you are a parent in one country, of course you are a parent in every country”,⁹ the European

¹ Art. 10 TFEU: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

² Art. 21(1) of the EU Charter of Fundamental Rights: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

³ Briefing of the European Parliament of 2022 on The rights of LGBTI people in the European Union www.europarl.europa.eu.

⁴ Netherlands (since 2001), Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013) Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017), Germany (2017) and Austria (2019).

⁵ Slovenia (2017), Estonia (2016), Greece (2015), Cyprus (2015), Croatia (2014), Hungary (2009), Czechia (2006), and Italy (2016).

⁶ Hungary: art. L(1) of the Fundamental Law: “Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. (2) Hungary shall support the commitment to have children. (3) The protection of families shall be regulated by a cardinal Act”; art. 12 of the Constitution of Croatia: a “legally regulated union of a man and a woman”.

⁷ Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia.

⁸ Adoption rights are still more restricted. Only thirteen EU countries guarantee legally the full joint adoption by same-sex couples: the Netherlands (since 2001), Sweden (2003), Spain (2005), Belgium (2006), Denmark (2010), France (2013), Malta (2014), Luxembourg (2015), Austria (2016), Ireland (2016), Portugal (2016), Finland (2017) and Germany (2017).

⁹ European Commission, ‘2022 State of the Union Address by President von der Leyen’ (14 September 2022) ec.europa.eu.

Commission came up with a legislative proposal (hereafter the Regulation Proposal)¹⁰ seeking to introduce uniform rules for jurisdiction and applicable law in matters of parenthood with a goal to ensure the recognition of parental rights in rainbow families¹¹ across the EU.

Fully taking into account that the Regulation Proposal also concerns the question of surrogacy, and without taking away any of the importance surrounding that question, in this article, the authors will examine the Regulation Proposal solely in the context of same-sex parenthood, as experience has shown that same-sex parents are significantly more likely to encounter difficulties in trying to get their parental rights recognised, than the opposite-sex parents through surrogacy.¹²

Indeed, there is conflict between Member States regarding the issue of LGBTIQ rights. In the context of the contention that has been surrounding the efforts to further the legal protection of LGBTIQ individuals for decades, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have been the two institutions to make the most significant legal strides towards backing that protection by hard law instruments that are their rulings.¹³ Nevertheless, the ability of the EU to act in the face of an anti-LGBTIQ legal and social climate is increasingly queried upon the political assessment in practice. In this context, although the proposal of the Commission is certainly expected to set in stone the framework of protection and promotion of the fundamental rights of LGBTIQ individuals, its effectiveness, practicability, and sustainability is unclear.

To analyse this question, the first section of this article will closely examine the contents of the Commission's legislative proposal and the legal solutions contained therein, as well as the political strategy toward outlining the proposal by the Commission, while the second section will be concentrated on practical obstacles to its adoption, in questioning the EU value driven policy from the point of instrumental and legal mechanisms of the Treaty on the Functioning of the European Union (TFEU) to seek an alternatives in pragmatic approaches.

¹⁰ Proposal COM(2022) 695 final for a Council Regulation of 7 December 2022 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.

¹¹ By the term "rainbow family", we are referring to families parented by two same-sex LGBTIQ+ parents, as opposed to the notion of a "traditional" family, parented by a heterosexual couple.

¹² This conclusion becomes clear on the very beginning of every administrative procedure, involving the child, where a birth certificate or other proof of parenthood has to be provided, as having two parents of the opposite sex hardly ever gives rise to complications, while the fact that the child has two same sex parents on their birth certificate often complicated the administrative proceedings, such as seen in the CJEU case C-490/20 *V.M.A.* ECLI:EU:C:2021:1008.

¹³ Such as ECtHR *Schalk and Kopf v Austria* App n. 30141/04 [24 June 2010]; ECtHR *Fedotova and Others v Russia* App n. 40792/10 [17 January 2023]; case C-673/16 *Coman and Others* ECLI:EU:C:2018:385.

II. RAINBOW FAMILIES' PARENTAL RIGHTS IN THE EU: CHARTING PROGRESS THROUGH LAW AND POLITICS

II.1. FROM COURTROOMS TO COMMISSION: THE EVOLUTION OF LGBTIQ PARENTHOOD RECOGNITION IN EU LAW

a) *V.M.A. v Stolichna obshtina Pancharevo: the CJEU as a trailblazer*

What precipitated the newest legislative initiative of the European Commission is the landmark CJEU ruling in the affair *V.M.A. v Stolichna obshtina Pancharevo*.¹⁴ In this reference for preliminary ruling, the Court deliberated on the following situation: a child of two same sex parents was born in a Member State of which neither of its parents were nationals (Spain). The parents were unable to procure a birth certificate for the child from the authorities of a Member State of which one of the parents is a national (Bulgaria) for the purposes of obtaining an identity document and a passport. The reasoning of Bulgarian administrative authorities was that Bulgaria's public policy does not allow for birth certificates to refer to two parents of the same sex.

After an appeal was lodged before the Sofia Administrative Court, the latter seized the CJEU with a reference for a preliminary ruling, seeking to find out whether EU law obliges a Member State to issue a birth certificate in order to obtain an identification document for a child that is its national, and who is in possession of a birth certificate issued lawfully by another Member State, designating a same-sex couple as parents, where one of the parents is a national of the first Member State. The CJEU emphasised that EU citizenship is the fundamental status of nationals of Member States, and that a Member State national who exercised their right to free movement pursuant to the Directive 2004/38¹⁵ (Citizens' Rights Directive, CRD) is entitled to rely on rights pertaining to EU citizenship even against their Member State of origin.¹⁶ Furthermore, art. 4(3) of the CRD requires Member States to issue their nationals an ID card or a passport regardless of whether the new birth certificate has been drawn up for the child.

In this case, however, the CJEU noted that the child is a Bulgarian national by descent,¹⁷ and therefore, pursuant to pre-existing case law,¹⁸ art. 21 TFEU precludes the authorities of a Member State in applying their national law from refusing to recognise information from a birth certificate emanating from the authorities of a Member State in which the child

¹⁴ *V.M.A. cit.*

¹⁵ Directive (EC) 2004/38 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.

¹⁶ *V.M.A. cit.* para. 42.

¹⁷ As per the admission of the referring court, who alone had jurisdiction in the matter. See paras 38 and 39 of the *V.M.A. cit.*

¹⁸ *Ibid.* para. 44; see also case C-353/06 *Grunkin and Paul* ECLI:EU:C:2008:559 para. 39.

is born and resides since birth. Furthermore, an ID document for a child in such situation must allow them to exercise the right to move and reside freely in the EU with each parent, whose status as such has been established by the host Member State during a stay in accordance with the CRD, including the right to lead a normal family life.

The CJEU further stated that if Spanish authorities lawfully established the parent-child relationship and attested it in the birth certificate, it must be recognized by all Member States in exercising the CRD rights. Member States remain free to refuse the recognition of same-sex partnerships in national law,¹⁹ but the civil status of rainbow families must be recognized for the purpose of exercising rights under EU law. The Court also upheld its longstanding view²⁰ that public policy cannot be used unilaterally by a Member State to justify a derogation from fundamental freedoms, without any control by EU institutions.

Lastly, the CJEU concluded that a child whose birth certificate designates as parents two persons of the same sex, one of whom is an EU citizen, must be considered by all Member States as a direct descendant of the EU citizen and imposed the obligation to take into account the lawfully established birth certificate from the host Member State, for the purposes of issuing identity documents, regardless of the legal status of same-sex partnerships or rainbow families in internal law.

b) Making concrete steps towards legal certainty for rainbow families in the EU

Influenced by the V.M.A. ruling, the European Commission came up with a legislative initiative to ensure the filling of this legal gap.

In its proposal, the Commission states that, while EU law requires all Member States to recognise the parenthood of a child as established in another Member State²¹ for the purpose of exercising rights under the CRD,²² it does not yet require Member States to recognise the parenthood of a child as established in another Member State for other purposes. This leads to adverse consequences for children, mainly due to differing substantive rules on the establishment of parenthood in domestic situations, and their transposition to cross-border situations. These adverse consequences would extend beyond the scope of free movement, and would affect succession, maintenance rights, the right of the parent to act as the child's representative on medical or schooling matters.

In essence, this regulation proposal represents a legal instrument of private international law, and seeks to establish rules regulating conflict of laws in matters of court (or other appropriate authority, where applicable) jurisdiction and in matters of applicable law. These collision norms are to be applied in much the same logic as those contained

¹⁹ Stems from the principle of attribution, as provided by art. 5(1) TEU.

²⁰ *V.M.A.* cit. para. 55 and *Coman* cit. para. 44.

²¹ Including the situations where two individuals of the same sex are designated as parents.

²² Namely the freedom of movement.

in other EU legislation regulating private international law, such as Brussels 1 bis Regulation²³ or Rome I Regulation.²⁴

In operational terms, the regulation proposal seems to be tailored to specifically enable the recognition of parenthood of same-sex parents across the EU, so as to overcome any potential obstacle that may arise from internal legal orders of Member States still opposing the idea of marriage equality and/or adoption by same-sex couples. Indeed, even though the wording throughout the document is such that leads to believe that opposite-sex parents also face the same issues in non-recognition of parental rights everywhere in the EU, the truth is that parental rights of opposite-sex couples are rarely, if ever, brought into question, let alone flat-out refused.²⁵ Furthermore, the regulation proposal seeks to heavily restrict the possibility of Member States to invoke public policy²⁶ and/or national identity,²⁷ which is in line with the CJEU case-law.²⁸

Given that the underlying principle of the regulation proposal is the best interest of the child,²⁹ the jurisdiction rules, as envisaged by Articles 6-9, all revolve around the child as the primary subject. Therefore, the subsidiary jurisdiction criteria are based on the habitual residence of the child, its nationality, the habitual residence of the respondent, either parent, nationality of either parent, and lastly, the birth of the child. Aside from the primary provision in the matter of jurisdiction set out in art. 6, the regulation proposal provides for another three possibilities, in case jurisdiction cannot be determined pursuant to art. 6 – that of the jurisdiction based on the presence of the child (provided that the State concerned is an EU Member State); second, the residual jurisdiction – meaning that the jurisdiction will be determined in each Member State by its own laws; and third, an exceptional *forum necessitates* – in case no court of an EU Member State is found to have jurisdiction, and where proceedings cannot be reasonably brought in a third State, provided there is sufficient connection with the Member State of the court seised.

The rules of jurisdiction and applicable law are therefore conceived in order to heavily favour the legal orders of States allowing the recognition of parental rights in rainbow families. This stems from the fact that the most likely real-life scenario of the initial establishment of the parenthood in a rainbow family will, by necessity, arise in a Member State recognizing the parenthood of same-sex couples. Simply put, that means that in a situation where a rainbow family seeks the recognition of its parental rights in a Member State not

²³ Regulation (EU) 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 (recast).

²⁴ Regulation (EC) 93/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

²⁵ A Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) Yearbook of European Law 220.

²⁶ Art. 22(2) of COM(2022) 695 final cit.

²⁷ In accordance with art. 4(2) TEU.

²⁸ *Coman* cit. para. 44, and case law cited therein.

²⁹ Recitals 2, 49 and 62 of COM(2022) 695 final cit.

recognizing them in its domestic legal order, the applicable law shall be that of the Member State where the parenthood was initially (already) established, thus overriding the domestic legal requirements, or bans, of the second Member State. The proposal appears to assume an interesting attitude towards situations where the question of parenthood arises as an incidental question, within proceedings in matters not falling under the scope of the future Regulation.³⁰ In that case, instead of staying its own proceedings and referring the interested party to the court which would normally be competent in matters of parenthood, the proposed rule is for the would-be referring court (which is normally not competent) to determine the incidental question related to parenthood for the purposes of those proceedings, which will produce effects only in those proceedings. However, an inevitable question that comes to mind is – what happens when a court in a competent Member State determines the question of parenthood in a different way? Does it change the outcome of previously mentioned proceedings? Create a ground for introducing extraordinary legal remedies? The Commission's intention was probably to ensure better efficiency of the court proceedings, however, the success of that intention can be brought into question, given the potential pitfalls of such a solution.

The provisions on applicable law follow the same logic as the rules on jurisdiction. However, art. 16 opens the possibility to designate as applicable the law of any State, whether or not the designated State is a member of the EU. The criteria according to which the applicable law is determined are also set to heavily favour the legal systems in which same-sex parenthood is recognized. This conclusion is drawn particularly having in mind art. 17(2), in cases “where the applicable law [...] results in the establishment of parenthood as regards only one parent, the law of the state of nationality of that parent, 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”, essentially meaning the most favourable law will apply. By setting up the criteria for determining the applicable law in this way, the intention of the Commission appears to be to prevent any possibility of legal manoeuvring which would result in the applicable law being that of a State not recognizing same-sex parenthood. The regulation proposal also contains an explicit provision codifying the view of the CJEU on the use of public policy as grounds for refusing to recognize family relations in rainbow families.³¹ Finally, arts 40 and 41 of the regulation proposal establish important guarantees in the interest of legal certainty – namely the prohibition of review of jurisdiction of the court of origin³² and non-review as to substance.

³⁰ *Ibid.* art. 10.

³¹ *Ibid.* arts 22, 31(2) and 39(2).

³² Art. 40 of the Regulation Proposal closes a potential loophole in the regulation proposal by making it impossible to apply the test of public policy in order to review jurisdiction on parenthood matters, which could have been exploited.

Lastly, one of the main innovations of the regulation proposal is the establishment of the European Certificate of Parenthood.³³ This document is specifically designed to be used in cross-border situations, in order to circumvent any need to issue an instrument based in national law for the purposes of enabling the unhindered freedom of movement of the child with any of the parents across the EU, as well as for any other purpose requiring proof of parenthood.³⁴ Although the delivery of the Certificate is optional and subject to an application by an interested party, its effects appear to be immediate, without any special procedure being required, thus eliminating the main administrative problem encountered in CJEU case law.³⁵

Overall, the Commission's proposal appears to be a sound step towards reinforcing the citizens' rights and legal certainty, which is why it provoked mostly positive reactions of relevant stakeholders.³⁶ Meanwhile, the deeper societal and political causes that brought about the proposal merit further analysis.

II.2. POLITICAL STRATEGY OF THE REGULATION PROPOSAL

a) In the name of "EU citizen"

As observed above, the major question of the Regulation Proposal is accurately described in the context of the recognition of the rainbow family as a mark of respect to the fundamental values of "equality and respect for dignity and human rights" that make up the Union principles. It results from the above stated that the EU has limited legal authority when it comes to family law, as this legal domain is in the exclusive competence of Member States. However, the EU does have the power to act in relations with a cross-border element, as they presuppose the use of the freedom of movement of EU citizens, and thus necessarily are regulated by Union law. Indeed, as mentioned clearly in the explanatory memorandum to the Regulation Proposal: "[t]he need to ensure the recognition of parenthood between Member States arises because citizens increasingly find themselves in cross-border situations".³⁷

The Regulation Proposal has shown the readiness of the Commission to put forward legislation of the project favouring the protection of EU citizens in cross-border situations based on the cornerstones of the rights of citizens of the EU.

³³ Chapter VI of COM(2022) 695 final cit.

³⁴ *Ibid.* art. 47: "[t]he Certificate is for use by a child or a legal representative who, in another Member State, needs to invoke the child's parenthood status".

³⁵ *V.M.A.* cit.

³⁶ ILGA Europe, 'LGBTI Organisations Welcome EU Parental Recognition Proposal' (7 December 2022) www.ilga-europe.org.

³⁷ COM(2022) 695 final cit.

Citizenship is a constitutional concept, mainly, in the context of national legal systems expressing the relation between an individual and the state.³⁸ Marshall defined citizenship as a “status bestowed on those who are full members of a community”, and those members enjoy this status having equal rights and subsequent obligations and the protection of a common legislation.³⁹ While it is much more complicated to consider this classical notion of citizenship in the framework of EU legal system, due to its unique characteristics, the conception of *citizen of the European Union* has formally been at the heart of European integration project in the formation of “citizenship” since its insertion in the Treaty of Maastricht in 1992, which refers to a status in determining a set of rights and responsibilities, and the relation of individuals to the community, and to each other.⁴⁰

Furthermore, this EU citizenship is interpreted as a legal concept as well; and as an instrument for the creation of “European consciousness” and a common sense of belonging⁴¹ which could be qualified in the frame of the protection of fundamental rights and democracy as part of the common European ideology. Thus, citizenship *vis-à-vis* the EU in relation to individual rights by EU legislation has been protected in the context of fundamental rights, which do not depend on the nationality and status of an individual, but are universally guaranteed to individuals.⁴²

Such a connection between Union citizenship and fundamental rights protection has been advocated in stressing that “the fundamental rights play a vital role [...] As an integral part of the status of citizenship, the fundamental rights strengthen the legal position of the individual by introducing a decisive aspect for the purposes of substantive justice in the case concerned. Holding their fundamental rights as prerogatives of freedom, citizens of the Union afford their claims greater legitimacy”.⁴³ In view of this, the status of EU citizenship as a legal notion and the fundamental rights attached are exercised within the sphere of EU law and its principles. Further, this could be in a process of assimilation into the mainstream in normative framework for social inclusion.⁴⁴ To clarify, citizenship provides EU citizens with the EU standard of fundamental rights protection.

The Commission, therefore, is trying to implement the project of the recognition of parenthood within the notion of EU citizenship and its fundamental rights in cross-border situations in order to challenge national measures. Along with this discourse, there are

³⁸ VE Hanneke, *EU Citizenship & the Constitutionalisation of the European Union* (Europa Law Publishing 2015) 5.

³⁹ TH Marshall, *Class, Citizenship and Social Development* (Greenwood Press 1973).

⁴⁰ C Armstrong, *Rethinking Equality: The Challenge of Equal Citizenship* (Manchester University Press 2006) 7.

⁴¹ A Follesdal, ‘Union Citizenship: Conceptions, Conditions and Preconditions’ (2001) *Law and Philosophy* 233.

⁴² VE Hanneke, *EU Citizenship & the Constitutionalisation of the European Union* cit. 102.

⁴³ Case C-228/07 *Jörn Petersen* ECLI:EU:C:2008:281, opinion of AG Colomer, para. 27.

⁴⁴ N Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013).

two main distinct fundamental rights of citizens of EU, which the Commission highly emphasises in the proposal: *i*) “right of equality”; and *ii*) “right to free movement”, which have been constructed as basic concepts from the nascent European citizenship⁴⁵ and now both rely on the current Treaties of the EU: TEU and TFEU in conjunction with the Charter of Fundamental Rights and the Citizens’ Rights Directive.⁴⁶

The basic element of citizenship is under the equality regardless of personal characteristics regarding the rights and duties of those individuals in its community. In addition, the right to equality before the law and to equal protection against discrimination has been established as a basic human right for all human beings in a context of modern international law. In this context, there is a link between European citizenship and equality as a fundamental right, toward the path to the right to equal treatment as of equal situations and persons in the EU society.

As laid out in the previous section, the main problematic starting point of the Regulation Proposal ultimately concerns the recognition of effects of relations between members of rainbow families, and the exercise of their rights as citizens of the Union. That is largely owing to heteronormativity, as the married heterosexual family model is viewed as the norm for full citizen status in some Member States. As Richardson argued, LGBTIQ people are “only partial citizens, in so far as they are excluded from certain of these rights”,⁴⁷ in being discriminated against in parenthood matters exclusively due to their sexual orientation. Therefore, the right of same-sex couples to inclusion within the premises of equal citizenship ought to transcend all context dependency in the EU principles, along with the underpinning of the tendency to improve individual rights towards more equality not only in accessing parental rights, but also in matters such as citizenship and inheritance.

The initiative of the right of equality, entailing equal treatment has already been a key element of citizenship against to the discrimination of LGBTIQ+ citizens in the EU including in “the EU LGBTIQ Equality Strategy (2020-2025)” which states that: “[t]he European Commission, the Parliament and the Council, together with Member States, all share a responsibility to protect fundamental rights and ensure equal treatment and equality for all”.⁴⁸

⁴⁵ EDH Olsen, ‘The Origins of European Citizenship in the First Two Decades of European Integration’ (2007) *Journal of European Public Policy* 40.

⁴⁶ “The right of equality and to non-discrimination” is in art. 9 TEU, arts 18, 19(1) TFEU, art. 21(1) of the Charter and CRD, art. 24; “[t]he right to free movement and residence” is in arts 20(2)(a) and 21 TEU, art. 45 of the Charter. Moreover, this perspective has been consistently emphasised in the European integration project such as in the 2010 ‘European Council Stockholm programme’ that “the area of freedom, security and justice must, above all, be a single area in which fundamental rights and freedoms are protected”. (Official Journal of the European Union, C 115/4, 4.5.2010)

⁴⁷ D Richardson, ‘Sexuality and Citizenship’ (1998) *Sociology* 88.

⁴⁸ Communication COM(2020) 698 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 November 2022 on Union of Equality: LGBTIQ Equality Strategy 2020-2025.

Indeed, this strategy for achieving LGBTIQ equality was released to reflect the institutions' concerns in EU policy-making, in the circumstances where some Member States unveiled national plans to curb LGBTIQ rights thereby breaching the principles of the Union.⁴⁹ And this tension drives the changes of the potential exclusions of citizens of a community characterised by the projection of the principle of equality in the field of citizenship.

Equality in the context of Union citizenship is implicit in the rights and the freedom of movement of European citizens in the European Union. Since its creation, the status of a Union citizen did grant certain individual rights, namely the right to move and reside freely within the territory of the Member States, now laid down in art. 21 TFEU.⁵⁰ Within the frame of equal treatment and citizenship of the EU combined with the freedom of movement, it allows individuals to access the same social benefits as the nationals of their host Member States, having also their family status guaranteed and recognised when exercising the freedom of movement.⁵¹ Thus, once EU citizens exercise their freedom of movement, they are also able to enjoy the other rights derived from the Union citizenship.

Moreover, the proposal of the Commission gives rise to the questions regarding the adoption of harmonised rules in requiring support from all EU members. Thus, the project technically will not offer extra rights to individuals but only the equal rights as the other citizens without exceeding its authority. As stated, the Regulation Proposal does not aim to change the national family laws of EU member states. In consequence, with this support for a plan to recognise all families and forms of parenthood that are identified in other Member States, the family would be able to move to another Member State with the parenthood certificate recognised along with their children whose two legal parents would be recognized as such so that the entire family will enjoy all the rights and duties of citizens in a society.

⁴⁹ For instance; in Hungary since the recently adopted law in 2021, it is prohibited or limited to accessing to content of the so-called "divergence from self-identity corresponding to sex at birth, sex change or homosexuality" for individuals under 18 years old; and a disclaimer imposed on a children's book with LGBTIQ content, and in Poland, the so-called "LGBT-ideology free zones" resolutions adopted by several Polish regions and municipalities from 2019.

⁵⁰ Art. 21 TFEU provides: "1. 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; 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament; and also now and in Article 45 in the Charter: 1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. 2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State".

⁵¹ L Mancano, *Constructing the Person in EU Law: Rights, Roles, Identities* (Bloomsbury Publishing 2017) 313.

b) In the name of “best interests of child”

However, even though the proposal arose from the need to ensure the non-discrimination of LGBTIQ citizens, the focus of the Regulation Proposal is largely on ensuring the protection of the best interests of the child in cross-border situations: “The objective of the proposal is to strengthen the protection of the fundamental rights and other rights of children in cross-border situations, including their right to an identity, to non-discrimination and to a private and family life, and to succession and maintenance”.⁵²

Furthermore, the European Commission wants to portray the proposal to be in the best interests of the child. To that end, Věra Jourová, Vice-President for Values and Transparency stated “[t]his [proposal] puts some children at risk, as they would not have guaranteed access to their rights, such as succession, maintenance or decisions on schooling and education”,⁵³ along with Didier Reynders, the European Commissioner for Justice that presented the proposal, who said that “all children should have the same rights irrespective of how they were conceived or born and of their type of family”.⁵⁴ Commissioner Reynders also emphasised: “We don’t want to change the national competence about the definition of the family and the organisation of the family. We just [want] to protect the rights of the child”.⁵⁵

This is because the European Commission wanted to avoid direct conflicts with certain Member States’ governments regarding the LGBTIQ issues when proposing harmonisation of numerous national laws, which already occurred previously. In fact, when the EU tries to intervene in LGBTIQ issues regarding Member States’ competences, some Member States, Poland and Hungary in particular, are always extremely outspoken opponents in the EU project.

In 2021, when the European Commission adopted “the EU strategy on children’s rights”⁵⁶ by “putting children and their best interests at the heart of EU policies, through its internal and external actions”, for instance, neither of the two countries wanted to sign the strategy paper at the EU Council in their latest strike against the welfare of sexual minorities children only saying that “LGBTIQ-children were especially vulnerable” in the strategy, but from their interpretation by citing, “school propaganda of LGBTQ activities” as a reason.⁵⁷ These vetoes were condemned by many international organisations, by stressing that all

⁵² COM(2022) 695 final cit.

⁵³ European Commission, Press release, ‘Equality Package: Commission Proposes new Rules for the Recognition of Parenthood between Member States’, 7 December 2022, ec.europa.eu.

⁵⁴ *Ibid.*

⁵⁵ AS Alonso, ‘Brussels Wants to Strengthen Cross-Border Rights of Parents and Children’ (8 December 2022) Euronews www.euronews.com.

⁵⁶ Communication COM(2021) 142 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 24 March 2021 on EU Strategy on the rights of the child.

⁵⁷ The Hungarian minister, Judit Varga, said on Twitter that “Hungarian government remains committed to a high level of protection of children’s rights & we will never let LGBTQ activists into our schools” (7 October 2021) twitter.com (accessed on 9 January 2021).

27 EU Member States are part of the UN Convention on the Rights of the Child.⁵⁸ Eventually, the Council adopted the strategy on children on 9 June 2022, with special statements by the Hungarian and Polish delegations affirming that they would agree to the protection of children, but not to any terminologies and references of EU LGBTIQ principles.⁵⁹

When policy decisions are being made, they are characterised by competition over values and interests upon politics as the mechanism by which political priorities are set.⁶⁰ Hence, while the Commission comes to the deployment of mainstreaming of recognition of LGBTIQ issues in the face of an anti-LGBTIQ legal and social climate of conservative Member States through the proposal, it places more weight on the priority of Member States' interests within a mechanism for achieving the protection of children, in order to largely predicate acceptance and avoid meeting fierce resistance in certain Member States. The notion of the best interests of a child as "universal ethical justification" is regarded as appropriate consideration to be given to relevant social concerns pertaining to the rules of domestic politics that are concretely upheld as obligatory.

III. CONCERNS ON THE EFFICIENCY OF THE EU LEGISLATIVE MECHANISM

III.1. THE AMBIGUITY OF "EU VALUE DRIVEN POLICY"

Inheriting of "normative power" of an "ideational nature characterised by common principles",⁶¹ the EU puts an emphasis on the importance of values and norms for conducting its policy. With a substantive notion of a constitution, as was observed, the frame of "fundamental rights" are exercising common parts of common constitutional values in internalising into its policy. And these shared values have played a key role to gather the countries that "with very different economic, geographical, and cultural identities embark on

⁵⁸ Eurochild, 'Reaction to the Veto on the EU Child Rights Strategy' (8 October 2021) www.eurochild.org.

⁵⁹ Hungary's statement: "Hungary's agreement to the adoption of the Council Conclusion on the EU Strategy on the Rights of the Child and to the references made therein to various strategies of the European Commission and the Council of Europe cannot be interpreted as a general endorsement of all actions announced, terminologies used as well as references made in those strategies, especially when these actions, terminologies and references are direct connotations of the LGBTIQ Equality Strategy 2020-2025 and/or the Gender Equality Strategy 2020-2025 of the Commission"; and Poland's statement: "it is in this spirit that Poland's consent to the adoption of the Council Conclusions on the EU Strategy on the Rights of the Child should be interpreted, and its references to various strategies of the European Commission and the Council of Europe cannot be interpreted as a general endorsement of all actions announced, terminologies used as well as references made in those strategies, especially when these actions, terminologies and references directly refer to the LGBTIQ Equality Strategy 2020-2025 and/or the Gender Equality Strategy 2020-2025 of the Commission" in Conclusions 10024/22 of the Council of the European Union of 10 June 2022 on the EU Strategy on the Rights of the Child - Statements by the Hungarian and Polish delegations.

⁶⁰ J Parkhurst, *The Politics of Evidence: From Evidence-based Policy to the Good Governance of Evidence* (Routledge 2016) 72.

⁶¹ I Manners, 'Normative power Europe: a contradiction in terms?' (2002) JCMS 239.

a shared journey of ever-closer Union".⁶² Thus, within these normative and value-driven features that are "a standard of appropriate behaviour"⁶³ in its identity, the EU has in fact actively sought a European project.

While the principle of common value discourse ought to go beyond conflicting interpretations in the EU, there appears to be a division with regard to LGBTIQ issues in terms of "culture difference" between the so-called "Western" Member states promoting the universal liberal values and the "Central and Eastern" Member states, like Poland and Hungary, attempting to conserve their traditional values.⁶⁴ Likewise, the concept of "European values" seems like a nodal point when the cultural value relativism is interpreted by putting forth in "European Universalism"⁶⁵ or in "EU norm-monopoly".

The "European values", however, underpin a construction and integration of the EU in reinforcing its identity, as exemplified in the Copenhagen criteria of 1993, which set out the condition of joining of the EU on the principles of democracy, respect for human rights and fundamental freedoms, and the rule of law, as the first and fundamental background for EU. Thereby, the prerequisite step for belonging to the EU is to respect the "European values" which all Member States share.⁶⁶ Hungary and Poland joined the EU in 2004, in accepting the shared core values of the EU through these criteria. In this context, the question which immediately comes to mind is not about *what* the "European values" could be, but *how* the "European values" could be "valid that meet (or could meet) with the approval of all affected in their capacity"⁶⁷ as Member States.

Furthermore, in its implementation of the integration process with the values, the need for sanctioning and preventive mechanism against member states' violations of European values, namely human rights and democracy, was already discussed at the Inter-Governmental Conference (IGC) in 1996. At the time, there was a perception that Central and Eastern Europe, which was undergoing system transition and was preparing to join the European Union, needed relevant provisions to consolidate democracy if it joined the

⁶² S Dermot (ed.), *Europe is our Story: Towards a New Narrative for the European Union* (The Institute for International and European Affairs 2014) 8-9.

⁶³ M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (International Organization 1998) 891.

⁶⁴ By the survey of the 2019 Eurobarometer Discrimination, the attitudes towards LGBT with the Western European States generally are more accepting than the Central and Eastern European countries European Commission, 'Eurobarometer on the social acceptance of LGBTIQ people in the EU - 2019' (2019) commission.europa.eu.

⁶⁵ I Wallerstein, *European Universalism: The Rhetoric of Power* (New Press 2006).

⁶⁶ These core values are described in art. 2 TEU as a renewed commitment: "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

⁶⁷ J Habermas, *Moral Consciousness and Communicative Action* (The MIT Press 1990) 197.

EU.⁶⁸ It paved the way in establishing the procedure for the suspension of participating rights in the Amsterdam Treaty in 1999. This procedure (later envisaged in art. 7 TEU) was intended to be a key factor of a censure whereby the voting rights for Member States which are found to be in a “a serious and persistent violation” of common values may be suspended.

Facing the “illiberal behaviour” of Hungary’s Fidesz since 2010 and Poland’s Law and Justice (PiS) governments since 2015 against the EU principles, the EU’s role in protection of values has been questioned in its members’ domestic affairs. Further, it has been deemed proof of EU’s political unwillingness to decisively ensure the respect of the fundamental values in “a reluctance to challenge their actions or to impose a real political cost”.⁶⁹

The observations above could reach to the larger context of the rule of law crisis within the EU. By failing to apply art. 7 TEU the first time a violation of fundamental values occurred, art. 7 TEU was essentially stripped of its efficiency, as its application requires unanimity of all EU Member States, not counting the allegedly defaulting Member State. Therefore, the only possible option that was left to compel the defaulting Member States to stop breaching fundamental values was the infringement procedure, pursuant to art. 258 TFEU. Ultimately, once the triggering of the procedure under art. 7 TEU inevitably failed, in spite of the support by the European Parliament,⁷⁰ the Commission was left with no other choice than to use the infringement procedures.

In that vein, and in the context of the deteriorating situation concerning the rights of LGBTIQ persons, Hungary has seen its “anti-LGBT” law attacked via an infringement procedure.⁷¹ It may be expected that the same would happen should the Regulation proposal be adopted, and if a Member State refuses to apply it.

III.2. THE TFEU AS AN UNEXPECTED OBSTACLE

Due to the fact that substantive law on family matters remains a competence of Member States who legislate freely in matters of marriage and parenthood, there can be no intervention of EU law in that sense (for example in order to compel a Member State to recognize in its national legislation, the right of same-sex couples to marry)⁷².

⁶⁸ W Sadurski, ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider’ (2010) ColumJEurL 390.

⁶⁹ G Búrca, ‘Poland and Hungary’s EU Membership: On Not Confronting Authoritarian Governments’ (2022) ICON 22.

⁷⁰ European Parliament resolution of 1 March 2018 on the Commission’s decision to activate Article 7(1) as regards the situation in Poland (2018/2541(RSP)).

⁷¹ RFI, ‘EU Commission Takes Hungary to Court in Effort to Overturn LGBTQ Law’ (15 July 2022) www.rfi.fr.

⁷² Although the ECtHR has shown a much bolder approach, by inviting States parties to the ECHR to recognize and give legal effects, in one way or another, to same-sex partnerships. To that end, see ECtHR *Oliari and Others v Italy* App n. 18766/11 and 36030/11.

However, aside from purely internal situations, where EU law in principle does not apply,⁷³ the question of family relations in cross-border situations is indeed a matter where the EU law will inherently apply. The TFEU provides for the possibility of adopting measures at the EU level concerning family law with cross-border implications. Namely, art. 81(3) TFEU opens the possibility for such measures to be adopted according to a special legislative procedure. In that regard, when the relevant treaty stipulation refers to the special legislative procedure, that means that the measures concerned shall be adopted unanimously by the Council, and that the role of the European Parliament shall be purely consultative.

This stands in stark contrast when art. 81 TFEU is analysed in relation to the entire TFEU system. An important thing to remember is that this article is an introduction to Chapter 3 of the TFEU, dealing with judicial cooperation in civil matters. Further, its paras 1 and 2 provide that the adoption of relevant acts in many areas of life⁷⁴ will be done in accordance with ordinary legislative procedure, that is, with the participation of the European Parliament on an equal footing with the Council, and with the Council deciding by qualified majority voting (QMV). Given this significant constraint, and particularly paying special attention to the contentious discourse surrounding the issues of strengthening the rights of LGBTIQ citizens, it does not appear likely that this legislative proposal will be adopted anytime soon. The Treaty enables a bypass option that could, at least in theory, circumvent the necessity to ensure the Council's unanimity. The Council may decide to refer the specific legislative initiative to the ordinary legislative procedure, but such a decision must, again, be taken by the Council unanimously. Therefore, given the previous observations, to hope for such a development would be idealistic at best, and at worst, delusional.

This obstacle is caused by the functioning of the institutional mechanisms in the EU. In an effort to ensure institutional equilibrium, specifically the one between the intergovernmental component of the EU decision making process (Council) and a supranational one (Parliament), it is the citizen of the Union that suffers the most because of the inefficiency that results from a flawed legislative mechanism. What's worse, in this particular matter, there is no equilibrium between two decision-making bodies, as the role of the Parliament⁷⁵ is reduced to purely consultative, and the intergovernmental body hijacks a

⁷³ As per the longstanding CJEC jurisprudence such as case C-268/15 *Ullens de Schooten* ECLI:EU:C:2016:874; see also A Arena, 'The Wall Around EU Fundamental Freedoms: The Purely Internal Rule at the Forty-Year Mark' (2019) *Yearbook of European Law* 153.

⁷⁴ To name a few, the cross-border service of judicial and extrajudicial documents, the effective access to justice, the cooperation in the taking of evidence, and, importantly, the elimination of obstacles to the proper functioning of civil proceedings.

⁷⁵ Arguably the most pro-rainbow families institution, demonstrating a proactive approach via numerous paths, such as Resolution (2021/2679(RSP)) of the European Parliament of 14 September 2021 on LGBTIQ rights in the EU.

sensitive real-life issue for the purposes of domestic political goals.⁷⁶ It is a clear demonstration that, indeed, progressive and sound legislative proposals are often blocked at the Council level due to that power dynamic.

This shows us that despite the praised “multi-level governance” of the EU,⁷⁷ in this particular context, the TFEU will, awkwardly enough, present an obstacle to the reinforcement of the protection of fundamental rights of citizens.

III.3. THE REGULATION PROPOSAL AT AN IMPASSE: WHICH ALTERNATIVES?

Amidst the emerging political problem regarding the adoption of the Commission’s proposal, reflected in potential blocking of the Regulation Proposal by certain Member States, the need arises to find an alternative way to guarantee the degree of rights in a substantive sense that the regulation proposal aims to provide. Other than an unlikely event of amending the TFEU to the extent where it would no longer require unanimity of the Council, an alternative way to push the proposal towards the ordinary legislative procedure provided for by the TFEU, and deemed inefficient (see section III.2), the most feasible way of ensuring this objective relies on the jurisprudence of the CJEU.

In a way, the authoritative and binding properties of the CJEU rulings have already been relied upon, specifically to that end⁷⁸ within the framework of the reference for preliminary ruling. However, even if the CJEU has voiced its support towards the parental right in rainbow families, and particularly in cases when members of such families have exercised their freedom of movement under EU law, the reference for preliminary ruling can only do so much. That legal remedy greatly depends on the activities of the national (referring) courts, ever since they have been made primary courts of EU law.⁷⁹ Further, it would take years, or perhaps even decades for the CJEU case law to cover all the areas in the regulation proposal extensively enough. Each question would have to come up independently within a separate reference for preliminary ruling and would inevitably have to pass through instances of internal law of the concerned Member State (administrative, judicial). Only then could it be deliberated on by the CJEU, thereby defeating one of the objectives of the regulation proposal, which is to reduce costs and time for families that currently encounter that sort of problem.

⁷⁶ Polish Deputy justice minister, Sebastian Kaleta, confirmed that Poland would veto the European Commission’s plans to guarantee the cross-border recognition of parenthood to Polish broadcaster TVP, ‘Poland to Veto EU Recognition of Same-Sex Parents says Justice Ministry’ (9 December 2022) notesfrompoland.com; further, it is also to be expected that Hungary will block the adoption of this regulation, and that it will also block any attempt to switch to ordinary legislative procedure. O Bonnell, ‘In Italy, the Meloni Government Attacks Same-Sex Parenthood’ (23 March 2023) [Le Monde www.lemonde.fr](https://www.lemonde.fr).

⁷⁷ A Moravcsik, ‘Europe Without Illusions’ (2005) *Prospect* 25.

⁷⁸ *V.M.A.* cit.

⁷⁹ R Lecourt, *L’Europe des juges* (Bruylant 2008) 8.

Sound opinions are also voiced regarding the impetus coming from other EU institutions (such as the European Commission), where it is argued that this institution could (or even should) take action under the art. 258 TFEU against the defaulting Member States.⁸⁰ In this case, as Tryfonidou rightly argues,⁸¹ the failure to recognize the family relations of rainbow families, may even amount to an infringement of relevant provisions of EU law, such as the right to private and family life, protected under art. 7 of the EU Charter, the prohibition of discrimination on the ground of sexual orientation, already protected by the CJEU case law in the *Coleman* case⁸² and art. 21 of the Charter. But even so, the difficulty remains in the fact that in order to reach the same level of standards, as envisaged by the regulation proposal, the European Commission would have to engage in a “witch hunt” against non-complying Member States, which would, in turn, widen the rift between Brussels and eastern EU Member States, and potentially create a political crisis which would further undermine the existing rule of law crisis and the supremacy of EU law.⁸³ Therefore, realistically speaking, while there are legal avenues towards forcing the adoption of the relevant provisions through the CJEU case law, albeit not in the initially desired form, they are far from ideal and bear significant risk of adverse consequences.

The solution which would cause the least amount of tensions between the governments of Member States, appears to be the use of enhanced cooperation, among a restricted group of Member States. This option has been already widely used in international family law,⁸⁴ and would imply the using of the procedure provided by art. 20 TEU and Title III TFEU. In order to examine whether the use of enhanced cooperation would be possible in this field, this option must be checked against a number of requirements of the relevant procedure. Namely, the area in which a group of Member States wish to engage in an enhanced cooperation must not be one in which the EU has exclusive competence. This criterion appears to be satisfied, having in mind that the regulation of family relations does not fall in the scope of EU exclusive competences. Next, the criterion stating that the activity has to further the objectives of the EU appears satisfied as well, given the objective of the Commission Proposal at hand, which is to ensure equal treatment of all citizens in matters of parenthood. Finally, art. 20(2) TEU provides a condition that a

⁸⁰ A Tryfonidou, ‘EU Free Movement Law and the Children of Rainbow Families’ cit. 265.

⁸¹ *Ibid.*

⁸² Case C-303/06 *Coleman* ECLI:EU:C:2008:415.

⁸³ Polish Constitutional Court judgment of 7 October 2021 Ref. No. K 3/21, Assessment of the conformity of the Polish Constitution of selected provisions on the Treaty on European Union. It is worth noting that the legal effect of this judgement is considered compromised, which stems from the compromised legitimacy of persons claiming to currently occupy the positions of judges of the Polish Constitutional Court.

⁸⁴ Examples include, but are not limited to, the Regulation (EU)2016/1103 of the Council 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; Regulation (EU)2016/1104 of the Council 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.

minimum of nine Member States must participate in the enhanced cooperation in order for it to be instituted.

This does not mean that the Council unanimity requirement has been circumvented, as the decision to authorise enhanced cooperation must be taken by the Council unanimously. However, the fact that the “acts adopted in the framework of enhanced cooperation shall bind only the participating Member States [and] shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union”⁸⁵ indicates that, with enough smart political manoeuvring, the authorisation of the Council for may indeed be achieved more easily than for the adoption of the Regulation Proposal, which makes the enhanced cooperation the most effective mechanism for the adoption of such legislation.

IV. CONCLUSION

The Regulation Proposal aims to provide clear rules on jurisdiction and applicable law for cross-border parenthood cases. This would benefit EU citizens by increasing legal certainty in such matters, even beyond the freedom of movement.

The approach respects the delicate balance between the EU regulatory competence and the exclusive competences of Member States. Additionally, the creation of a European Parenthood Certificate represents an elegant solution for a practical administrative problem of a lack of a unique document to prove parenthood. Making it optional offers additional flexibility for citizens.

However, the main concern is that the Regulation Proposal will not follow the ordinary legislative procedure, which could lead to it being vetoed by one or more Member States. As already mentioned, the special legislative procedure in this case requires unanimity at the Council, which is practically impossible to achieve on an issue as controversial as the parenthood rights of same-sex couples.

It is clear that the ongoing discussions about the Regulation Proposal will address challenges posed by illiberal governments or parties that conflict with the fundamental values of the EU on LGBTIQ rights. Given that Member States' adherence to the founding values of the EU cannot be taken for granted, it is important to prioritise the integration of the principles of the EU into mainstream political discourse and discussions on integrated political standards. This includes a deeper exploration of the legal and normative frameworks that support these values. What's more, the solution identified as the most effective one – the establishment of enhanced cooperation on the matter, appears to only be a band-aid on a bullet wound. Indeed, anything short of a fully-fledged EU Regulation in this matter, with full direct applicability and direct effect, would mean failure to accomplish the key ob-

⁸⁵ Art. 20(4) TEU.

jective of the Regulation Proposal, which is to “strengthen the protection of the fundamental rights and other rights of children in cross-border situations including their right to an identity, to non-discrimination and to a private and family life, and to succession and maintenance”,⁸⁶ as the enhanced cooperation in the matter would, by definition, have limited territorial effect, and would impede the exercise of fundamental rights of concerned individuals in non-participating Member States. This situation is the symptom of a systemic deficiency in the EU decision-making dynamics as established by the Lisbon Treaty, which puts the important field of family law outside of the ordinary legislative procedure. Whatever the purpose of this measure was supposed to be, one can hardly defend the argument that it should be a tool to deny fundamental rights of EU citizens, particularly having in mind the founding value of respect for human rights, enshrined in art. 2 TEU. The core values of the EU should not be sacrificed as mere normative ideals of the European project’s ontology and teleology to protect so-called material strategic interest. These values must take place in material action itself to protect EU citizens.

⁸⁶ COM(2022) 695 final cit.