

EU REGULATION NO. 2016/1191 AND THE CIRCULATION OF PUBLIC DOCUMENTS BETWEEN EU MEMBER STATES AND THIRD COUNTRIES

IL REGOLAMENTO (UE) N. 2016/1191 E LA CIRCOLAZIONE DEI DOCUMENTI PUBBLICI TRA STATI MEMBRI E PAESI TERZI

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Abstract: The recent EU Regulation No. 2016/1191 has introduced common rules only for the intra-European circulation of public documents. Nevertheless, it could raise some concerns regarding the circulation of public documents between EU Member States and third countries. Specifically, the European Union's adoption of common rules on public documents when combined with the CJEU's case law on the European Union's exclusive external competence could call into question the EU Member States' power to conclude or maintain international agreements with third countries on this topic. This paper will outline these concerns and suggest that this regulation should not preclude EU Member States from concluding or maintaining international agreements with third countries on the circulation of public documents.

Keywords: public documents, civil status documents, legalisation, *apostille*, EU exclusive external competence.

Riassunto: Il recente regolamento (UE) n. 2016/1191 ha introdotto regole comuni in materia di circolazione dei documenti pubblici, limitando la sua applicazione alla circolazione tra gli Stati membri dell'Unione europea. La sua adozione, tuttavia, potrebbe sollevare alcuni problemi con riguardo alla circolazione di documenti pubblici tra questi e gli Stati terzi. Nello specifico, l'introduzione di tali regole comuni potrebbe pregiudicare il potere degli Stati membri di negoziare, concludere, modificare e aderire ad accordi internazionali con Paesi terzi (nonché accettare l'adesione di nuove parti contraenti), in considerazione dell'interpretazione della Corte di giustizia sulla competenza esterna esclusiva dell'Unione europea. Il presente contributo, pertanto, analizzerà tali aspetti, suggerendo, quale possibile soluzione, che l'interpretazione del nuovo regolamento sia orientata a confermare il potere degli Stati membri di negoziare, concludere, modificare, aderire a qualsiasi convenzione internazionale con Paesi terzi (e accettare l'adesione di nuove parti contraenti) in materia di circolazione dei documenti pubblici.

Parole chiave: documenti pubblici, atti di stato civile, legalizzazione, apostilla, competenza esterna esclusiva dell'Unione europea.

Summary: I. Introduction. II. EU Regulation No. 2016/1191: Article 19(4) and the EU Member States' power to regulate the circulation of public documents with third countries. III. EU exclusive competence to sign international agreements and CJEU Opinion 1/13. IV. The adoption of common rules on public documents, and the Member States' power to regulate the circulation of public documents with third countries. 1. The purpose and *raison d'être* of Article 19(4) of EU Regulation No. 2016/1191. 2. The potential threat to common rules and the interplay between Article 19(4) of the Regulation (EU) No. 2016/1191 and the relevant provisions of the EU Treaties. V. Final remarks.

I. Introduction

1. The EU Institutions have recently adopted EU Regulation No. 2016/1191 on “promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012”¹. The regulation is aimed at facilitating the circulation of public documents, “les parents pauvres du droit international privé”², between different States, a practice which is crucial for facilitating the international movement of persons³.

2. To reach this goal, the regulation removes some administrative formalities and simplifies others⁴, but it ultimately fails to address issues concerning the destination country’s full recognition of the legal status certified by the nation of origin’s authorities in these public documents⁵. Therefore, although the regulation will simplify the movement of EU citizens within the EU, it will not have a significant impact on the main issues tied to the transnational circulation of citizens arising at the recognition stage. It also fails to address the significant problems regarding the movement of business entities across EU borders⁶.

3. Nevertheless, while it is a minimal reform, it could still arouse some concerns regarding the current framework governing the international circulation of public documents. To be precise, this regulation is likely to raise some questions regarding its scope. Indeed, pursuant to Article 2, the regulation’s scope is expressly limited to EU public documents. Moreover, Article 19(4) expressly affirms the Member States’ power to set up or maintain international relations with third countries in this legal domain. The adoption of common rules on public documents may affect EU Member States’ power to regulate the circulation of these documents when they originate from third countries, however. This may be the case especially if the regulation is read together with Article 3(2) of the TFEU, Article 216(1) of the TFEU, and the CJEU jurisprudence on the EU’s exclusive external competence, particularly the recent CJEU Opinion 1/13⁷. In light of this potential reading, it is worth examining whether, after this recent

¹ Regulation (EU) No 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, *OJL* 200 of 26 de July 2016, p. 1 ff.

² CH. PAMBOUKIS, “Les actes publics et la méthode de la reconnaissance”, in P. LAGARDE, *La reconnaissance des situations en droit international privé, Actes du colloque international de La Haye du 18 Janvier 2013*, Paris, Pedone, 2013, pp. 133-46, at p. 133.

³ In this regard see P. LAGARDE, “Préface”, in P. PAMBOUKIS, *L’acte public étranger en droit international privé*, Paris, Bibliothèque de droit privé, L.G.D.J., t. 219, 1993, XVII.

⁴ The administrative formalities are, for instance, legalisation and the *apostille*, required to establish the authenticity of public documents so that they can be used outside the Member State where they have been issued. They concern in particular the authenticity of signatures and the capacity in which the person signing the document has acted. Other formalities which serve a similar purpose in cross-border situations are certification requirements for copies and translations.

⁵ As is well known, these concerns have been addressed by legal scholars and are at the very core of the “method of recognition”, which is being raised as a significant subject of debate. On this topic see, for instance, P. LAGARDE, “Introduction au thème de la reconnaissance des situations: rappel des points les plus discutés”, in P. LAGARDE, *La reconnaissance des situations en droit international privé, Actes du colloque international de La Haye du 18 Janvier 2013, supra*, n 2, pp. 19-25; P. LAGARDE, “La reconnaissance mode d’emploi”, in *Vers de nouveaux équilibres entre ordres juridiques. Liber amicorum Hélène Gaudemet-Tallon*, Paris, Dalloz, 2008, pp. 481-501; P. MAYER, “Les méthodes de la reconnaissance en droit international privé”, in *Le droit international privé: esprit et méthodes: Mélanges en l’honneur de Paul Lagarde*, Paris, Dalloz, 2005, pp. 547-73; H. MUIR WATT, “La reconnaissance entre philosophie politique et droit international privé”, in E. TOURME JOUANNET, H. MUIR WATT O. DE FROUVILLE, J. MATRINGE, *Droit international et reconnaissance*, Paris, Pedone, 2016, pp. 281-91. Criticism against the method of recognition has been made by E. JAYME, C. KOHLER, “Europaisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?”, *Praxis des internationalen Privat- und Verfahrensrechts* 21, issue 6, 2001, pp. 501-14, at p. 502; C. CAMPIGLIO, “Corsi e ricorsi nel diritto internazionale privato: dagli statutori ai giorni nostri”, (2013) *Rivista di diritto internazionale privato e processuale*, pp. 593-617, at pp. 607-8.

⁶ Differently, the Green Paper (*infra*, fn 8), presented by the EU Commission in 2010, and the original Proposal for an EU Regulation on public documents (*infra*, fn 9), presented by the EU Commission in 2013, dealt with the movement of businesses between EU Member States. On this topic, see *infra* section 3.

⁷ Opinion 1/13, *Opinion pursuant to Article 218(11) TFEU — Convention on the civil aspects of international child abduction*, ECLI:EU:C:2014:2303. For a critical analysis of the Opinion, see P. BEAUMONT, “A critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13”, Working Paper No. 2015/1, available at <http://www.abdn.ac.uk/law/research/working-papers-455.php>; and I. GOVAERE, “Setting the international scene”: EU external competence

EU regulation, EU Member States still retain their power to enter into or maintain any international agreements on the circulation of public documents with third countries.

4. After briefly summarising the background and the content of EU Regulation No. 2016/1191, particularly focusing on its Article 19(4), and the current framework governing the EU Member States' power to regulate the circulation of public documents coming from third countries (Section 2), this paper analyses the relevant CJEU jurisprudence (in particular its Opinion 1/13) in order to explain why this question may arise (Section 3). In Section 4, the paper outlines the *raison d'être* of Article 19(4) and its potential relationship with the relevant provisions of the TFEU; and finally, in Section 5, it suggests that this regulation should not preclude EU Member States from concluding or maintaining international agreements with third countries on the matter at hand.

II. EU Regulation No. 2016/1191: Article 19(4) and the EU Member States' power to regulate the circulation of public documents with third countries

5. Regulation (EU) No. 2016/1191 was adopted after long negotiations which started in 2010, when the EU Commission released the Green Paper on "Less bureaucracy for citizens: promoting the free movement of public documents and recognition of the effects of civil status records"⁸ (hereinafter: "the 2010 Green Paper"). The negotiations continued with the EU Commission's presentation of a Proposal for an EU Regulation in 2013⁹, which led to the adoption of EU Regulation No. 2016/1191 three years later; it was published on 26 July 2016. The regulation was adopted on the basis of Article 21 of the TFEU, and is thus not formally founded upon the proper legal basis for EU private international law. Nevertheless, it undoubtedly contributes to this area of law.

6. Like the proposal, the adopted regulation constitutes a minimal reform, less extensive than that of the 2010 Green Paper, partly since it does not address problems related to the movement of businesses across EU borders and primarily because it avoids the issue of continuity of civil legal status across the Member States within the EU¹⁰.

7. But, as already mentioned in Section 1, in addition to the issue of recognition, there is also another issue which emerges when the very first version of the proposal is compared with the text of the adopted regulation. While the proposal did not deal with the power of EU Member States to regulate the circulation of public documents with third countries, the regulation includes a specific provision on that topic. Indeed, Article 19(4) of EU Regulation No. 2016/1191, echoing point 48 of the preamble to the regulation¹¹, states that "[t]his Regulation shall not preclude Member States from negotiating, conclud-

and the procedures post-Lisbon revisited in the light of CJEU Opinion 1/13", (2015) *Common Market Law Review* 52, pp. 1277-1308.

⁸ See the Green Paper "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records", Brussels, 15 December 2010, COM(2010) 747 final.

⁹ See the Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012, COM/2013/0228 final, available at <http://eur-lex.europa.eu>. On the 2013 proposal see P. LAGARDE, "The Movement of Civil Status Records in Europe, and the European Commission's Proposal of 24 April 2013", *Yearbook of Private International Law*, vol. XV, 2013/2014, pp. 1-12; C. KOHLER, "Towards the Recognition of Civil Status in the European Union", *Yearbook of Private International Law*, vol. 15, 2013/2014, pp. 13-29; S. MARINO, "Cooperazione amministrativa e circolazione delle persone: verso il riconoscimento automatico degli atti di stato civile?", *Rivista di diritto internazionale*, 2013, pp. 964-70, at p. 969; C. A. MONZONIS, "New Developments in the Scope of the Circulation of Public Documents in the European Union", *Zeitschrift für Zivilprozess international: Jahrbuch des internationalen Zivilprozessrechts*, vol. 18, 2013, pp. 245-81.

¹⁰ It is worth noting that the final version of the regulation only deals with formalities related to EU citizens, avoiding formalities related to businesses. Specifically, the regulation only exempts a limited number of public documents from legalisation and similar formalities and only for this limited range of public documents does it establish Union multilingual standard forms, after the model of EU Regulation No. 650/2012.

¹¹ Point 48 of the Preamble affirms that "this Regulation should not preclude Member States from concluding bilateral

ing, acceding to, amending or applying international agreements and arrangements with third countries concerning legalisation or similar formality in respect of public documents concerning matters covered by this Regulation, and issued by the authorities of Member States or third countries in order to be used in relations between the Member States and the third countries concerned”. It also affirms that “[t]his Regulation shall not preclude Member States from deciding on the acceptance of the accession of new contracting parties to such agreements and arrangements to which one or more Member States is or may decide to become party”.

8. The recent EU Regulation on this topic, therefore, is supposed to address no more than the intra-European movement of documents and should not affect international conventions pertaining to matters between an EU Member State and a non-EU-Member State. According to the regulation’s express provisions, such matters should remain within the domain of each EU Member State, which should retain the power to regulate the circulation of public documents with non-EU countries through bilateral or multilateral treaties.

9. With regard to the latter, attempts to abolish formalities have been carried out within some international organisations. Specifically, these attempts have led to the adoption of several conventions. Among these, the most important is the Hague Convention of 5 October 1961 “Abolishing the Requirement of Legalisation for Foreign Public Documents” (hereinafter: “the 1961 Hague Convention”)¹², which (true to its name) abolishes the requirement of legalisation for foreign public documents and replaces it with the apostille. The Council of Europe has also adopted a convention on legalisation, the similarly titled European Convention of 7 June 1968 on the “Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers” (hereinafter: “the 1968 Council of Europe Convention”)¹³. Moreover, the 1973 Unidroit Convention providing a Uniform Law on the Form of an International Will (hereinafter: the “Unidroit Convention”) exempts international wills from “any legalization or like formality”¹⁴. The International Commission on Civil Status (hereinafter: “ICCS”) has also promoted conventions aimed at reducing administrative formalities concerning public documents. The ICCS conventions specifically concerning public documents and their administrative formalities are: ICCS Convention No. 2 of 26 September 1957 on the Issue Free of Charge and the Exemption from Legalisation of Copies of Civil-Status Records (hereinafter: “the 1957 ICCS Convention”); ICCS Convention No. 16 of 8 September 1976 on the Issue of Multilingual Extracts from Civil Status Records (hereinafter: “the 1976 ICCS Convention”); ICCS Convention No. 17 of 15 September 1977 on the Exemption from Legalisation of Certain Records and Documents (hereinafter: “the 1977 ICCS Convention”); ICCS Convention No. 24 of 5 September 1990 on the Recognition and Updating of Civil Status Booklets (hereinafter: “the 1990 ICCS Convention”); and the ICCS Convention No. 34 of 14 March 2014 on the Issue of Multilingual and Coded Extracts from Civil-Status Records and Multilingual and Coded Civil-Status Certificates (hereinafter: “the 2014 ICCS Convention”)¹⁵.

10. Today, all EU Member States are parties to the 1961 Hague Convention. Some of them are not parties to the 1968 Council of Europe Convention, however, and many are still not parties to either

or multilateral international agreements with third countries concerning legalisation or similar formality in respect of public documents relating to matters covered by this Regulation and issued by the authorities of Member States or of third countries for use in relations between the Member States and the third countries concerned. Member States should also not be precluded, to the extent that one or more Member States are or may decide to become party to such agreements and arrangements, from deciding on the acceptance of the accession of new contracting parties, in particular as regards the right to raise and notify objections to new accessions as referred to in the second paragraph of Article 12 of the Apostille Convention, or from applying, amending or deciding on accessions of new contracting parties to, the European Convention of 1968 on the Abolition of Legalisation of documents executed by Diplomatic Agents or Consular Officers”.

¹² The text of the Convention is available at <https://www.hcch.net>.

¹³ The text of the Convention is available at www.coe.int.

¹⁴ See Art. VI of the 1973 Unidroit Convention providing a Uniform Law on the Form of an International Will. The text of the Convention is available at <http://www.unidroit.org>.

¹⁵ The texts of the ICCS Conventions are available at http://www.ciec1.org/WD210AWP/WD210Awp.exe/CONNECT/SiteCIEC?_WWREFERER_=http%3A%2F%2Fwww.ciec1.org%2F&_WWNATION_=5.

the Unidroit Convention or the aforementioned ICCS conventions. Furthermore, numerous non-EU countries are not yet parties to any of these conventions.

11. Therefore, while this Regulation facilitates the intra-European circulation of public documents, efforts have still to be carried out to promote – through international conventions – the circulation of these documents between EU Member States and third countries.

12. At this point, however, there is a question as to whether EU Member States maintain some leeway to enter into bilateral or multilateral agreements with third countries or to accept third countries' potential adhesion to already established conventions, such as the 1961 Hague Convention, without violating their TFEU obligations. Indeed, although the provision contained in Article 19(4) of EU Regulation No. 2016/1191 seems clear in this respect, the question arises in light of Article 216(1) and Article 3(2) of the TFEU, read in combination with the activist CJEU jurisprudence on the EU's external exclusive competence, particularly the recent CJEU Opinion 1/13.

III. EU exclusive competence to sign international agreements and CJEU Opinion 1/13

13. After the Lisbon Treaty, the EU's competence to conclude international agreements is governed by the new provision enshrined in Article 216(1) of the TFEU, which states that “[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope”.

14. However, as has been pointed out, the CJEU has only mentioned this provision “dismissively”¹⁶ in its post-Lisbon case law. It did so in the Broadcasting case¹⁷, and particularly in its Opinion 1/13, dealing with private international law matters. This opinion focused specifically on the competence of the EU to accept the accession of a third country to the 1980 Hague Convention on the Civil Aspects of International Child Abduction¹⁸.

It has been affirmed that in Opinion 1/13 the CJEU “declines to start with Article 216 [of the] TFEU in determining whether the EU has competence to accept the accession of third States [...] [I]t sets out the competence of the EU from its own case law”¹⁹.

Indeed, in this opinion, the CJEU has evidently departed from the provisions of the Treaty that assess the external competence of the EU.

This departure clearly emerges at paragraph 67 of the opinion. Here the CJEU relied first of all on its jurisprudence established in the ERTA case²⁰ regarding the European Agreement on Road Transport, where the CJEU held that, in the absence of an external legal basis, Member States may no longer act externally if their external action “would affect common rules or alter their scope”. But then the CJEU cited its later case law, where it broadly interpreted the ERTA test. Specifically, CJEU Opinion

¹⁶ P. BEAUMONT, *supra* n. 7, p. 7.

¹⁷ Case C-114/12, *European Commission v Council of the European Union*, ECLI identifier: ECLI:EU:C:2014:2151, not published in ECR.

¹⁸ As is well known, Opinion 1/13 considered the 1980 Hague Convention on the Civil Aspects of International Child Abduction in relation to Regulation (EC) No. 2201/2003, which was adopted on the basis of Article 81 of the TFEU, the proper legal basis of EU private international law. EU Regulation No. 2016/1191, by contrast, was adopted mainly on the basis of Article 21 of the TFEU. However, this article will also consider Opinion 1/13, as the aforementioned regulation deals with an issue directly connected with EU judicial cooperation in civil matters and completes such cooperation. Therefore, it seems reasonable to discuss Opinion 1/13 here to examine possible developments in the EU's external exclusive competence in private international law matters.

¹⁹ P. BEAUMONT, *supra* fn 7, p. 7.

²⁰ Case 22/70, *Commission of the European Communities v Council of the European Communities* [1971] ECR 263.

1/13 directly references Opinion 1/03 on the Lugano Convention²¹ and also indirectly refers to Opinion 1/76 on a Draft Agreement establishing a European laying-up fund for inland waterway vessels²² and Opinion 2/91 on the ILO²³. Pursuant to this case law, the EU's internal competence to legislate is the only subject that must be considered when assessing the EU's external competence; any actual risk to adopted common rules is not treated as a relevant concern.

15. Thus, according to CJEU Opinion 1/13, the ERTA test as later broadly interpreted was the first legal basis on which to assess the EU's external competence.

16. On that basis, the CJEU stated that “[t]he competence of the EU to conclude international agreements may arise not only from an express conferment by the Treaties but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect”²⁴.

Only later did the CJEU affirm that “[t]he last-mentioned possibility is also referred to in Article 216(1) [of the] TFEU”²⁵. However, this article, which was only mentioned in passing (and as a last point) by the CJEU, actually states something different. It codifies the original ERTA test. By contrast, the CJEU refers, without giving any reasons for doing so, to its later broad interpretation of the ERTA test, which the 2009 Lisbon reform did not codify in the Treaty.

17. The CJEU's reasoning has been criticised by legal scholars, who, with specific regard to Opinion 1/13, have pointed out that “[t]he impression is that the Court thinks the EU has external competence whenever a matter falls within an area over which the EU has internal competence to legislate”²⁶.

18. Criticism also arises regarding the CJEU's assessment on the nature of the EU's external competence, as stated in Article 3(2) of the TFEU, which affirms that “[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”.

Furthermore, when assessing the exclusive nature of EU competence, the CJEU referred back to its own case law prior to the Lisbon reform, without “mak[ing] any attempt to justify why the Court's old case law on this topic is still relevant to interpreting the words of the Treaty”²⁷.

19. Once again, the CJEU based its reasoning on the ERTA test as it was broadly interpreted in its later, but still pre-Lisbon, case law.

20. Indeed, to further support its assessment of the nature of the EU's competence, the CJEU recalled its aforementioned Opinion 2/91, pointing out that the external and internal measures do not necessarily need to coincide fully, since it is sufficient that there be merely “an area already covered to a

²¹ Opinion 1/03, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145. On this Opinion see F. Pocar (ed.), *The External Competence of the European Union and Private International Law. The Court's Advisory Opinion on the Lugano Convention*, Padova, CEDAM, 2007.

²² Opinion 1/76, *Opinion given pursuant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels'* [1977] ECR 741.

²³ Opinion 2/91, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-1061.

²⁴ Opinion 1/13, *supra* fn 7, para 67.

²⁵ *Ibid.*

²⁶ P. BEAUMONT, *supra* fn 7, p. 7.

²⁷ P. BEAUMONT, *supra* fn 7, p. 9.

large extent by EU measures”, as was confirmed in its Opinion 1/94, regarding the WTO Agreement and its annexes²⁸. In addition, the CJEU recalled its aforementioned Opinion 1/03, where it further affirmed that its interpretation would take into consideration not only already adopted EU internal measures, but also “foreseeable future developments”. These interpretations, broader than the original ERTA test, were later confirmed in the Open Skies cases²⁹.

However, as already mentioned, the 2009 Lisbon Treaty codified the original ERTA test³⁰, while it did not codify its later broader interpretation.

Despite this, when assessing the extent of EU competence, the CJEU relied on its pre-Lisbon case law and these more relaxed interpretations³¹, without clarifying the reasons for such a choice.

21. Hence, although CJEU judicial activism is well known and criticised³², Opinion 1/13 goes a step further in allowing the EU to take over the power of individual Member States to conclude or maintain agreements with third countries. As legal scholars have noted, the CJEU with the “dogmatic”³³ assertions enshrined in Opinion 1/13 “unequivocally accepts that the EU may replace the Member State in setting the international scene”³⁴. And the CJEU’s interpretation could pave the way for also superseding the EU Member States’ power to regulate private international law matters involving third countries³⁵.

22. In the following section, we will examine whether, after the EU’s adoption of common rules on public documents, this could be the fate of the EU Member States’ power in regulating the extra-European circulation of foreign public documents as well.

IV. The adoption of common rules on public documents, and the Member States’ power to regulate the circulation of public documents with third countries

1. The purpose and raison d’être of Article 19(4) of EU Regulation No. 2016/1191

23. Article 19(4) of EU Regulation No. 2016/1191 expressly provides for the power of Member States to regulate regarding public documents coming from third countries. As affirmed by legal scholars, “[t]his provision, which only surfaced in the negotiations after the Court of Justice issued Opinion 1/13, may in fact be regarded as a sort of reaction to the principle stated therein”³⁶.

24. Indeed, the ratio legis of the regulation clearly goes in this direction. Such a ratio is evident if one looks at the stages that led to the regulation’s adoption. The original proposal presented in 2013 made no mention of the relations between EU Member States and third countries. The provision

²⁸ Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty* [1994] ECR I-5267.

²⁹ Case C-466/98, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [2002] ECR I-9427; Case C-467/98, *Commission of the European Communities v Kingdom of Denmark* [2002] ECR I-9519; Case C-468/98, *Commission of the European Communities v Kingdom of Sweden* [2002] ECR I-9575; Case C-469/98, *Commission of the European Communities v République de Finlande* [2002] ECR I-9627; Case C-471/98, *Commission of the European Communities v Kingdom of Belgium* [2002] ECR I-9681; Case C-472/98, *Commission of the European Communities v Grand Duchy of Luxemburg* [2002] ECR I-9741; Case C-475/98, *Commission of the European Communities v Republic of Austria* [2002] ECR I-9797; Case C-476/98, *Commission of the European Communities v Federal Republic of Germany* [2002] ECR I-9855.

³⁰ I. GOVAERE, *supra* fn 7, p. 1278.

³¹ *Ibid*, p. 1279.

³² See, among others, H. RASMUSSEN, *European Court of Justice*, Copenhagen, Gad Jura, 1998; S. WEATHERILL and P. BEAUMONT, *EU Law*, London, Penguin, 1999, pp. 193-201.

³³ P. BEAUMONT, *supra* fn 7, p. 14.

³⁴ I. GOVAERE, *supra* fn 7, p. 1306.

³⁵ In this sense, see P. FRANZINA, *CJEU to Issue a New Opinion on the External Competence of the EU*, available at <http://conflictflaws.net/>.

³⁶ P. FRANZINA, *Preface*, in P. FRANZINA (Ed.), *The External Dimension of EU Private International Law after Opinion 1/13*, Cambridge, Intersentia Ltd, 2017, p. iv.

enshrined in Article 19(4) was introduced only after Opinion 1/13 was adopted. This is no accident; it must be seen as clear evidence that the EU legislature was well aware of the specific rule that it was introducing.

25. The provision reflects the wish of EU Member States to maintain their external competence in private international law issues and in matters closely connected to these issues. This also clearly emerged in the proceedings leading to CJEU Opinion 1/13, where only Italy supported recognising the EU's competence in this area, while France, Greece, and Poland argued that the EU had no external competence and Austria, Belgium, Cyprus, the Czech Republic, Estonia, Finland, Germany, Ireland, Latvia, Lithuania, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom argued that the EU did not have exclusive external competence. Member States' reluctance to abandon their power to initiate or maintain international relations with third countries has recently become evident with regard to another private international law matter. Specifically, such reluctance emerged from the statements made by Germany³⁷ and the United Kingdom³⁸ in relation to the EU Council decision which authorised Austria and Malta to become parties to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters³⁹. In the same way, it can be understood that each EU Member State acts separately from the others with regard to the accession of third countries to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters⁴⁰, as seen in Member States' actions related to this Convention⁴¹. It is worth noting that neither Regulation (EC) No. 1393/2007 on service of documents⁴² nor Regulation (EC) No. 1206/2001 on evidence in civil and commercial matters⁴³ provides for a specific rule on the retention of EU Member States' power in this area. Nevertheless, Member States still act separately in these fields, thus clearly showing their intention to continue pursuing their own policies in the field of private international law in their relations with third countries⁴⁴.

2. The potential threat to common rules and the interplay between Article 19(4) of the Regulation (EU) No. 2016/1191 and the relevant provisions of the EU Treaties

26. Notwithstanding the express provision enshrined in Article 19(4) of the TFEU, there remains a question of whether the conclusion of an agreement between one or more EU Member States with one or more third countries on the circulation of public documents could at times lead to an infringement of the TFEU's provisions on the EU's exclusive external competence. This question could arise, for instance, in cases where common rules are affected because of the CJEU's activist interpretation of Article 216(1) of the TFEU and Article 3(2) of the TFEU, as outlined in Section 3.

³⁷ See Document No. ST 6343/16 ADD 2, Draft Council Decision authorising the Republic of Austria to sign and ratify, and Malta to accede to, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, in the interest of the European Union - Statement by Germany. The text of the statement is available at <http://www.consilium.europa.eu/en/documents-publications>.

³⁸ See Document No. ST 6343/16 ADD 1, Draft Council Decision authorising the Republic of Austria to sign and ratify, and Malta to accede to, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, in the interest of the European Union - Statement by the United Kingdom. The text of the statement is available at <http://www.consilium.europa.eu/en/documents-publications>.

³⁹ The text of the convention is available at <https://www.hcch.net>.

⁴⁰ The text of the convention is available at <https://www.hcch.net>.

⁴¹ The data regarding the acceptance of third countries accession to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters are available at <https://assets.hcch.net/docs>.

⁴² Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, *OJ L* 324 of 10 December 2007, p. 79 ff.

⁴³ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, *OJ L* 174 of 27 de June 2001, p. 1 ff.

⁴⁴ On the political questions raised by the expansive development of EU's external relations in the area of private international law, see P. FRANZINA, *Preface*, *supra* fn 36, p. vi.

27. As the CJEU suggests, an assessment of whether common rules⁴⁵ are or could be undermined shall take into account “foreseeable future developments”. Thus, it could be easily argued that the extension of the scope of the regulation to documents coming from third countries might constitute a “foreseeable future development”. According to the CJEU, moreover, such an assessment of the potential threat to common rules also requires an analysis of the effect that the international agreement has on “the meaning, scope and effectiveness of the rules laid down” in the regulation⁴⁶. On this point, it may be argued that the effectiveness of EU Regulation No. 2016/1191 could be threatened if, for instance, some EU Member States object to the accession of a third country to the 1961 Hague Convention, while other EU Member States do not raise any objections to such accession. For example, this issue may arise where a citizen of an EU Member State (State A) gets married in a third country and afterwards moves to other EU Member States (States B and C). If State A and State B do not object to the third country’s accession to the 1961 Hague Convention, when the citizen presents the marriage certificate issued from the third country to States A and B, legalisation is not needed. But when the citizen moves to a Member State (State C) which has objected to the third country’s accession to this Convention, legalisation will be needed. Thus, in such a case movement between EU Member States would require different formalities. Considering such a scenario, it could be argued that the effectiveness of common rules, namely those enshrined in EU Regulation No. 2016/1191, might be affected.

28. If these common rules are affected, there would then be a question concerning whether Article 19(4) of the regulation could be sufficiently invoked in order to recognise Member States’ ability to enter into or maintain international relations with third countries without infringing the relevant Treaty provisions. In other words, it is worth examining the relationship between Article 19(4) of the regulation and Articles 216(1) of the TFEU and Article 3(2) of the TFEU. In this perspective, two paths seem possible.

29. A first possible path looks at Article 216(1) of the TFEU and Article 3(2) of the TFEU as broadly interpreted by the CJEU. Since, according to the CJEU, the determination that common rules may be affected must also take into account any foreseeable future developments and the potential threat to the regulation’s effectiveness, there is some room for affirming that Article 19(4) of the regulation may be interpreted as preventing Member States from concluding or maintaining international agreements with third countries in cases where common rules are affected. In other words, the CJEU’s activist interpretation of the existence of EU external exclusive competence may potentially pave the way for the EU to seize EU Member States’ power in this legal domain.

30. A second possible path focuses instead on the purpose and *raison d’être* of Article 19(4), highlighted in Section IV.1, in addition to the aforementioned Treaty provisions. Such a solution undoubtedly appears to be the better choice, since it takes into account the very *ratio legis* of the Article. In consideration of this, there is an argument that the risk of common rules being affected by international conventions agreed upon between Member States has been provided for in the common rules themselves. Article 19(4), indeed, was created immediately after CJEU’s Opinion 1/13 was adopted.

⁴⁵ With regard to the existence of common rules, we have already seen in Section 3 that inexplicably the CJEU requires, rather than meticulous analysis and application of Article 216(1) TFEU, only an analysis of whether EU law has granted EU institutions internal power to legislate on a certain matter. Thus, since EU Institutions have used their internal competence to rule on the circulation of public documents, an affirmative answer could be a possible conclusion on the existence of EU external competence on the matter at hand. In this regard, it is worth recalling that, according to the CJEU, it is sufficient that the commitments in question are concerned with an area already covered to a large extent by EU rules; a full overlap between the area covered by the international commitments and those covered by the EU is not necessary. Therefore, the fact that the new EU Regulation will not provide common rules for public documents coming from third countries is not likely to serve as an argument against the existence of common rules in the fields covered by those conventions. This is because, according to the CJEU, it is not necessary for the territorial scope of the EU Regulation to coincide with that of the international agreement, and nor is it necessary that the EU be party to the international conventions at stake. Thus, a full match between the EU Regulation analysed here and an international convention is not required by the CJEU.

⁴⁶ See CJEU Opinion 1/13, *supra* fn 7, para 85.

31. In brief, Article 19(4) can be read as a clear provision, which constitutes an example of the possible coordination between EU Member States and the EU regarding the initiation of international agreements with third countries. A positive development in this respect has already been seen in Regulation (EC) No. 662/2009⁴⁷ and Regulation (EC) No. 664/2009⁴⁸, both of which establish procedures for authorising EU Member States to amend existing treaties or conclude new treaties with third countries in specific matters⁴⁹.

32. In sum, Member States should be allowed to maintain and enter into any international treaties on public documents with third countries, with the potential limitation of needing to abide by the principle of sincere cooperation established in Article 4(3) of the TEU. This could be satisfied by requiring that a Member State intending to enter into or maintain international agreements with third countries must communicate this intention to the other Member States, for instance. With regard to “pre-existing” treaties concluded by Member States with third countries before the Member States became parties to the EU, potential infringements of EU Treaties could also be avoided through cooperation between Member States. In this regard, Article 351(2) of the TFEU states that “Member States shall, where necessary, assist each other [to eliminate the incompatibilities] and shall, where appropriate, adopt a common attitude”. In order to resolve issues of this type, such assistance may be sufficient if each Member State that wants to conclude international agreements with third countries on the circulation of public documents makes a declaration to this effect to the other Member States so that a common stance can be reached.

V. Final remarks

33. CJEU jurisprudence on EU exclusive external competence, whose most recent and most significant act went on stage on 14 October 2014 when the CJEU’s Opinion 1/13 was released, has long been criticised for paving the way for the EU to expropriate EU Member States’ power to set the international scene in the area of private international law as well.

34. When it comes to the international circulation of public documents, however, this should not be considered an issue.

35. Indeed, although there are some reasons to affirm that the EU Member States’ power to regulate the circulation of public documents with third countries could at times affect common rules, such arguments should not prevail over the wording and the ratio legis of Article 19(4) of EU Regulation No. 2016/1191. Such a provision could even be a positive example of express coordination between EU Member States and the EU in relation to the conclusion of international conventions with third countries. This example also could be followed in future European regulations in the realm of private international law.

⁴⁷ Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, *OJ L 200* of 31 de July 2009, p. 25 ff.

⁴⁸ Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, *OJ L 200* of 31 July 2009, p. 46 ff.

⁴⁹ P.A. DE MIGUEL ASENSIO, “International Conventions and European instruments of Private International Law: interrelation and codification”, in P.A. DE MIGUEL ASENSIO, J.-S. BERGÉ, “International Conventions and European instruments of Private International Law: interrelation and codification”, in M. FALLON, P. LAGARDE, S. POILLOT PERUZZETTO, *The place of International agreements and European Law in a European code of private international law*, Frankfurt am Main, Peter Lang, 2012, pp. 185-212, at p. 198.