



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT

delivered on 15 April 2021¹

Case C-490/20

V.M.A.

v

Stolichna obshtina, rayon ‘Pancharevo’ (Sofia municipality, Pancharevo district, Bulgaria)

(Request for a preliminary ruling
from the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria))

(Reference for a preliminary ruling – Citizenship of the European Union – Article 21 TFEU – Right to move and reside freely in the territory of the Member States – Child of a married same-sex couple born in a Member State – Birth certificate issued by that Member State designating two mothers of the child, one of whom is a national of another Member State – National legislation of that second Member State not permitting a birth certificate designating two mothers to be issued – Determination of the parentage of a child – Refusal to indicate which woman gave birth to the child – Article 4(2) TEU – Respect for the national identities of the Member States – Intensity of the judicial review)

I. Introduction

1. Must a Member State issue a birth certificate showing two women as mothers, one of whom is a national of that Member State, to a child born in another Member State in which that child has been issued with such a birth certificate? This, in essence, is the question that has been referred to the Court of Justice by the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria) in the present preliminary ruling proceedings.

2. The reason for the Bulgarian authorities’ refusal to issue such a birth certificate is, essentially, the fact that Bulgarian law does not allow two mothers to be registered as the parents of a child on a birth certificate. This is precluded since, in Bulgaria, the conception of the so-called ‘traditional’ family prevails, which, according to the information provided by the referring court, is a value protected as an element of national identity within the meaning of Article 4(2) TEU. Since that means that there can be only one mother of a child, the Bulgarian authorities therefore consider it necessary to identify the woman who gave birth to the child in order to record only her name on the birth certificate, information which the couple concerned refuses to disclose.

¹ Original language: French.

3. Issuing the birth certificate applied for would therefore confirm, in practice, not only the nationality of the child concerned but also the status of that child as a European Union citizen. Its issuing also determines whether the applicant in the main proceedings and her wife will be regarded as the parents of their daughter under the national law of the Member State of origin of one of them. Against that background, the referring court has asked the Court of Justice whether the refusal to issue a Bulgarian birth certificate recognising the family relationships established in Spain is contrary to Article 21(1) TFEU and to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular in Articles 7 and 24(2) thereof.

4. This is a very sensitive matter, given the exclusive competence of the Member States in the area of nationality and family law and the considerable differences that exist, to date, within the European Union in respect of the legal status of and the rights conferred on same-sex couples. It is also of significant practical importance, as demonstrated by Case C-2/21, *Rzecznik Praw Obywatelskich*, currently pending before the Court, the legal and factual context of which is very similar to that of the present case and which, in part, raises almost identical questions.

II. Legal framework

A. EU law

1. *Regulation (EU) 2016/1191*

5. Regulation (EU) 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 1024/2012² exempts from legalisation or similar formality certain public documents issued by the authorities of a Member State in accordance with its national law the purpose of which is to establish, inter alia, birth and parenthood. In accordance with Article 2(1) thereof, it applies where such documents have to be presented to the authorities of another Member State.

6. In accordance with recital 7 of that regulation, the regulation should not oblige Member States to issue public documents that do not exist under their national law.

7. Article 2(4) of that regulation provides that the regulation does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State.

2. *Directive 2004/38/EC*

8. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives

² OJ 2016 L 200, p. 1.

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/EEC³ defines, in Article 2(2) thereof, the ‘family member[s]’ of a Union citizen as follows:

- ‘(a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);’

9. Article 4 of that directive, entitled ‘Right of exit’, provides:

‘1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

...

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

...’

B. Bulgarian law

10. Under Article 46(1) of the Bulgarian Constitution, which is in Chapter 2 thereof, entitled ‘Fundamental rights and duties of citizens’, ‘marriage is a voluntary union between a man and a woman’.

11. As it currently stands, Bulgarian law does not allow either marriage or any other form of union with legal effects between persons of the same sex.

12. Parentage is governed by Chapter VI of the Semeen kodeks (Family Code).⁴ Under Article 60(1) and (2) thereof:

‘1. Parentage with respect to the mother is determined by birth.

³ OJ 2004 L 158, p. 77.

⁴ DV No 47 of 23 June 2009, amended in DV No 74 of 15 September 2009, in DV No 82 of 16 October 2009, in DV No 98 of 14 December 2010, in DV No 100 of 21 December 2010, amended and supplemented in DV No 82 of 26 October 2012, amended in DV No 68 of 2 August 2013, in DV No 74 of 20 September 2016, amended and supplemented in DV No 103 of 28 December 2017, amended and supplemented in DV No 24 of 22 March 2019, amended in DV No 101 of 27 December 2019.

2. The mother of the child is the woman who gave birth to that child, including in the case of assisted reproduction.'

13. Article 61 of the Family Code provides:

'1. The husband of the mother is deemed to be the father of the child born during the marriage or within three hundred days of its dissolution.

2. If the child is born within three hundred days of the dissolution of the marriage but after the mother has remarried, the husband in the new marriage shall be deemed to be the father of the child.

...'

14. In accordance with Article 64 of the Family Code, where the parentage of a child with respect to one of his or her parents is unknown, any parent may recognise his or her child. That recognition takes place, in accordance with Article 65 of that code, by means of a unilateral declaration to a civil registry official or a signed declaration which has been certified by a notary.

15. Naredba (Ordinance) No RD-02-20-9 of 21 May 2012 on the operation of the uniform system for the registration of civil status, of the Minister for Regional Development and Public Works ('Ordinance No RD-02-20-9')⁵ provides, in Article 12 thereof:

'(1) When registering a birth which occurred abroad, the information relating to the name of the holder, the date and place of birth, the sex and the established parentage shall be entered on the birth certificate as set out in the copy or the Bulgarian translation of the foreign document produced.

...

(3) Where the parent-child relationship in respect of one parent (mother or father) is not established, when a birth certificate is drawn up in the Republic of Bulgaria, the corresponding field for data relating to that parent shall not be completed and shall be crossed out.

(4) If the copy or extract does not contain all of the required data in respect of the parents, data from their identity documents or the population register shall be used. Information relating to the personal identity number, date of birth, patronymic (if any) and nationality of the parent who is a Bulgarian national shall be completed using the population register as a basis. The date of birth and nationality of the parent who is a foreign national may be completed using his or her national identity document. If all of the data relating to that parent cannot be completed, the document shall contain only the information available.

...'

⁵ DV No 43 of 8 June 2012, amended and supplemented in DV No 4 of 14 January 2014, amended in DV No 2 of 9 January 2015, amended and supplemented in DV No 64 of 21 August 2015, amended and supplemented in DV No 22 of 22 March 2016, amended and supplemented in DV No 32 of 13 April 2018.

III. Facts and dispute in the main proceedings

16. V.M.A., the applicant in the main proceedings, is a Bulgarian national, whereas her wife is a United Kingdom national born in Gibraltar, where the two women married in 2018. Since 2015, they have resided in Spain. In December 2019, they had a daughter who was born in Spain and who also resides there, together with both her parents. Their daughter's birth certificate, issued by the Spanish authorities, designates the applicant in the main proceedings as 'Mother A' and her wife as 'Mother' of the child.

17. On 29 January 2020, the applicant in the main proceedings applied to the competent authority, namely the Stolichna obshtina (Sofia municipality, Bulgaria), to issue her with a birth certificate for her daughter, which is necessary, *inter alia*, for the issue of a Bulgarian identity document. In support of that application, she submitted a legalised and certified translation into Bulgarian of the extract from the register of civil status of Barcelona (Spain) relating to the child's birth certificate.

18. By email of 7 February 2020, the Sofia municipality instructed the applicant in the main proceedings to provide, within seven days, evidence of the child's parentage with respect to her biological mother. The municipality argued in that regard that the model birth certificate which forms part of the applicable national law has only one box for the 'mother' and another box for the 'father', and that only one name may be entered in each box.

19. On 18 February 2020, the applicant in the main proceedings replied to that request, stating that she could not provide the information requested and that, under Bulgarian law, she was not required to do so.

20. By decision of 5 March 2020, the Sofia municipality therefore rejected the application for the issuing of a birth certificate. The reasons given for that refusal decision were the absence of information concerning the child's biological mother and the fact that the registration of two female parents in a birth certificate is contrary to the public policy of Bulgaria, which does not authorise marriages between two persons of the same sex.

21. The applicant in the main proceedings then brought an action against that refusal decision before the referring court, the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia).

22. That court states that, under Article 25(1) of the Constitution of Bulgaria and Article 8 of the *Zakon za balgarskoto grazhdanstvo* (Law on Bulgarian nationality), the child is a Bulgarian national even if, to date, she does not have a Bulgarian birth certificate. According to that court, failure to issue such a document does not constitute a refusal to grant Bulgarian nationality.

23. The Administrativen sad Sofia-grad (Administrative Court of the City of Sofia) has doubts as to whether the refusal by the Bulgarian authorities to register the birth of a Bulgarian national, which occurred in another Member State and which has been attested by a birth certificate referring to two mothers, issued by the latter Member State, infringes the rights conferred on that Bulgarian national by Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter. The refusal to issue a Bulgarian birth certificate is liable to give rise to serious administrative obstacles to the issuing of Bulgarian identity documents and, therefore, to make it more difficult for the child to exercise her right to freedom of movement and thus to fully enjoy her rights as a European Union citizen.

24. Moreover, in so far as the other mother of the child is a United Kingdom national, that court is uncertain whether the legal consequences arising from the United Kingdom’s withdrawal from the European Union, and in particular the fact that the child can no longer enjoy the status of European Union citizen by virtue of the nationality of her other mother, are relevant to the assessment of that question.

25. At the same time, the referring court is uncertain whether the obligation imposed, as the case may be, on the Bulgarian authorities, when drawing up a birth certificate, to register two mothers as parents on the Bulgarian birth certificate, would not have an adverse effect on the national identity of the Republic of Bulgaria, which has not provided for the possibility of registering two parents of the same sex on the birth certificate. That court notes, in that regard, that the legal provisions governing the child’s parentage are of fundamental importance in the Bulgarian constitutional tradition, and in the Bulgarian legal literature on family and inheritance law, both from a purely legal perspective and from the point of view of values, given the current stage of development of society in Bulgaria.

26. Therefore, that court raises the question whether it is necessary to strike a balance between the various legitimate interests involved in the present case: on the one hand, the national identity of the Republic of Bulgaria and, on the other, the interests of the child and, in particular, the right to privacy and free movement, as that child is in no way responsible for the differences in the scales of values in society between EU Member States. In that regard, the referring court is uncertain in particular whether such a balance could be achieved by applying the principle of proportionality. More specifically, it wishes to know whether an acceptable balance between those different legitimate interests could be achieved if, under the heading ‘mother’, one of the two mothers referred to on the Spanish birth certificate was registered, that is to say, either the child’s biological mother or her wife who became the child’s mother by way of another procedure (for example, adoption), and the ‘father’ section remained blank.

27. Finally, should the Court of Justice find that EU law requires that both mothers of the child are registered on the Bulgarian birth certificate, the referring court asks how that requirement should be enforced, bearing in mind that it is unable to replace the model birth certificate in force.

IV. The request for a preliminary ruling and the procedure before the Court

28. By decision of 2 October 2020, received at the Court on the same day, the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia) therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 20 TFEU and Article 21 TFEU and Articles 7, 24 and 45 of the Charter be interpreted as meaning that the Bulgarian administrative authorities to which an application for a document certifying the birth of a child of Bulgarian nationality in another Member State of the EU was submitted, which had been certified by way of a Spanish birth certificate in which two persons of the female sex are registered as mothers without specifying whether one of them, and if so, which of them, is the child’s biological mother, are not permitted to refuse to issue a Bulgarian birth certificate on the grounds that the applicant refuses to state which of them is the child’s biological mother?’

- (2) Must Article 4(2) TEU and Article 9 of the Charter be interpreted as meaning that respect for the national identity and constitutional identity of the Member States of the European Union means that those Member States have a broad discretion as regards the rules for establishing parentage? Specifically:
- Must Article 4(2) TEU be interpreted as allowing Member States to request information on the biological parentage of the child?
 - Must Article 4(2) TEU in conjunction with Article 7 and Article 24(2) of the Charter be interpreted as meaning that it is essential to strike a balance of interests between, on the one hand, the national identity and constitutional identity of a Member State and, on the other hand, the best interests of the child, having regard to the fact that, at the present time, there is neither a consensus as regards values nor, in legal terms, a consensus about the possibility of registering as parents on a birth certificate persons of the same sex without providing further details of whether one of them, and if so, which of them, is the child's biological parent? If this question is answered in the affirmative, how could that balance of interests be achieved in concrete terms?
- (3) Is the answer to Question 1 affected by the legal consequences of Brexit in that one of the mothers listed on the birth certificate issued in another Member State is a UK national whereas the other mother is a national of an EU Member State, having regard in particular to the fact that the refusal to issue a Bulgarian birth certificate for the child constitutes an obstacle to the issue of an identity document for the child by an EU Member State and, as a result, may impede the unlimited exercise of her rights as an EU citizen?
- (4) If the first question is answered in the affirmative: does EU law, in particular the principle of effectiveness, oblige the competent national authorities to derogate from the model birth certificate which forms part of the applicable national law?

29. On 19 October 2020, the President of the Court of Justice granted the referring court's request that the present case be determined pursuant to the expedited procedure, in accordance with Article 105(1) of the Rules of Procedure of the Court of Justice.

30. The applicant in the main proceedings, the German, Spanish, Italian, Hungarian, Polish and Slovak Governments and the European Commission submitted written observations on the questions referred for a preliminary ruling. The applicant in the main proceedings, the Bulgarian, Spanish, Hungarian, Italian, Netherlands and Polish Governments and the Commission intervened at the hearing on 9 February 2021.

V. Assessment

A. The factual premisses of the case in the main proceedings and their impact on the analysis of the questions referred for a preliminary ruling

31. First of all, it is necessary to clarify a number of factual premisses in the order for reference which were contested by the Bulgarian Government at the hearing and their impact on the analysis of the questions referred for a preliminary ruling.

32. The referring court states several times in the order for reference that it is established that the child has Bulgarian nationality under Article 25(1) of the Constitution of Bulgaria. In accordance with that provision, 'a person is a Bulgarian national if at least one of the parents is a Bulgarian national ...'. In that regard, the Bulgarian Government confirmed at the hearing before the Court of Justice that the acquisition of Bulgarian nationality under the provision cited above is automatic, that is to say no administrative act granting nationality is necessary.

33. However, since, under Article 60(2) of the Family Code, the mother of the child is 'the woman who gave birth to that child' ('the biological mother') and it is precisely that information that is lacking in the dispute in the main proceedings, the Bulgarian Government disputed, at the hearing, the referring court's claim that it is established that the child is a Bulgarian national. In other words, Bulgaria does not recognise the parent-child relationship between the applicant in the main proceedings and the child and, therefore, that that child has Bulgarian nationality, on the sole basis of the presentation of the Spanish birth certificate.

34. It is true that the Bulgarian Government has also pointed out that it would be sufficient, for the purpose of granting the child Bulgarian nationality, for the applicant in the main proceedings to acknowledge her maternity in accordance with Article 64 of the Family Code. That possibility is neither reserved for a man in a heterosexual relationship nor subject to proof of biological parentage. In other words, even if the applicant in the main proceedings was not the biological mother within the meaning of Article 60(2) of the Family Code, she could acquire the status of mother of the child under Bulgarian law in this way (and become what I shall subsequently refer to as 'the legal mother'). However, according to the Bulgarian Government, that would have the effect of erasing any parent-child relationship between the child and her biological mother under Bulgarian law.

35. In that regard, it should be recalled that it is not for the Court of Justice, in the context of the procedure for cooperation established by Article 267 TFEU, to call into question the assessment of the facts in the light of the applicable national law as carried out by the referring court.⁶ In those circumstances, the Court of Justice is in principle bound by the assumption that the child is a Bulgarian national.

36. In view of the apparent uncertainties surrounding that question and in order to give a useful answer to the referring court, the present case must, however, be examined in two scenarios.

37. The first is that the child has not automatically acquired Bulgarian nationality since the applicant in the main proceedings is not her biological mother; nor can the child acquire it in the future since the applicant in the main proceedings does not wish to acknowledge her maternity in accordance with Article 64 of the Family Code. The second scenario is that the child has acquired Bulgarian nationality because the applicant in the main proceedings is her biological mother, or could acquire it as a result of the acknowledgement by the applicant in the main proceedings of her maternity in accordance with Article 64 of that code.

38. While, in the first scenario, the child is not a citizen of the European Union under the second subparagraph of Article 20(1) TFEU, it should nevertheless be noted that the situation in the main proceedings does not fall outside the scope of EU law. In that scenario, the question arises as to whether a European Union citizen – the applicant in the main proceedings – who has exercised her right to freedom of movement and has become the mother of a child together with her wife

⁶ See, to that effect, judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 15), and of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 27).

under the national law of another Member State, may request that her Member State of origin recognise that situation and issue, for those purposes, a birth certificate designating both women as the parents of the child concerned. The wording of the first and second questions referred for a preliminary ruling does not preclude their examination from the point of view of the applicant in the main proceedings, since they do not refer expressly or exclusively to the child's right to freedom of movement.

39. Likewise, with regard to the second scenario, it should be noted that the questions referred for a preliminary ruling would in no way become devoid of purpose if the (biological or legal) maternity of the applicant in the main proceedings was established. It is true that the wording of the first question may give the impression that the issuing of a Bulgarian birth certificate depends only on the identification of the (biological) mother of the child. In reality, even the identification of the applicant as the mother of the child would not alter the fact that the Bulgarian authorities are not willing to issue the birth certificate applied for designating, like the Spanish birth certificate, the applicant in the main proceedings and her wife as mothers of the child. That fact was confirmed by the Bulgarian Government at the hearing. The refusal to issue the birth certificate applied for also makes it *de facto* impossible for the child to obtain a Bulgarian identity document. The question therefore still arises as to whether that situation is compatible with Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter.

40. Therefore, in any event, the Court will have to answer the question whether EU law requires a Member State to recognise, for the purpose of issuing a birth certificate, that a married couple who are women are the parents of a child, as determined in a public document issued by another Member State, or whether, on the contrary, that first Member State is free to determine parentage in accordance with its national law where that entails recognising only one woman as the mother.⁷

41. The question whether the Bulgarian authorities may require information as to the identity of the child's biological mother, advanced by the referring court in its first question, therefore has no independent significance. If Bulgaria must recognise the two women designated as mothers on the Spanish birth certificate as parents of the child, the identification of the biological mother is of secondary importance since the Bulgarian authorities would in any event be obliged to register both women as mothers on the birth certificate. By contrast, if Bulgaria is free to determine parentage in accordance with its national law, this necessarily means that it may consider only one woman to be the child's mother, be it the biological mother or the woman who has acknowledged the child.

B. The approach to be taken

42. In the light of the foregoing considerations, the first and second questions referred for a preliminary ruling, as defined in point 40 of this Opinion, must be addressed together. In that context, the third question referred for a preliminary ruling, which concerns the consequences of Brexit for the situation in the main proceedings, will also be answered.

⁷ That question is very similar to the one which has been referred to the Court of Justice by the national court in Case C-2/21, *Rzecznik Praw Obywatelskich*, referred to in point 4 of this Opinion. That case concerns the child of a Polish national who is married to an Irish citizen, who reside together in Spain. That Member State issued a birth certificate designating both women as mothers of the child. The referring court therefore asks the Court of Justice whether the Polish administrative authorities may refuse to transcribe that birth certificate, which is necessary to enable the child to obtain a Polish identity document, on the ground that Polish law does not provide for parenthood of same-sex couples and that birth certificate designates as parents persons who are the same sex.

43. In order to answer those questions, it is necessary to examine, in the first place, whether the refusal to issue the birth certificate applied for constitutes, with regard to each of the scenarios set out in point 37 above – that is to say, whether the child has Bulgarian nationality or not – an obstacle to the rights enshrined in Part Two of the TFEU, in particular the right of citizens of the European Union to move and reside freely within the territory of the European Union, pursuant to Article 21(1) TFEU.

44. In the second place, it must be examined whether a potential obstacle to the freedom of movement may be justified, in particular in the light of Article 4(2) TEU which guarantees respect for the national identities of the Member States. The referring court addresses this point in more detail in its second question for a preliminary ruling. In that regard, it will be necessary *inter alia* to determine whether reliance on national identity must be weighed up against other interests, such as the fundamental rights of the Charter mentioned in the first question and, where appropriate, the intensity of the review carried out by the Court of Justice.

45. First, that analysis will be carried out for the first scenario set out in point 37 above, namely that in which the child does not have Bulgarian nationality. In that context, an answer will also be given to the question, raised at least implicitly at the hearing, as to whether the Republic of Bulgaria could possibly be obliged, in the circumstances of the present case, to grant the child of the applicant in the main proceedings Bulgarian nationality (Section C).

46. Next, the scenario in which the child is a Bulgarian national will be examined (Section D).

47. Finally, in response to the fourth question referred for a preliminary ruling, I shall set out a number of practical considerations in order to guide the referring court in implementing the recommended solution (Section E).

C. The first and second questions referred for a preliminary ruling in the scenario that the child does not have Bulgarian nationality

1. The obstacle to the free movement of European Union citizens

(a) The obstacle to the rights of the child

48. Under Article 21(1) TFEU, every citizen of the Union is to 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. In order to ensure the exercise of that right in practice, Member States are required, in accordance with Article 4(3) of Directive 2004/38, to issue their citizens with an identity document in accordance with their national law.

49. With regard to the latter obligation, it should be noted at the outset that the Bulgarian authorities do not have the competence to issue an identity document to the child under Article 4(3) of that directive if that child is not a Bulgarian national.

50. As regards whether the Bulgarian authorities could be required, in the circumstances of the present case, to grant the child Bulgarian nationality, it must be recalled, first, that each Member State has the power, having due regard to international law, to lay down the conditions for

acquisition and loss of nationality.⁸

51. Second, as regards the proviso that the Member States must, when exercising that power, have due regard to EU law,⁹ it must be recalled that that proviso applies only where the exercise of that power affects the rights conferred and protected by the legal order of the European Union.¹⁰ In other words, it is only by restricting the rights deriving from the status of citizen of the European Union that a measure determining the acquisition or the loss of the nationality of a Member State is capable of falling within the ambit of EU law.¹¹ By contrast, where a person has never acquired the rights deriving from the status of citizen of the European Union, such a measure cannot, from the outset, restrict those rights. Therefore, the situation of that person cannot be regarded as falling within the ambit of EU law 'by reason of its nature and its consequences'.¹²

52. For that reason, if the child has not automatically acquired Bulgarian nationality, the question as to whether the Republic of Bulgaria could be required to grant her nationality under Articles 20 and 21 TFEU cannot be examined from the child's point of view.¹³

53. For all practical purposes, it should be noted, in this context, that it was confirmed by the Spanish Government at the hearing that, if the child could not claim either Bulgarian or United Kingdom¹⁴ nationality, she would be entitled to claim Spanish nationality, in accordance with Article 17 of the Spanish Civil Code. There is therefore no risk of the child becoming stateless.

54. Therefore, if the child is not a Bulgarian national, she does not enjoy the rights deriving from Article 4(3) of Directive 2004/38 and Articles 20 and 21 TFEU, which are reserved for European Union citizens. Consequently, the refusal by the Bulgarian authorities to issue the child with a Bulgarian birth certificate designating, like the Spanish birth certificate, the applicant in the main proceedings and her wife as mothers of that child, and the refusal to issue that child with a Bulgarian identity document, cannot infringe those rights.

(b) The obstacle to the rights of the applicant in the main proceedings

55. It should be recalled that, in the scenario examined here, the applicant in the main proceedings is not the child's biological mother and does not wish to acknowledge her maternity in accordance with Article 64 of the Family Code.¹⁵

⁸ Judgments of 7 July 1992, *Micheletti and Others* (C-369/90, EU:C:1992:295, paragraph 10); of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraph 39); and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 30).

⁹ Judgments of 7 July 1992, *Micheletti and Others* (C-369/90, EU:C:1992:295, paragraph 10); of 20 February 2001, *Kaur* (C-192/99, EU:C:2001:106, paragraph 19); of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraph 45); and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 32).

¹⁰ Judgment of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraph 48).

¹¹ Judgments of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraph 48), and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 32).

¹² See judgments of 20 February 2001, *Kaur* (C-192/99, EU:C:2001:106, paragraph 25), and of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraphs 42 and 49).

¹³ With regard to the question whether such an obligation could arise as a result of the status of European Union citizen and the rights which the applicant in the main proceedings derives from that status, see points 65 and 133 of this Opinion.

¹⁴ It appears that, after the case was referred to the Court of Justice by the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia), the British authorities refused to recognise the child as a British national in accordance with the British Nationality Act 1981, on the ground that the British mother, who was born in Gibraltar to a parent who was a British national, cannot pass on her nationality to a child when that child is born outside the territory of the United Kingdom.

¹⁵ See point 37 of this Opinion.

56. The refusal to issue the birth certificate applied for may nevertheless constitute an obstacle to her right to free movement since she has legally acquired the status of mother of the child under Spanish law.

57. A birth certificate reflects the parentage of a person as established by the competent authorities. From that perspective, it is apparent from the request for a preliminary ruling and the explanations provided by the Bulgarian Government at the hearing that a transcript of the Spanish birth certificate would, in practice, confer the status of mother on the applicant in the main proceedings and on her wife. Conversely, if one of the two women does not appear on that document, she will not be regarded as the mother of the child for the purposes of Bulgarian family law.

58. In that regard, it is true that, as it currently stands, EU law does not govern the rules on the establishment of a person's civil status¹⁶ and, more specifically, parentage. That does not mean, however, that a national measure adopted in that area cannot constitute an obstacle to the fundamental rights and freedoms guaranteed by the Treaties. It is settled case-law that, where a situation falls within the scope *ratione materiae* of the Treaties, when exercising their powers, Member States must comply with EU law.¹⁷

59. There is no doubt that the situation of the applicant in the main proceedings, who is a Bulgarian national residing in Spain, falls within the scope of Article 21(1) TFEU, and that she may rely on the rights which derive from it also in respect of her Member State of origin.¹⁸ In that regard, it must be recalled that any national measure which is capable of hindering or rendering less attractive the exercise by European Union nationals of the free movement of citizens may constitute an obstacle to that freedom.¹⁹

60. Moreover, the Court has previously held that the rights which nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State.²⁰

61. The Court has previously had occasion to specify in that context that 'family members' are in any event those mentioned in Article 2(2) of Directive 2004/38.²¹ That provision refers *inter alia* to the 'spouse' of a Union citizen (Article 2(2)(a)) and his or her 'direct descendants' (Article 2(2)(c)). If the same-sex spouse of a Union citizen with whom that citizen has validly entered into a marriage pursuant to the legislation of a Member State is not classified as a 'family member' on the ground that the law of another Member State does not provide for that possibility, this would risk a variation in the rights deriving from Article 21(1) TFEU from one Member State to another,

¹⁶ Judgments of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 25); of 14 October 2008, *Grunkin and Paul* (C-353/06, EU:C:2008:559, paragraph 16); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 37).

¹⁷ Judgments of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraphs 25 and 26); of 14 October 2008, *Grunkin and Paul* (C-353/06, EU:C:2008:559, paragraph 16); of 2 June 2016, *Bogendorff von Wolfersdorff* (C-438/14, EU:C:2016:401, paragraph 32); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 38).

¹⁸ Judgments of 18 July 2013, *Prinz and Seeberger* (C-523/11 and C-585/11, EU:C:2013:524, paragraph 23); of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 51); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 31).

¹⁹ Judgments of 12 May 2011, *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 70); of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 33); of 13 June 2019, *TopFit and Biffi* (C-22/18, EU:C:2019:497, paragraph 47), and of 10 October 2019, *Krah* (C-703/17, EU:C:2019:850, paragraph 41).

²⁰ Judgments of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296, paragraph 21 *et seq.*); of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 52); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 32).

²¹ Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 33).

depending on the provisions of their national law.²² For the same reason, the Court has held that the concept of a ‘direct descendant’ must be interpreted uniformly throughout the European Union.²³ In the present case, it is established that both the applicant in the main proceedings and her wife have validly acquired the status of parent of the child under Spanish law²⁴ and that they also lead an effective family life with their daughter in Spain.

62. The failure to recognise those family relationships established in Spain would create serious obstacles to a family life in Bulgaria. The status of family member forms the basis of numerous rights and obligations arising from both EU and national law. To name just a few examples, from the uncertainties surrounding the child’s right of residence in Bulgaria, to obstacles relating to custody and social security, that refusal would also have consequences in matrimonial and inheritance matters. In those circumstances, there is no doubt that the failure to recognise the family relationships established in Spain could deter the applicant in the main proceedings from returning to her Member State of origin.

63. It is true that, as set out in point 34 above, even if she is not the child’s biological mother, the applicant in the main proceedings could acknowledge her maternity in accordance with Article 64 of the Family Code. However, the acknowledgement of maternity necessarily implies that another woman, and in particular her wife, cannot be recognised as a mother.²⁵

64. That would therefore prevent the applicant in the main proceedings, if she were to return to Bulgaria, from continuing the family life she has led in Spain. Specifically, she alone would have to assume all of the parental duties requiring proof of parental status, whether it be school enrolment, medical decisions or any type of administrative procedure on behalf of the child, since her wife would be excluded from the status of mother. Moreover, from that perspective, her wife, who has also legally acquired the status of mother and, therefore, has custodial rights over the child in the couple’s Member State of residence, namely Spain, could object to the child returning to Bulgaria. That is also likely to deter the applicant in the main proceedings from returning to her Member State of origin.

65. By contrast, not granting Bulgarian nationality to the child does not in itself constitute an obstacle to the right of free movement enjoyed by the applicant in the main proceedings. As long as the family relationships established in Spain are respected and recognised for the purpose of applying EU rules on freedom of movement,²⁶ the mere fact that the child of a European Union citizen is not granted the nationality of a Member State on account of those relationships is not liable to hinder the free movement of the European Union citizen concerned. As explained above, the Member States remain free in principle to lay down the conditions for acquisition and loss of nationality.²⁷ In particular, they are not obliged, under EU law, to grant nationality to the direct descendants of their citizens. That consideration is illustrated by the very existence of

²² Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 39).

²³ Judgment of 26 March 2019, *SM (Child placed under Algerian kafala)* (C-129/18, EU:C:2019:248, paragraph 50).

²⁴ In this regard I am starting from the premiss, confirmed by the Spanish Government at the hearing, that the determination of parentage is, in accordance with Spanish private international law, linked to the place of the child’s habitual residence, that is to say, to Spanish law which provides for the parenthood of the wife of the biological mother of a child. Unlike the case which gave rise to the judgment of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraphs 62 and 63), the legality of the status acquired in another Member State is therefore not in doubt.

²⁵ See point 34 of this Opinion.

²⁶ See, in that regard, in particular, point 102 et seq. below.

²⁷ See point 50 of this Opinion.

Directive 2004/38, the specific purpose of which is to guarantee the freedom of movement of European Union citizens together with their family members, including, inter alia, their direct descendants who are *third-country nationals*.

(c) *Interim conclusion*

66. In the scenario that the child does not have Bulgarian nationality, she may not rely on the rights deriving from Article 4(3) of Directive 2004/38, or those deriving from Articles 20 and 21 TFEU. Nor do the latter provisions confer on her the right to claim Bulgarian nationality.

67. However, in the same scenario, the refusal by the Bulgarian authorities to issue a Bulgarian birth certificate designating, like the certificate issued by the Spanish authorities, the applicant in the main proceedings and her wife as parents of the child, constitutes an obstacle to the right of the applicant in the main proceedings under Article 21(1) TFEU.

2. *The justification for the obstacle to the right of free movement of the applicant in the main proceedings*

68. In accordance with settled case-law, an obstacle to the freedom of movement of persons may be justified where it is based on objective considerations and is proportionate to the legitimate objective pursued by national law.²⁸

69. In the present case, the Bulgarian authorities submit that the entry on a birth certificate of a same-sex married couple as parents of a child would adversely affect the national identity of the Republic of Bulgaria within the meaning of Article 4(2) TEU. It must therefore be examined, first of all, whether the Republic of Bulgaria may rely in this context on adverse effect to its national identity within the meaning of Article 4(2) TEU (Section a). If so, it is then necessary to examine the legal consequences of such an argument, in particular on the intensity of the review carried out by the Court (Section b), before, finally, proceeding to examine the present case (Section c).

(a) *The concept of ‘national identities’ within the meaning of Article 4(2) TEU*

70. In accordance with Article 4(2) TEU, the European Union is to respect the national identities inherent in the fundamental political and constitutional structures of the Member States. That limitation to fundamental political and constitutional structures demonstrates that Article 4(2) TEU does not simply refer to interpretations of the constitutional law of the Member States but that it introduces an autonomous concept of EU law the interpretation of which is a matter for the Court. However, the precise content of that concept is likely to vary from one Member State to another and, by its very nature, cannot be determined without taking into account the Member States’ conceptions of their national identities.

²⁸ Judgments of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraph 81); of 2 June 2016, *Bogendorff von Wolfersdorff* (C-438/14, EU:C:2016:401, paragraph 48); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 41).

71. In that regard, the obligation for the European Union to respect the national identities of the Member States may be understood as an obligation to respect the plurality of views and, therefore, the differences which characterise each Member State.²⁹ National identity thus guarantees the motto of the European Union, as enshrined for the first time in Article I-8 of the draft Treaty establishing a Constitution for Europe (‘the Constitutional Treaty’),³⁰ namely ‘United in diversity’.

72. For that reason, the concept of national identity cannot be interpreted in the abstract at European Union level.

73. The starting point for interpreting Article 4(2) TEU is the information provided by the referring court and the Member State concerned,³¹ which has a broad margin of discretion in that regard.³² However, that discretion is limited by the obligation of sincere cooperation set out in Article 4(3) TEU.³³ Moreover, only a conception of national identity which is consistent with the fundamental values of the European Union as enshrined inter alia in Article 2 TEU may be protected under Article 4(2) TEU.³⁴

74. In the present case, according to the referring court, the adverse effect to Bulgarian national identity lies in the fact that the birth certificate requested disregards the conception of the traditional family, laid down in Article 46(1) of the Constitution of Bulgaria, which according to that court forms, from a legal point of view, the basis of family and inheritance law and is one of the fundamental values of Bulgarian society. That concept necessarily means, according to that court, that a child can have only one mother (and one father).

75. Currently, there is no consensus within the European Union on the prerequisites for access to the fundamental institutions of family law. National rules governing marriage (or divorce) and parentage (or even reproduction) define the family relationships which are at the heart of this field. In the case of, for example, divorce, insurmountable conceptual differences were found during the drafting of a regulation on the law applicable to that institution, leading to the failure of the Commission’s legislative initiative and the implementation of enhanced cooperation in its place.³⁵ As regards marriage, only 13 of the 27 EU Member States have, at the present time, extended that institution to same-sex couples.³⁶ Moreover, of those 13 Member States, only some provide for the ‘automatic’ parenthood of the wife of the biological mother of a child.³⁷ On account of those differences, Regulation 2016/1191 simplifying the requirements for presenting

²⁹ See, to that effect, judgments of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraphs 91 and 92), and of 2 June 2016, *Bogendorff von Wolffersdorff* (C-438/14, EU:C:2016:401, paragraph 73).

³⁰ OJ 2004 C 310, p. 1.

³¹ See judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 58).

³² See, with regard to the definition of public policy, judgments of 4 December 1974, *van Duyn* (41/74, EU:C:1974:133, paragraph 18); of 14 October 2004, *Omega* (C-36/02, EU:C:2004:614, paragraph 31); of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraph 87); and of 2 June 2016, *Bogendorff von Wolffersdorff* (C-438/14, EU:C:2016:401, paragraph 68).

³³ See, in that regard, Opinion of Advocate General Wathelet in *Coman and Others* (C-673/16, EU:C:2018:2, point 40).

³⁴ See, to that effect, Opinion of Advocate General Cruz Villalón in *Gauweiler and Others* (C-62/14, EU:C:2015:7, point 61), and judgment of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraph 89).

³⁵ See recital 5 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010 L 343, p. 10).

³⁶ Namely the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden.

³⁷ These are, according to my research, the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of Spain, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden. In the majority of those States, however, that option is permitted only in the case of medically assisted reproduction, to which the wife of the biological mother has consented.

certain public documents attesting, inter alia, birth, marriage, divorce and parenthood reiterates several times that it does not change the substantive law in that area or the obligations to recognise the legal effects relating to such a document.³⁸

76. In that context, the Court has previously implicitly recognised that the rules governing marriage form part of national identity within the meaning of Article 4(2) TEU.³⁹

77. This is because family law is a particularly sensitive legal area which is characterised by a plurality of concepts and values at the level of the Member States and the societies within them. Family law – whether based on traditional or more ‘modern’ values – is the expression of a State’s self-image on both the political and social levels. It may be based on religious ideas or mark the renunciation of those ideas by the State concerned. To that end, however, it is in any event an expression of the national identity inherent in fundamental political and constitutional structures.

78. Moreover, the rules defining family relationships are of paramount importance for the functioning of the State community in general.⁴⁰ Therefore, where a State applies the principle of *ius sanguinis* in this regard, the parentage of a person determines nationality and therefore the very fact that a person belongs to a given State.

79. The legal definition of what is a family or one of its members therefore affects the fundamental structures of a society. That definition is therefore capable of falling within the scope of the national identity of a Member State within the meaning of Article 4(2) TEU.

(b) The legal consequences of reliance on national identity within the meaning of Article 4(2) TEU

80. Once it has been established that the definition of family relationships may form part of the national identities of the Member States, it is necessary to examine the effects this has on the possibility of justifying the refusal, by the authorities of a Member State, to recognise the definition of family relationships used by another Member State. In that regard, the referring court asks the Court of Justice in particular, in its second question, whether reliance on national identity within the meaning of Article 4(2) TEU must be weighed up against other interests deriving from EU law, in particular the fundamental rights guaranteed by the Charter.

81. In order to answer that question, it is necessary to consider, as a first step, the nature and function of the clause safeguarding national identity (Section 1), in order to then draw conclusions as to the legal effects of reliance on that clause (Section 2).

³⁸ See, in particular, recitals 7 and 18 and Article 2(4) of Regulation 2016/1191.

³⁹ Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 42 and 43).

⁴⁰ The Bundesverfassungsgericht (Federal Constitutional Court, Germany) thus held, in its judgment on the Treaty of Lisbon, known as the *Lissabon* judgment, that family law was one of the areas that are especially sensitive for the ability of a constitutional State to democratically shape itself, from which it follows that the action of the European Union must be limited to the strict minimum necessary for the coordination of cross-border situations. See judgment of 30 June 2009, *Lissabon* (DE:BVerfG:2009:es20090630.2bve000208, paragraphs 251 and 252).

(1) *The nature and function of the clause safeguarding national identity*

82. Contrary to what, at first sight, the Court’s case-law to date in this field appears to suggest,⁴¹ the national identity enshrined in Article 4(2) TEU is not only one legitimate objective among others which may be taken into account when examining a possible justification for a restriction on the right to freedom of movement.

83. A reading of that provision in the context of Article 4 and the other provisions under Title I of the Treaty on European Union reveals that that concept also has a vertical dimension, that it to say the Treaties confer on it a role in the delimitation of competences between the European Union and the Member States.

84. In that regard, it should be recalled that one of the main objectives of the Treaty of Lisbon was a clearer delimitation of competences between the European Union and the Member States. In that context, the Constitutional Treaty marked the transition from the clause safeguarding national identity to an enforceable principle relating to the allocation of competences. This was already apparent in the title of Article I-5 of the Constitutional Treaty, on which the current Article 4 TEU is based, which was worded ‘Relations between the Union and the Member States’. By way of comparison, the provision on national identity, introduced by the Maastricht Treaty, was first found in Article F(1) TEU,⁴² and then in Article 6(3) TEU which governed the values and principles of the European Union.⁴³

85. That interpretation is supported by the other two paragraphs in the current version of Article 4 TEU. It not only contains the clause on the principle of sincere cooperation, which was already linked to the safeguarding of national identity in Article I-5(2) of the Constitutional Treaty, but is now supplemented by Article 4(1) TEU. The latter provision sets out the principle of conferral, thus clearly establishing the link between the safeguarding of national identity and the allocation of competences between the European Union and its Member States. Similarly, Article 4(2) TEU, which, like its model in the Constitutional Treaty, cites by way of example various areas which may fall within the scope of national identity, such as national security, now contains the additional clarification that that ‘remains the sole responsibility of each Member State’.

86. That development demonstrates that national identity as set out in Article 4(2) TEU was conceived to limit the impact of EU law in areas considered essential for the Member States and not only as a value of the European Union which must be weighed against other interests of the same ranking.

87. This is consistent with the objective of national identity of preserving, as far as fundamental political and constitutional structures are concerned, the particular approaches specific to each Member State.⁴⁴

⁴¹ See, inter alia, judgments of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraphs 83 and 84); of 12 May 2011, *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraphs 86 and 87); of 16 April 2013, *Las* (C-202/11, EU:C:2013:239, paragraphs 26 and 27); of 2 June 2016, *Bogendorff von Wolfersdorff* (C-438/14, EU:C:2016:401, paragraph 65); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 43 et seq.).

⁴² See the consolidated version (OJ 1992 C 224, p. 1).

⁴³ See the consolidated version of the Treaty of Nice (OJ 2002 C 325, p. 1).

⁴⁴ See in that regard point 71 of this Opinion.

88. Moreover, only that function of the clause safeguarding national identity can explain why Article 4(2) TEU has been limited in comparison with the previous provision contained in the Maastricht Treaty,⁴⁵ by reducing the scope of national identity to fundamental political and constitutional structures. If national identity was only one of a number of interests that may be relied on as justification for a derogation from EU law, that limitation would make no sense and would also conflict with the case-law of the Court. According to settled case-law, *any* legitimate interest may, as a general rule, be invoked for the purposes of justifying a restriction of rights deriving from EU law and not only an interest inherent in the fundamental political and constitutional structures of the Member States.⁴⁶

(2) *The intensity of the review carried out by the Court*

89. It may be inferred from the Court’s judicial practice that the intensity of the review of national measures restricting fundamental freedoms depends, in general, on the degree of harmonisation of the matter in question. In so far as a matter has not (yet) been the subject of harmonisation at European Union level or falls within the competence of the Member States, the Court grants the Member States a broad discretion.⁴⁷

90. If the obligation to respect national identities within the meaning of Article 4(2) TEU is therefore intended to preserve the fundamental political and constitutional structures specific to each Member State and thus demarcates the limits of the European Union’s integrative action, it follows that the Court may carry out only a limited review of the measures adopted by a Member State for the purposes of safeguarding its national identity. By contrast, a review of the proportionality of those measures would reduce national identity to a mere legitimate objective.⁴⁸

91. This explains why all of the participants in the proceedings before the Court, with the exception, however, of the Spanish Government and the applicant in the main proceedings, have submitted that the Republic of Bulgaria was not obliged to recognise the parentage as established on the Spanish birth certificate for the purpose of applying Bulgarian family and inheritance law, since the determination of parentage for the purposes of family law falls within the exclusive competence of the Member States. Those participants therefore considered, at least implicitly, that that competence cannot be called into question by considerations relating to the right of the applicant in the main proceedings and her daughter to respect for their private and family life under Article 7 of the Charter or the best interests of the child as enshrined in Article 24(2) thereof.

92. However, such a limited review must not be applied to every expression of national identity, but only in respect of the fundamental expression of the national identity in question, in order to prevent the application of Article 4(2) TEU from conflicting with the principle of the primacy of EU law.⁴⁹

⁴⁵ Which simply stated that ‘The Union shall respect the national identities of its Member States’.

⁴⁶ See judgments of 20 February 1979, *Rewe-Zentral* (120/78, EU:C:1979:42, paragraph 14); of 14 December 2004, *Commission v Germany* (C-463/01, EU:C:2004:797, paragraph 75); and of 10 October 2019, *Krah* (C-703/17, EU:C:2019:850, paragraph 55).

⁴⁷ See, for example, judgments of 9 December 1997, *Commission v France* (C-265/95, EU:C:1997:595, paragraphs 33 and 34); of 11 September 2008, *Commission v Germany* (C-141/07, EU:C:2008:492, paragraph 46); and of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International* (C-42/07, EU:C:2009:519, paragraph 69).

⁴⁸ See, in that regard, in particular, points 86 and 88 of this Opinion.

⁴⁹ See, inter alia, judgment of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114, paragraph 3).

93. In the cases to date which have raised the question of the protection of national identity, it was not the fundamental expression of the conception that the Member State concerned sought to protect as its national identity that was at issue. Most of those cases have concerned restrictions on the free movement of European Union citizens as a result of the refusal to recognise the name they had adopted in another Member State. It is true that the Court has held that the abolition of the nobility, the protection of the official national language or the status of the State as a Republic, put forward, respectively, as justification for that refusal, were capable of forming part of national identity within the meaning of Article 4(2) TEU.⁵⁰ However, it should be noted that the obligation to transcribe or recognise a name does not generally affect the essence of those objectives. That is why the Court analysed the justification put forward by the Member State concerned as a legitimate objective capable of justifying the restriction.⁵¹

94. To illustrate this distinction, it should be noted that the obligation to recognise a title or element of nobility as part of a name – at issue in *Sayn-Wittgenstein* and *Bogendorff von Wolfersdorff* – does not call into question the abolition of the nobility or the status of the State as a Republic since no privilege derives from it. Similarly, in *Coman*, the Court held that the obligation to recognise marriages between persons of the same sex, concluded in another Member State in accordance with the law of that State, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage, which falls within the exclusive competence of the Member States. The reason for this is that the recognition of such a marriage for the sole purpose of granting a right of residence does not require that Member State to provide for the institution of marriage between persons of the same sex in its national law. Therefore, an obligation to recognise such marriages for the sole purpose of exercising the rights that European Union citizens enjoy under EU law does not undermine the national identity of the Member State concerned.⁵²

95. The situation is different, however, where the act requested on the basis of EU law is actually capable of altering the national institution or conception, thus encroaching on the exclusive competence of the Member States in the area concerned. That may be the case in particular where the rules which are at the heart of the conception that the Member State concerned is seeking to protect as its national identity are at issue.

96. In the case of such a fundamental expression of national identity, it is therefore necessary to restrict the intensity of the review in order to preserve the existence of areas of substantive powers reserved for the Member States within the scope of EU law.⁵³

97. The present case is a perfect illustration of that need.

98. In fact, because the European Union does not have competence in this area, national family law, in principle, is not subject to review in the light of the Charter, since the Member States are not implementing Union law within the meaning of Article 51(1) thereof in this field. In view of

⁵⁰ See judgments of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraphs 83, 88 and 92); of 12 May 2011, *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraphs 86 and 87); and of 2 June 2016, *Bogendorff von Wolfersdorff* (C-438/14, EU:C:2016:401, paragraph 73).

⁵¹ See, in that regard, point 82 of this Opinion and the case-law cited in the footnote.

⁵² Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 45 and 46).

⁵³ See, to that effect, Opinion of Advocate General Poiares Maduro in *Rottmann* (C-135/08, EU:C:2009:588, points 24 and 25).

the particularly sensitive nature and the fundamental importance of this matter, it is even capable of falling within the scope of national identity within the meaning of Article 4(2) TEU, which means that EU law must respect differences in values and views.⁵⁴

99. Yet as soon as there is a cross-border element in a family relationship, any national provision of family law is capable of constituting a restriction to Article 21(1) TFEU simply because it differs from the legislation of another Member State.⁵⁵ If, when examining the justification for such a restriction, the Court were to carry out, on each occasion, an exhaustive review of the national legislation in the light of the Charter and in particular its provisions concerning family relations – such as Articles 7 and 24 – this would mean that all national family law, including the fundamental expression of the differences which the European Union respects under Article 4(2) TEU, would have to conform to a uniform vision of family policy which the Court would draw from its interpretation of those provisions.

100. Such an interpretation would furthermore be contrary to Article 51(2) of the Charter, in accordance with which the Charter does not extend the field of application of Union law beyond the powers of the Union.

(c) Application to the present case

101. It follows from the foregoing considerations that, where the fundamental expression of national identity in accordance with Article 4(2) TEU is at issue, the Court must confine itself to a review of the limits of the reliance on that principle, in particular respect for the values enshrined in Article 2 TEU.⁵⁶ It must therefore be examined whether this is the case here.

(1) The adverse effect of the recognition of parentage on the fundamental expression of national identities within the meaning of Article 4(2) TEU

102. It must be recalled that the obstacle to the free movement of the applicant in the main proceedings stems from the failure to recognise her family relationships established in Spain.⁵⁷

(i) The recognition of parentage for the purposes of drawing up a birth certificate

103. In this regard, on the one hand, as far as the drawing up of a birth certificate in the form applied for in the present case is concerned, that is to say one that shows the applicant in the main proceedings and her wife as mothers of the child, it should be noted that the inclusion of the applicant in the main proceedings as mother on that document necessarily involves recognising the legal effects of the marriage for the purpose of establishing parentage. That is because in the scenario under consideration in this section, in which the applicant in the main proceedings is not the child’s biological mother,⁵⁸ her maternity results from her status as the

⁵⁴ See points 70 and 79 of this Opinion.

⁵⁵ Since, as has been recalled above, where family life is created or strengthened in the host Member State, the right of European Union citizens to freedom of movement means, in accordance with the case-law of the Court, that the family members concerned may continue that family life when they return to their Member State of origin. See judgments of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296, paragraphs 21 and 23); of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 52); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 32).

⁵⁶ See point 73 of this Opinion.

⁵⁷ See points 62 to 64 and 67 of this Opinion.

⁵⁸ See points 37 and 55 of this Opinion.

wife of the child’s biological mother. Moreover, her inclusion on the birth certificate alongside her wife would confer on her, at least in practice, the status of mother for the purposes of Bulgarian family law.⁵⁹

104. The obligation to grant the request on the basis of EU law would therefore create obligations for the Republic of Bulgaria in the area of family law, that is, in an area which may fall within the scope of the national identities of the Member States, and not only, as was the case in *Coman*, in an area that is governed by EU law, such as the right of residence of European Union citizens and their family members. In fact, as the Polish Government stated, in essence, in the course of the procedure before the Court, it is not possible to draw up a birth certificate solely for the purposes of free movement within the meaning of EU law.⁶⁰ It is the birth certificate which, by its nature, reflects parentage within the meaning of family law.

105. The rules on parentage determine the family relationships which are at the heart of family law. They represent the essence of the conception which the Republic of Bulgaria is seeking to protect as its national identity.⁶¹ As explained in point 78 of this Opinion, the definition of a family and its members is of fundamental importance for the State community. Hence, the obligation to transcribe the Spanish birth certificate would even lead to prejudging to whom the Republic of Bulgaria must grant nationality.

106. In this context, Article 2(4) of Regulation 2016/1191 makes readily apparent the intention of the EU legislature to exclude an obligation to recognise inter alia the parentage established in a public document issued by another Member State. Against that background, it must be considered that the obligation to recognise parentage for the purpose of drawing up a birth certificate affects the fundamental expression of the national identity of the Republic of Bulgaria in the sense described above.⁶²

107. Admittedly, it could be argued, and with good reason, that the legal recognition of other forms of family life would not have any negative impact on the conception of the ‘traditional’ family which the Republic of Bulgaria is seeking to protect, but would leave it completely untouched. What is crucial, however, is that this is a legislative assessment which, in the light of the system for the allocation of competences, falls to the Member States. If the Court were to put itself in the position of the Member States for the purpose of assessing the need for a measure to safeguard national identity as defined by the Member State concerned, that very concept would be rendered meaningless. That, in my view, illustrates the conclusion that reliance on the essence of national identity cannot be subject to a review of proportionality (a step of which involves analysing the necessity of a measure in the light of the objective pursued).

(ii) The recognition of parentage for the purpose of exercising rights deriving from secondary EU law on the free movement of citizens

108. However, on the other hand, it should be noted that a significant number of the obstacles to the applicant’s freedom of movement described in point 62 above can be removed by recognising the family relationships established in Spain for the sole purpose of applying secondary EU law on the free movement of citizens. Thus, the recognition of her daughter as her ‘direct descendant’

⁵⁹ See, also, point 57 of this Opinion.

⁶⁰ The applicant in the main proceedings is not seeking to do so, however, since it is precisely the recognition of the family relationships established in Spain that she wishes to secure.

⁶¹ See, in that regard, points 74 and 95 of this Opinion.

⁶² See, in particular, points 92 and 95 of this Opinion.

within the meaning of Article 2(2)(c) of Directive 2004/38 and the recognition of her wife as her ‘spouse’ within the meaning of point (a) of that provision would have the effect of enabling them to reside in the territory of the Bulgarian State together with the applicant in the main proceedings.⁶³ Likewise, since the definition of those concepts under Directive 2004/38 must also be adopted with regard to the concept of the ‘family members’ of a migrant worker for the purposes of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1),⁶⁴ this would also ensure that the child may claim, for example, in accordance with the settled case-law of the Court concerning Article 7(2) of that regulation,⁶⁵ the social and tax advantages associated with the applicant in the main proceedings’ possible status of migrant worker in the same way as a biological child.

109. In so far as the legal effects of the recognition of family relationships solely for the purpose of exercising rights deriving from an act of secondary legislation, such as Directive 2004/38 or Regulation No 492/2011, are confined to an area falling within the competence of the European Union, the view cannot be taken that the obligation on a Member State to guarantee that those rights are conferred on European Union citizens who have validly established such family relationships under the law of another Member State constitutes an interference with the competences which the Member States retain in the area of family law.

110. Accordingly, in those circumstances, the recognition of family relationships established in Spain for the sole purpose of applying secondary EU law on the free movement of persons does not adversely affect the national identity of the Member States.⁶⁶

111. The refusal to recognise the family situation created in Spain and to consider, for that purpose, the daughter as the ‘direct descendant’ of the applicant in the main proceedings and her wife as her ‘spouse’ within the meaning of Article 2(2)(a) and (c) of Directive 2004/38 must therefore be subject to an examination of its proportionality in the light of the Charter.⁶⁷

112. In that regard, it should be noted, at the outset, that the concept of ‘family life’ within the meaning of Article 7 of the Charter is, in accordance with the definition developed by the European Court of Human Rights (‘ECtHR’) in its case-law on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (‘ECHR’), dependent upon the real existence in practice of close personal ties.⁶⁸ The Court of Justice has thus ruled that Article 7 of the Charter encompasses family relations which have developed in the context of a relationship between persons of the same sex,⁶⁹ irrespective of their legal classification in a given Member State. It is also apparent from a combined reading of Article 24(2) and (3) of the Charter that the best interests of the child entail, as a general rule, maintaining family unity.⁷⁰

⁶³ See, by analogy, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 51 and 56).

⁶⁴ See judgment of 15 December 2016, *Depesme and Others* (C-401/15 to C-403/15, EU:C:2016:955, paragraph 51).

⁶⁵ Judgments of 20 June 2013, *Giersch and Others* (C-20/12, EU:C:2013:411, paragraph 40); of 15 December 2016, *Depesme and Others* (C-401/15 to C-403/15, EU:C:2016:955, paragraph 40); and of 10 July 2019, *Aubriet* (C-410/18, EU:C:2019:582, paragraph 38).

⁶⁶ See, by analogy, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 45 and 46).

⁶⁷ See, by analogy, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 47).

⁶⁸ ECtHR, 12 July 2001, *K and T v. Finland* (CE:ECHR:2001:0712JUD002570294, § 150).

⁶⁹ Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 49 and 50).

⁷⁰ This is confirmed by various acts of secondary EU law. See, for example, recital 18 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection (OJ 2011 L 337, p. 9), which provides that ‘in assessing the best interests of the child, Member States should in particular take due account of the principle of family unity’. See also Opinion of Advocate General Pikamäe in *TQ (Return of an unaccompanied minor)* (C-441/19, EU:C:2020:515, point 65).

113. In the present case, it has been established that the two women have not only validly acquired the status of parents under Spanish law but also that they lead an effective family life with their daughter in Spain. As explained above,⁷¹ that family life would be compromised if, in particular, the applicant in the main proceedings could not reside in her Member State of origin with her family members under normal conditions.⁷² It is precisely the rights deriving from regulatory acts such as Directive 2004/38 and Regulation No 492/2011 which guarantee that a European Union citizen can *live* his or her family life within the meaning of Article 7 of the Charter. The Court has previously held in this context that Article 7 of the Charter may also create ‘positive’ obligations for the Member States, it being understood that they must maintain the balance between the competing interests of the individuals concerned and of the community as a whole.⁷³

114. In those circumstances, since the obligation to recognise the family relationships established in Spain for the sole purpose of applying secondary EU law on the free movement of citizens does not alter the conceptions of parentage or marriage in Bulgarian family law, nor does it lead to the introduction of new conceptions in that law, it must be considered that a refusal to recognise the applicant and her wife as the child’s parents for those purposes goes beyond what is necessary to safeguard those objectives.

115. It must therefore be concluded that the Republic of Bulgaria may not refuse to recognise the applicant and her wife as the child’s parents for the sole purpose of applying secondary EU law on the free movement of citizens on the ground that Bulgarian law does not provide for the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child.

(2) Compliance with Article 2 TEU in respect of the failure to recognise parentage for the purpose of drawing up a birth certificate

116. It remains to be determined whether or not the refusal to recognise the family relationships established in Spain between the child, on the one hand, and the applicant in the main proceedings and her wife, on the other, for the purpose of drawing up a birth certificate, infringes Article 2 TEU. In accordance with that provision, the 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.

117. Respect for the values enshrined in Article 2 TEU is a prerequisite for accession to the European Union which must be fulfilled by every Member State at all times.⁷⁴

118. The examination under Article 2 TEU, and in particular an examination of compliance with the principle of equality and human rights, cannot, however, be equated with an examination of the national measure in the light of the corresponding fundamental rights in the Charter.⁷⁵ The Charter does not introduce a harmonised minimum level of protection of fundamental rights in the Member States which would always apply. In accordance with Article 51(2) thereof, it does

⁷¹ See, in particular, point 62 of this Opinion.

⁷² See, to that effect, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 48).

⁷³ Judgment of 27 June 2006, *Parliament v Council* (C-540/03, EU:C:2006:429, paragraph 54).

⁷⁴ See, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 42).

⁷⁵ See, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 29 and 30), and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 50).

not extend the field of application of Union law beyond the powers of the Union. In those circumstances, the examination under Article 2 TEU must be limited to observance of the essence of those principles and rights.⁷⁶

119. However, in so far as the national legislation at issue were, in practice, to comply with the requirements of the ECHR or even the Charter, this must a fortiori be considered to be the case with regard to the requirements arising from Article 2 TEU.

120. In the present case, it is necessary to examine, first, whether the very conception that Bulgaria is seeking to protect as its national identity and, second, the outcome achieved, are therefore consistent with it.

121. As regards, in the first place, the objective of protecting the ‘traditional’ family, it must be examined, in particular, whether this is consistent with the essence of the principle of non-discrimination, which the European Union promotes by virtue of Article 2 TEU.

122. To that end, prohibiting same-sex marriage and allowing only one woman to be the mother of a child undeniably entails a difference in treatment between heterosexual couples and homosexual couples. However, with regard to marriage, it must be noted that there is currently no consensus within the European Union that that difference in treatment cannot be justified. Thus, the Court has found, to date, in its settled case-law, that the Member States are not required to provide for the institution of marriage between persons of the same sex in their national law.⁷⁷ Second, as regards the fact that the husband of the biological mother of a child, unlike the wife of the biological mother, is considered to be the other parent of that child, it should be noted that the ECtHR considers that this does not even constitute a difference in treatment. In so far as there is no factual basis for the legal presumption that the child is a descendant of the wife of the biological mother,⁷⁸ the situation of the husband of the biological mother is not comparable to that of her wife, in the view of the ECtHR.⁷⁹ In those circumstances, the conception of marriage and parentage that Bulgaria is seeking to preserve as its national identity cannot be considered to infringe Article 2 TEU.

123. In the second place, as regards the outcome, namely the fact that, under Bulgarian law, there is no family relationship between the child and the applicant in the main proceedings, it must be examined if this complies with the requirements arising from Article 2 TEU with regard to respect for human rights. These include, inter alia, the right to respect for private and family life, enshrined in Article 8 ECHR, and the best interests of the child, which the Republic of Bulgaria must safeguard under that provision⁸⁰ and under Article 3(1) of the United Nations Convention of 20 November 1989 on the Rights of the Child.

124. According to the case-law of the ECtHR, observance of the essence of those rights, however, does not require the legal recognition of a parent-child relationship with the parent who is not the biological parent of a child. Although biological parentage is regarded as a fundamental

⁷⁶ See, to that effect, judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 48), and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 58).

⁷⁷ Judgments of 24 November 2016, *Parris* (C-443/15, EU:C:2016:897, paragraph 59), and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 37).

⁷⁸ Where, as in the present case, the situation does not involve a couple where one person is transsexual, or surrogacy, or the case of a child who is created using the gametes of one mother, but has been carried to term and delivered by the other mother.

⁷⁹ ECtHR, 7 May 2013, *Boeckel and Gessner-Boeckel v. Germany* (CE:ECHR:2013:0507DEC000801711, § 30).

⁸⁰ See, to that effect, ECtHR, 26 June 2014, *Menesson v. France* (CE:ECHR:2014:0626JUD006519211, § 99).

component of a person’s identity,⁸¹ which is protected by Article 8 ECHR, that is not, however, currently the case with respect to the legal parent-child relationship, established abroad, between two people.⁸²

125. In that regard, it must be pointed out that the ECtHR has also held, to date, that a Contracting State is not required to authorise the simple adoption of a child by the homosexual partner of the child’s biological mother.⁸³

126. Moreover, the right to respect for family life is characterised, in essence, by the possibility of living together in conditions broadly comparable to those of other families.⁸⁴ In other words, what is important in order to respect the essence of that right is to guarantee an effective family life. In practice, there should in particular be no risk of family members being separated by a State measure.⁸⁵ As stated above,⁸⁶ even if the family relationships are not recognised for the purposes of domestic family law, in practice it is assured that the applicant in the main proceedings and her wife will be able to live together with their daughter in Bulgaria and in the other Member States of the European Union in conditions which are comparable to those of other families since, in any event, they must be treated as family members for the purposes of applying in particular Directive 2004/38 and Regulation No 492/2011.

127. The more stringent requirements which could arise, as the case may be, from the opinion of the ECtHR delivered at the request of the French Court of Cassation following the judgment of the ECtHR in *Mennesson v. France*, cannot be regarded as reflecting the essence of the right to respect for private and family life in accordance with Article 2 TEU. In that opinion, with regard to the parentage of a child who was conceived in the United States through a gestational surrogacy arrangement with respect to the ‘intended’ mother, who is not the biological mother, the ECtHR took the view that, although the ‘intended’ mother’s Member State of origin was not required to recognise the parent-child relationship established on the American birth certificate, it should nevertheless offer another possibility of establishing a family relationship between the child and the ‘intended’ mother, such as adoption.⁸⁷ However, the ECtHR did not take a position on the relationship between that solution and the case-law cited in point 125 of this Opinion, in accordance with which a Contracting State is not required to authorise the simple adoption of a child by the homosexual partner of the child’s biological mother.

128. In any event, as has been pointed out above, compliance with Article 2 TEU is a prerequisite for accession to the European Union.⁸⁸ In those circumstances, first, in addition to the fact that only some of the Member States of the European Union have ratified Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms on advisory

⁸¹ ECtHR, 13 July 2006, *Jäggi v. Switzerland* (CE:ECHR:2006:0713JUD005875700, § 37).

⁸² See, to that effect, ECtHR, 26 June 2014, *Mennesson v. France* (CE:ECHR:2014:0626JUD006519211, § 100), and Advisory Opinion of 10 April 2019 (Request No P16-2018-001, § 53).

⁸³ ECtHR, 15 March 2012, *Gas and Dubois v. France* (CE:ECHR:2012:0315JUD002595107, §§ 62 and 72).

⁸⁴ ECtHR, 21 December 2010, *Chavdarov v. Bulgaria* (CE:ECHR:2010:1221JUD000346503, §§ 49 and 50), and 26 June 2014, *Mennesson v. France* (CE:ECHR:2014:0626JUD006519211, §§ 92 and 94).

⁸⁵ See, to that effect, ECtHR, 26 June 2014, *Mennesson v. France* (CE:ECHR:2014:0626JUD006519211, § 92).

⁸⁶ See points 108 to 115 of this Opinion.

⁸⁷ Advisory Opinion of 10 April 2019 (Request No P16-2018-001, § 53). The applicant in the main proceedings submits that that route is blocked in the present case since Bulgarian private international law links the law applicable to adoption to the place of habitual residence of the child, in the present case Spain. Under Spanish law, adoption of a child by one of the women who is already recognised as the mother is logically precluded. However, it is questionable whether, if the family were to return to Bulgaria, Bulgarian law would apply in respect of the adoption.

⁸⁸ See point 117 of this Opinion.

opinions and that those opinions are not binding,⁸⁹ not every infringement of the ECHR can be regarded as an infringement of Article 2 TEU. Second, as regards the areas of competence which are reserved for the Member States, the observance of fundamental rights is ensured by the ECtHR and not by the Court of Justice.⁹⁰

129. Accordingly, Bulgaria’s reliance on national identity with regard to the determination of parentage for the purpose in particular of applying Bulgarian family and inheritance law does not infringe Article 2 TEU. It can therefore constitute, in the present case, the limit of the European Union’s integrative action in that regard, meaning that the Republic of Bulgaria is not obliged, under Article 21(1) TFEU, to recognise the parent-child relationship for the purposes of family law as that relationship has been established in Spain.

130. That conclusion is consistent with the intention of the European legislature, expressed through the provisions of Regulation 2016/1191, not to have recourse to an obligation to recognise the substantive legal position created in another Member State in order to eliminate obstacles to the free movement of European Union citizens that result from rules relating to the civil status of a person.

131. Although it follows that the Court of Justice does not review the conformity of national law governing parentage with inter alia the concept of the ‘child’s best interests’ within the meaning of Article 24(2) of the Charter, this does not in any way exempt the referring court from the obligation of carrying out a review of the proportionality of the decision not to recognise the child’s parentage under its national (constitutional) law and, where applicable, the Republic of Bulgaria’s international obligations. It should be recalled that safeguarding the best interests of the child falls to the Republic of Bulgaria in all situations governed by its national law pursuant to Article 8 ECHR and Article 3(1) of the United Nations Convention on the Rights of the Child. Moreover, it must be pointed out that a process to weigh up those interests against any other constitutional values, such as the protection of the ‘traditional’ family, is inherent in the rule of law. In other words, the question in the present case is not whether or not a review of the proportionality of the refusal to recognise the parentage established in Spain must be carried out, but at what level – EU or national – that review must be carried out.

132. In that regard, it should be noted that the referring court expressly mentions its doubts as to whether the situation that will arise if the family relationship of the applicant in the main proceedings is not recognised complies with the ECHR and in particular with the advisory opinion of the ECtHR in *Menesson v. France*, cited above.⁹¹ Consequently, if it considers that that refusal infringes the Republic of Bulgaria’s obligations under the ECHR, it must act in accordance with the Bulgarian legal system in order to create a situation which complies with the obligations deriving from that convention (for example, interpret Bulgarian law in the light of the provisions of the ECHR, apply the ECHR or equivalent directly).

⁸⁹ See Article 5 of Protocol No 16 to the ECHR with regard to advisory opinions.

⁹⁰ See also in that regard points 100 and 118 of this Opinion.

⁹¹ ECtHR, Advisory Opinion of 10 April 2019 (Request No P16-2018-001).

(3) *Interim conclusion*

133. It follows from all of the foregoing considerations that Bulgaria’s reliance on national identity within the meaning of Article 4(2) TEU may justify the refusal to recognise the child’s parentage, as established on the Spanish birth certificate, for the purpose of drawing up a birth certificate which determines the parentage of that child under domestic family law. Consequently, Bulgaria is also not obliged, under EU law, to grant the child Bulgarian nationality on that basis.

134. However, the reliance on national identity cannot justify the refusal to recognise the family relationships, as established on the Spanish birth certificate, for the sole purpose of exercising the rights conferred on the applicant in the main proceedings by secondary EU law on the free movement of citizens, such as Directive 2004/38 and Regulation No 492/2011.

D. The first and second questions referred for a preliminary ruling in the scenario that the child has Bulgarian nationality

135. First of all, it must be recalled that, in the scenario examined below, the applicant in the main proceedings is either the biological mother of the child or her legal mother, from which it follows not only that the child has Bulgarian nationality, but also that she is a citizen of the European Union under Article 20(1) TFEU. This scenario is therefore similar to the factual situation which gave rise to Case C-2/21, *Rzecznik Praw Obywatelskich*.⁹²

1. The infringement of the child’s rights

(a) Whether there is an obstacle

136. With regard to the question as to whether the refusal by the Bulgarian authorities to issue the child with the birth certificate applied for constitutes an obstacle to the rights which she derives from EU law, the referring court emphasises that, under Bulgarian law, the issuing of a birth certificate is a prerequisite for the issuing of a Bulgarian identity document. Thus, by refusing to issue the birth certificate, the Bulgarian authorities would effectively deny the child the possibility of obtaining a Bulgarian identity document, which, however, is expressly provided for in Article 4(3) in Directive 2004/38.⁹³

137. There is no doubt that the effective exercise of the child’s right to free movement would be seriously compromised if that child had no valid identity document.⁹⁴

138. It is true, in that regard, that the discussions at the hearing showed that the Bulgarian authorities would be prepared to draw up a birth certificate designating only the applicant in the main proceedings as the mother, on the basis of which an identity document could then be issued to her daughter.

139. However, even if that were the case, the mere fact that only the applicant in the main proceedings would be registered as the mother on the birth certificate and, where appropriate, on the travel documents issued on the basis of that birth certificate, could constitute an obstacle

⁹² See point 4 and footnote 7 above.

⁹³ See, also, point 48 of this Opinion.

⁹⁴ See, to that effect, judgment of 2 December 1997, *Dafeki* (C-336/94, EU:C:1997:579, paragraph 19).

to the child’s right to free movement. The Spanish birth certificate also designates the wife of the applicant in the main proceedings as mother of the child and it is not disputed that the two women lead an effective family life with their daughter in Spain.

140. Although, in principle, the Member States have exclusive competence to determine the parentage to be registered on a birth certificate, as recalled in point 58 above, they must nonetheless, when exercising that competence, comply with EU law and, in particular, with the provisions on the freedom of every citizen of the European Union to move and reside within the territory of the Member States under Article 21 TFEU.

141. In that regard, in accordance with settled case-law, the situation of a child who is a national of one Member State, but was born in another Member State and is legally resident there, falls within the scope of Article 21(1) TFEU. That applies even if the child has never left the Member State in which he or she was born.⁹⁵

142. With regard to the existence of an obstacle to the right of freedom of movement, the Court has previously held that a divergence in the information contained in documents relating to a person’s civil status issued by different Member States can cause serious inconvenience to those concerned at administrative, professional and private levels.⁹⁶ Such a divergence may in particular give rise to doubts as to the person’s identity or the accuracy of his or her declarations.⁹⁷ Consequently, it is capable of creating obstacles to the free movement of that person within the territory of the European Union.

143. In the present case, in the first place, it should be recalled that the presentation of a birth certificate is required in a variety of administrative and professional procedures. Therefore, with regard to the divergence between the information on the Bulgarian birth certificate – if that latter mentions only the applicant in the main proceedings as the mother – and the Spanish birth certificate, this would therefore raise questions or even suspicions of false declaration if those documents were presented and, accordingly, cause serious inconvenience for the child.⁹⁸

144. In the second place, as has also been explained above,⁹⁹ the rights which nationals of Member States enjoy under that provision include the right to lead a normal family life both in the host Member State and in the Member State of which they are nationals when they return to that Member State.¹⁰⁰

145. As a result of the refusal to issue the birth certificate applied for, the British wife would ultimately not be considered to be a mother under Bulgarian law. As has been noted above, in point 57 of this Opinion, the birth certificate reflects in that regard the outcome of the

⁹⁵ Judgments of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 27); of 14 October 2008, *Grunkin and Paul* (C-353/06, EU:C:2008:559, paragraph 17); of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraphs 42 and 43); and of 2 October 2019, *Bajratari* (C-93/18, EU:C:2019:809, paragraph 26).

⁹⁶ Judgments of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 36); of 14 October 2008, *Grunkin and Paul* (C-353/06, EU:C:2008:559, paragraphs 23 and 24); of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraph 66); of 12 May 2011, *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 76); and of 2 June 2016, *Bogendorff von Wolfersdorff* (C-438/14, EU:C:2016:401, paragraph 39).

⁹⁷ Judgments of 14 October 2008, *Grunkin and Paul* (C-353/06, EU:C:2008:559, paragraph 26); of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraphs 68 to 70); of 12 May 2011, *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 77); and of 2 June 2016, *Bogendorff von Wolfersdorff* (C-438/14, EU:C:2016:401, paragraph 39).

⁹⁸ See, by analogy, judgment of 14 October 2008, *Grunkin and Paul* (C-353/06, EU:C:2008:559, paragraph 29).

⁹⁹ See, in that regard, points 59 and 60 of this Opinion.

¹⁰⁰ Judgments of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296, paragraphs 21 and 23); of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 52); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 32).

determination of the parentage of a person by the competent authorities for the purposes of family law. This would entail all of the adverse consequences set out in point 62 of this Opinion and is an outcome which is also such as to deter the child from returning to her Member State of origin.

146. In the third place, it is not clear from the request for a preliminary ruling whether the identity document which may be issued on the basis of the birth certificate would reproduce all of the information on that certificate, including in particular the names of the parents, or whether it would be limited to the information relating to the holder in the strict sense. In any event, if that document or other travel documents accompanying it, which are used to designate the persons authorised to travel with the child concerned, refers to only one of the two women who are designated as the child’s mother on the Spanish birth certificate, this may also hinder the child’s right to freedom of movement. For the reasons set out in the preceding points and as noted, in essence, by the Commission in the proceedings before the Court, the right to freedom of movement under Article 21(1) TFEU means that the child must be able to travel with each of her parents.

147. Accordingly, it must be concluded that, if the child has the status of European Union citizen by virtue of her Bulgarian nationality, not only the refusal by the Bulgarian authorities to issue her with a Bulgarian identity document, in accordance with Article 4(3) of Directive 2004/38, but also the refusal to draw up a Bulgarian birth certificate designating, like the certificate issued by the Spanish authorities, the applicant in the main proceedings and her wife as mothers of the child, constitutes an obstacle to the freedom of movement of the child.

148. Moreover, the possible opportunity for the child to obtain an identity document which will de facto enable her to move and reside freely within the territory of the European Union with each of her parents which is dependent on, first, the willingness of the United Kingdom to grant her nationality,¹⁰¹ and, second, the outcome of the negotiations on the future relations between the European Union and the United Kingdom, cannot invalidate that conclusion. Apart from the fact that that possibility is uncertain, it follows from the above considerations that an obstacle to the free movement of citizens arises solely as a result of having two public documents with differing content attesting the same event and the serious inconvenience resulting therefrom. Therefore, the legal consequences of Brexit, mentioned by the referring court in its third question, have no bearing on the outcome of the dispute in the main proceedings.

(b) The justification for the obstacles to the rights of the child

149. As regards, first, the refusal to also recognise the British mother as a parent for the purpose of drawing up a Bulgarian birth certificate, it follows from the considerations set out in the previous section¹⁰² that reliance on national identity in accordance with Article 4(2) TEU may justify that refusal.

150. By contrast, as regards, second, the refusal to recognise parentage for the purpose of issuing an identity document in accordance with Article 4(3) of Directive 2004/38, where that document or a document accompanying it mentions the names of the parents in order to designate the persons authorised to travel with the child concerned, such a document does not appear to have the same legal effects as a birth certificate including that information.¹⁰³ An identity document

¹⁰¹ See, in that regard, footnote 14 above.

¹⁰² See in particular the conclusion in point 133 of this Opinion.

¹⁰³ See point 57 of this Opinion.

does not have probative function as regards the parentage of a person. Therefore, it appears inconceivable that rights or obligations relating to the fundamental expression of the concept of family which the Republic of Bulgaria is seeking to protect may be based on the fact that a person is mentioned as the parent of a minor on his or her identity document (or a document accompanying such a document for the purposes of travel). Thus, the entry of the two parents mentioned on the Spanish birth certificate on such a document is not in any way capable of altering the concepts of parent-child relationships or parenthood in Bulgarian law. The only obligations created for the Republic of Bulgaria in that regard relate to the safeguarding of the rights which that child derives from EU law, in particular Directive 2004/38, which lays down, in Article 4(3) thereof, the obligation to issue an identity document to every citizen.

151. In those circumstances, the obligation to enter on such documents, for the sole purpose of ensuring the exercise of the child's freedom of movement with each of her parents individually, the names of the two women designated as mothers on the Spanish birth certificate, does not adversely affect the national identity.¹⁰⁴

152. Moreover, the refusal to issue an identity document or a document which accompanies it designating the applicant in the main proceedings and her wife as parents of the child, who are authorised to travel with her, cannot be justified either.¹⁰⁵

153. In the light of the considerations set out in point 112 of this Opinion, the relationship between each mother individually and her daughter is protected by Article 7 of the Charter. Living that relationship would however be considerably more difficult, in particular in the case of a bi-national family residing in a third State, if one of the two mothers was not authorised to travel with that child because she is not recognised as the child's mother for that purpose. In those circumstances, since the obligation to issue travel documents, allowing the child to travel with each of her parents, has no formal impact on parentage and the institution of marriage in the Bulgarian legal order, it appears that the refusal to issue such documents goes beyond what is necessary in order to safeguard the objectives relied on by the Republic of Bulgaria.

154. Those considerations and the arguments set out in points 108 to 115 of this Opinion apply, *mutatis mutandis*, to all of the rights deriving from Directive 2004/38 and other secondary legislation which confers rights on European Union citizens and their family members as a result of the exercise of the right to freedom of movement. It follows, in particular, that the applicant in the main proceedings and her wife must be regarded as the 'direct relatives in the ascending line' and the child as the 'direct descendant' within the meaning of Article 2(2)(c) and (d) of Directive 2004/38.

155. It follows from the foregoing considerations that, in the scenario that the child has Bulgarian nationality, the Republic of Bulgaria cannot refuse to issue an identity document and the necessary travel documents to the child of the applicant in the main proceedings, in accordance with Article 4(3) of Directive 2004/38, referring to the applicant in the main proceedings and her wife as parents of the child, on the ground that Bulgarian law does not recognise either the institution of marriage between persons of the same sex or the maternity of the wife of the biological mother of a child. Nor may Bulgaria refuse, on the same ground, to recognise the family relationships between that child and those two women for the purpose of applying secondary EU law on the free movement of citizens.

¹⁰⁴ See, by analogy, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 45 and 46).

¹⁰⁵ See, in that regard, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 47 to 50).

2. *The infringement of the rights of the applicant in the main proceedings*

156. As was pointed out at the beginning of this section, in the scenario under consideration here, the applicant in the main proceedings is either the biological mother or the legal mother of the child.

157. In that regard, in the first place, if the applicant in the main proceedings is the child's biological mother, the mere obligation to disclose that information for the purpose of recognising her family relationship with her daughter cannot be considered to infringe the rights conferred on European Union citizens under Article 21(1) TFEU. In so far as a matter is not harmonised at EU level, that provision does not guarantee a citizen of the European Union that moving to another Member State will be entirely neutral in terms of the rules in that area which apply to that person.¹⁰⁶ Not all legislation of the host Member State of a European Union citizen which is less favourable than that of his or her Member State of origin can be regarded as constituting an obstacle to the freedom of movement.¹⁰⁷

158. In those circumstances, the possible infringement of the right to protection of privacy or the difference in treatment as compared to heterosexual couples which would stem from the obligation to disclose that information cannot be assessed in the light of EU law, and in particular Articles 8 and 21 of the Charter, but solely in the light of national (constitutional) law. In so far as the issuing of a birth certificate does not entail an obstacle to the freedom of movement, it does not constitute an implementation of EU law for the purposes of Article 51(1) of the Charter.¹⁰⁸

159. However, what does constitute an obstacle to the applicant's freedom of movement, as explained above, is the failure to recognise her wife as a parent of the child.¹⁰⁹

160. Yet, as I have just explained, the Republic of Bulgaria is not obliged under Article 21(1) TFEU to recognise the parent-child relationship as established on the Spanish birth certificate, even if this results in the mother who is designated as such on the Spanish birth certificate but is not the child's biological mother not being recognised as having the status of mother under Bulgarian law.¹¹⁰ However, by analogy with the reasoning set out in points 108 to 114 of this Opinion, the Republic of Bulgaria must recognise the wife of the applicant in the main proceedings as being her 'spouse' within the meaning of Article 2(2)(a) of Directive 2004/38,¹¹¹ and as being the child's 'direct relative in the ascending line' within the meaning of Article 2(2)(d) of that directive.

161. In the second place, if the applicant in the main proceedings is the legal mother of the child, it is true that this assumes that she has previously had to acknowledge her maternity under Article 64 of the Family Code. In that regard, although the obligation on her to do so must certainly be regarded as an obstacle to her right to free movement,¹¹² it must in any event, and for the same reasons as those set out in the previous point, be regarded as justified.

¹⁰⁶ See, with regard to Article 45 TFEU, judgment of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraphs 34 and 35).

¹⁰⁷ See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2018:627, point 51).

¹⁰⁸ See, *a contrario*, judgments of 18 June 1991, *ERT* (C-260/89, EU:C:1991:254, paragraph 43), and of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 35).

¹⁰⁹ See, in that regard, in particular point 64 of this Opinion.

¹¹⁰ See in particular the conclusion in point 133 of this Opinion.

¹¹¹ See, by analogy, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 51).

¹¹² See, in that regard, on the consequences of the acknowledgement of maternity in accordance with Article 64 of the Family Code, points 34 and 63 of this Opinion.

3. *Interim conclusion*

162. In the scenario that the child has Bulgarian nationality, the Republic of Bulgaria may not refuse, on the ground that Bulgarian law does not recognise either the institution of marriage between persons of the same sex or the maternity of the wife of the biological mother of a child, to issue an identity document and the necessary travel documents to the child of the applicant in the main proceedings, in accordance with Article 4(3) of Directive 2004/38, referring to the applicant in the main proceedings and her wife as parents of the child.

163. Nor may the Republic of Bulgaria refuse, on the same ground, to recognise the family relationship between the child and her British mother and the status of the British mother as the ‘spouse’ of the applicant in the main proceedings for the purpose of applying in particular Directive 2004/38 and Regulation No 492/2011.

E. The practical implementation of the obligations established in the dispute in the main proceedings (fourth question referred for a preliminary ruling)

164. By its fourth question, the referring court asks whether it must disregard the model birth certificate which forms part of the national legislation in force in order to replace it with a model allowing two mothers to be entered under the heading of ‘parents’. Although that obstacle to the implementation of the judgment to be delivered should not arise if the Court of Justice adopts the approach advocated in this Opinion, the referring court, however – if the child has Bulgarian nationality – will have to resolve the practical issue that the drawing up of a Bulgarian birth certificate is a prerequisite for issuing an identity document.¹¹³

165. However, it should be noted, as the Commission has done, that EU law imposes only an obligation on the Bulgarian authorities to achieve a result in that regard, namely, to issue an identity document which allows the child to travel with each of her parents individually. It is for the domestic legal order of the Member State to lay down the detailed rules in order to attain that objective.

166. In that context, the referring court is obliged, within the limits of its jurisdiction, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, by taking into consideration the whole body of rules of national law and by applying all methods of interpretation that are recognised by those rules.¹¹⁴ It follows that it must also consider alternative approaches, provided, however, that this does not result in an application of national law which is *contra legem*.

167. In that regard, first, it appears that an identity document may be issued on the basis of a birth certificate which designates only one of the two women as the mother, since, according to the explanations given by the Bulgarian Government at the hearing, a Bulgarian identity document does not mention the names of the parents. It would therefore be sufficient to refer to the two women in a travel document accompanying a child’s identity document for the purpose of identifying his or her parents.

¹¹³ If the child does not have Bulgarian nationality, the Bulgarian authorities are not competent to issue her with an identity document under Article 4(3) of Directive 2004/38. See point 49 of this Opinion.

¹¹⁴ See, for example, judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraphs 30 and 31).

168. Second, as the Commission pointed out during the proceedings before the Court, it does not seem inconceivable for an identity document to be issued on the basis of the certified Bulgarian translation of the Spanish birth certificate. In that regard, it should be noted in particular that the Bulgarian Government has confirmed that the granting of Bulgarian nationality is not conditional upon the drawing up of a Bulgarian birth certificate.¹¹⁵ Accordingly, this does not appear to be necessary as a basis for the child's right to request that a Bulgarian identity document be issued where her nationality is established by other means, such as proof of biological parentage with respect to the applicant in the main proceedings or acknowledgement of maternity on her part, in accordance with Article 64 of the Family Code.

169. It is for the referring court to verify the foregoing and to apply the solution which it considers most appropriate to ensure the full effect of the rights which the applicant in the main proceedings and the child derive from Article 21(1) TFEU.

VI. Conclusion

170. In the light of the foregoing considerations, I propose that the Court of Justice should answer the questions referred for a preliminary ruling by the *Administrativen sad Sofia-grad* (Administrative Court of the City of Sofia, Bulgaria) as follows:

- (1) A Member State is required, under Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, to issue to a child, who is a national of that Member State, of two women who are designated on the birth certificate issued by the Member State of birth and residence as mothers of that child, an identity document and the necessary travel documents referring to both women as parents of that child, even if the law of the child's Member State of origin does not provide for either the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child.

Article 21(1) TFEU must be interpreted as meaning that that Member State also may not refuse, on the same ground, to recognise the family relationships between that child and the two women designated as her parents on the birth certificate issued by the Member State of residence for the purpose of exercising the rights conferred on that child by secondary EU law on the free movement of citizens.

- (2) Article 21(1) TFEU must be interpreted as meaning that a Member State may not refuse to recognise the family relationships, established on the birth certificate issued by another Member State, between one of its nationals, her wife and their child for the purpose of exercising the rights conferred on that national by secondary EU law on the free movement of citizens, on the ground that the domestic law of that woman's Member State of origin does not provide for either the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child. This applies irrespective of whether the national of that Member State is or is not the biological or legal mother of that child under the law of her Member State of origin and the nationality of the child.

¹¹⁵ See, in that regard points 32 and 33 of this Opinion.

- (3) Reliance on national identity within the meaning of Article 4(2) TEU may justify the refusal to recognise that a married couple of two women are the parents of a child, as established on the birth certificate issued by the child's Member State of residence, for the purpose of drawing up a birth certificate in the child's Member State of origin or the Member State of origin of one of those two women, determining the parentage of that child for the purposes of the family law of that Member State.
- (4) The legal consequences of the United Kingdom's withdrawal from the European Union under Article 50 TEU have no bearing on the outcome of the dispute in the main proceedings.