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Executive Summary

Uniform (PIL and substantial) rules on parenthood do not exist (yet) and national rules on this topic vary significantly. This impacts the circulation of family status across borders, in particular when parenthood follows recourse to Assisted Reproductive Technologies (ARTs) and affects, more broadly, the exercise of free movement rights as well as human rights of children and their families.

In the EU context, the absence of uniform PIL rules on parenthood also impacts on the operativity of the existing EU instruments adopted in the field of judicial cooperation in civil matters and mainly the instruments on parental responsibility, maintenance or succession. As a consequence, the existence of a parent-child legal relationship, as well as the incidental recognition of a judgment on parenthood, are determined by domestic PIL. In connection to public documents, whilst circulation of a birth certificate's form is regulated by EU law, it is for domestic PIL rules to assess how its (factual and legal) content shall be considered in national legal order.

This **European Impact Report** aims at identifying the parenthood issues arising in connection to the existing relevant EU PIL instruments: whilst parenthood is clearly relevant in the application of PIL instruments dealing with family law, other pieces of legislation will be barely (if at all) affected. In the PIL perspective – considering jurisdiction, applicable law, circulation of judgments and public documents – the following issues have been identified:

- **Parenthood may be relevant when establishing habitual residence.** For instance, the establishment of parenthood based on the existence of a marriage between the parents may be a relevant element in the localization process, in EU PIL instruments using habitual residence for the purposes of determining jurisdiction and/or applicable law.
- **The determination of parenthood may be an incidental question in parental responsibility proceedings:** according to Art. 16 of Regulation (EU) 2019/1111, if in proceedings other than parental responsibility, determining parental responsibility becomes necessary as an incidental question, the courts that are hearing the main case may also hear the incidental question even if they do not have jurisdiction under the. Art. 16(2) expressly provides that the determination of an incidental question shall produce effects only in the proceedings for which that determination was made. An additional issue would be whether the court hearing a succession or parental responsibility case can decide about parenthood. This is not solved by Regulation (EU) 2019/1111.
- **With regard to recognition of decisions ruling on both parenthood and parental responsibility,** whilst the part of the decision dealing with parental responsibility will be recognized under the provisions of Regulation (EU) 2019/1111, the part on parenthood will be recognized under the *lex fori* rules on recognition. .
- **Under Art. 80 Regulation (EU) 2019/1111, the Central Authorities shall provide any information relevant in procedures in matters of parental responsibility** in the requesting Member State, in particular about the situation of a parent, a relative or another person who may be suitable to care for the child. Such information may include the existence of proceedings in the context of parenthood..
- **The establishment of parenthood may arise in succession matters under Regulation (EU) 650/2012,** namely (i) as a preliminary/incidental question, in order to establish whether a given person is a child of the deceased and, therefore, for the demonstration

of the quality of the beneficiary (for instance, an heir) to the estate of the deceased or of a person entitled to the reserved share or a claim against the estate or other beneficiaries and (ii) for the purposes of **issuing a European Certificate of Succession**.

- Family relationships, including parenthood, may be the legal basis of **maintenance obligations falling within the scope of application of the the Regulation (EC) 4/2009 and of the 2007 Hague Protocol**. In the absence of any provision on how the authorities of the EU Member State seized with maintenance matters should decide on the question of the existence of a family relationship including parenthood, between the debtor and creditor, the Explanatory Report on the 2007 Hague Protocol advocates that the law designated to govern the maintenance obligation should also apply to the preliminary issue of the existence of a family relationship. This should be considered an authoritative theoretical approach to preliminary questions in international conventions in general.
- **Claims concerning maintenance of the of children born following a surrogacy agreement** (and therefore impacting on Regulation (EC) 4/2009) **are arising**. Three possible scenarios have been identified: (i) the surrogate mother decides to keep the child and seeks child maintenance from the intended father and/or intended mother; (ii) the intended father and/or the intended mother make a claim for child maintenance against the surrogate mother; and (iii) following the breakdown of the relationship of the intended parents, one of the intended parents seeks child maintenance from the other intended parent or from the surrogate mother.
- **Parenthood may be a main cause of action to which jurisdiction in a maintenance dispute will be attached**. The Regulation (EC) 4/2009 stipulates that the jurisdiction to maintenance can be auxiliary to the jurisdiction for the proceedings concerning the status of person, only if if jurisdiction on parenthood jurisdiction established by domestic PIL has not been exclusively linked to of the nationality of one of the parties.
- **Parenthood is relevant as a preliminary/incidental question in the context of matrimonial property matters under Regulation (EU) 2016/1103 as well as of property consequences of registered partnerships under Regulation (EU) 2016/1104**, since these instruments cover PIL aspects concerning property relationships between the spouses/partners and in their relations with third parties, including their child(ren). For instance, Regulation 2016/1103 should not apply to questions of general legal capacity of the spouses (recital 20). However, this might be relevant if one of the spouses has not reached the age for full (or marital) legal capacity and dependent on the provisions of national law, might need approval from the parent to enter into marriage. Again, the existence of a parent-child relationship may hypothetically impact, if provided by the applicable law, on the possibility for one or both spouses/partners to dispose of some property.
- **Parenthood (as well as the exercise of parental responsibility) is relevant with regard to the partition, distribution or liquidation of the matrimonial property regime or the property regime between partners, in the context of Regulations (EU) 2016/1103 and 2016/1104** (such as in the case of assignment of the family home to the spouse/partner taking care of the child after the dissolution of marriage/registered partnership).
- **Establishment of parenthood is (indirectly) relevant in the contractual disputes where a minor enters into a contract and has to be represented by a legal representative**. In this respect, parenthood may have an impact on the PIL rules concerning civil and commercial matters provided by Regulation (EU) 1215/2012 and Regulation (EC) 593/2008

- Parenthood may be relevant also **in the context of representation of a child for the purposes of civil responsibility under Regulation (EU) 1215/2012**: if in the course of the main dispute, the court has to decide on parenthood incidentally, it would have to investigate its jurisdiction under its national PIL rules.
- **Parenthood falls within the notion of family relationships excluded from the scope of application of Regulation (EC) 593/2008 (recital 8) and Regulation (EC) 864/2007 (recital 9)**. However, obligations not deriving from the existence of a family relationship might be covered by the Regulations.
- **Parenthood may be relevant to determine the persons entitled to compensation for damages sustained personally**: according to Regulation 864/2007, the applicable law may determine that, for example, the parents are entitled to damages for the loss of a child, but the determination of the existence of the relationship between the parents and their children will be a preliminary question to be solved on the law applicable to that relationship.
- **Parenthood is relevant also over the issue of liability of parents for their children**, which is an aspect regulated by the law applicable to a non-contractual obligation designated by Regulation (EC) 864/2007.
- **Parenthood is relevant as a preliminary question in the context of divorce or separation proceedings**, when the law applicable to the divorce/separation designated by Regulation (EU) 1259/2010 leads to the obligation to present a parenting plan.
- **In insolvency proceedings covered by Regulation (EU) 2015/848, the establishment of parenthood emerges in a wide range of situations**, for instance a) where a child acts as debtor or creditor and the child-parent relationship shows who will represent the child in the insolvency proceedings; b) as regards the related persons in avoidance actions; and c) in the interplay between insolvency and maintenance obligations – the liquidator may be responsible for outstanding or ongoing child maintenance and has to establish the parent-child relationship.
- **Parenthood is relevant to determine the scope of application of Regulation (EU) 606/2013 *vis a vis* Regulation (EU) 2019/1111**. When the beneficiary of protection measures is a child and the person harming the child is also the holder of parental responsibility, Regulation (EU) 2019/1111 shall apply. On the contrary, outside this situation, the relevant instrument is the Regulation (EU) 606/2013.
- **Parenthood is relevant in the context of Regulation (EC) 805/2004**, in the light of maintenance obligations and establishing the child-parent relationship in terms of creditor/debtor and/or with respect to establishing the legal representative of the child in all types of claims and proceedings.
- **Parenthood is relevant with regard to access to legal aid under Directive 2002/8**: being recognized as a parent has a crucial relevance on person's family and economic situation and impacts on whether to provide for legal aid and, in the affirmative, on its extent.

Introduction and methodology

The present report is part of the research undertaken under the EU co-funded project UniPAR – Towards Universal Parenthood in Europe,¹ which addresses the legal issues stemming from the circulation of family status – in particular, parent-child relationships – across borders, also in light of the in light of the current evolutions in the field of Assisted Reproductive Technologies.

Legal professionals apply EU instruments in the field of judicial civil cooperation to the private international law on parental responsibility, maintenance and succession, but these instruments do not determine which law is applicable to the question of whether a parental bond exists (in law). This aspect is left to domestic private international law. In concrete cases courts that are faced with disputes on parental responsibility, maintenance or succession might have to investigate whether a parent-child bond exists. Domestic Private international law also determines whether a judgment on parentage can be recognised incidentally. In connection to public documents, EU law might stipulate that authorities must recognise a birth certificate's form, but then they will have to rely on their own domestic private international law to assess whether they can accept its content. This situation may create obstacles to the exercise of free movement rights of children and their families and infringe/undermine human rights.

It was recently acknowledged that EU law was necessary to assist in guaranteeing the recognition of parenthood among Member States. As it is known, the European Commission presented a Proposal for a Regulation in matters of Parenthood.² However, until the instrument is adopted, the effective and coherent application of the EU acquis is at times dependent on the operation of domestic Private International Law. At the same time, there is the opportunity to analyze how a Parenthood Regulation could positively impact the operativity of the existing EU PIL instruments.

This report addresses the first objective of the UniPAR project, namely to identifying parenthood issues arising in connection to existing EU secondary law, also analyzing the possible impact of the Parenthood Regulation at the EU level. In order to obtain this result, the consortium has conducted an analytical research of the EU Acquis, accompanied by an impact research in the light of the possible introduction of a Parenthood Regulation.

The analysis of the overall EU PIL legal framework has been conducted from the perspective of the possible relevance that the ascertainment of a parent-child relationship (which is, as mentioned, still outside the scope of application of the common rules on judicial civil cooperation) may have upon the application of each instrument. Hence, one of the main aspects that need to be examined is when parenthood arises as a preliminary question to the main issue. The analysis highlighted whether and how each instrument provides (or does not provide) rules on preliminary/incidental questions and how the interplay with parenthood matters eventually operates: as a methodological specification, in the general theory of Private

¹ JUST-JCOO-AG-2023-101137859. More information about the project, its activities and resources are available on the official website: <https://www.pravos.unios.hr/unipar/>.

² Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022)695.

International Law the terms “preliminary question” and “incidental questions” are used as synonyms³.

In the light of the above, a clarification is required. Even if the analysis of each EU PIL instrument mainly concerns the impact of parenthood matters on the application of the Regulation or Directive concerned, the report may also highlight the possible impact that each instrument *may already have* on parenthood matters.

It goes without saying that parenthood matters have different impact on the Regulations and Directives concerned, mostly depending on the material scope of application of the instrument considered. There are pieces of legislation on which the impact of parenthood matters is relatively low. At the same time, an overall research is necessary in order to have a clear and trustworthy picture, to identify possible solutions and, above all, to identify the need to continue to work towards a uniform PIL legal framework.

The auspice is that the present report may be useful not only for legal professionals working in the field of civil law and applying the EU PIL instruments (such as lawyers, judges, notaries, central authorities, civil servants, social services, academics, mediators), but also to lawmakers at national and EU level, authorities in the field of children’s rights, child welfare organizations, NGOs, interest groups.

³ See A. Bonomi, Incidental (Preliminary) Question, in J. Basedow, G. Ruhl, F. Ferrari, P. De Miguel Asensio, *Encyclopedia of Private International Law*, 2017, p. 912-924. As far as EU Private International Law is concerned, the term “preliminary question” is used with regard to the applicable law (see, for instance, Rome I Regulation, recital 38; Rome III Regulation, recital 3 and Article 1), whilst the term “incidental question” is used with regard to jurisdiction (see Brussels II *ter* Regulation, recital 10 and 32, Article 16). On this topic, see S. Goessl, *Preliminary Questions in EU Private International Law*, in *Journal of Private International Law*, 2012, pp. 63-76.

COUNCIL REGULATION (EU) 2019/1111 OF 25 JUNE 2019 ON JURISDICTION, THE RECOGNITION AND ENFORCEMENT OF DECISIONS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY, AND ON INTERNATIONAL CHILD ABDUCTION (RECAST)

C. Gonzalez Beilfuss, O. Cazzola Carmona

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation (EU) 2019/1111⁴ applies *ratione temporis* only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after August 1st 2022. It is also binding and directly applicable in all Member States except Denmark.

The material scope of application of Regulation (EU) 2019/1111, is set out in Article 1 and Recitals (4), (5), (7), (9), (10), (11), (12) and (13). Art. 1 (1) b) of Regulation (EU) 2019/1111 states that “1. *This Regulation applies in civil matters of: (...) (b) the attribution, exercise, delegation, restriction or termination of parental responsibility*”. Although parental responsibility is not necessarily attributed to or exercised by the parents, this is the most common scenario. Therefore, in matters of attribution of parental responsibility, determining the parenthood of the child is usually an incidental question to be addressed. As for the other cases referred to in this section (exercise, delegation, restriction or termination), a prior attribution of parental responsibility is needed, so an argument can be made that they are affected, albeit indirectly, by the determination of parenthood.

Art. 1(2) of Regulation 2019/1111 lists some of the matters inherent in parental responsibility: “(a) *rights of custody and rights of access; (b) guardianship, curatorship and similar institutions; (c) the designation and functions of any person or body having charge of the person or property of a child, or representing or assisting a child; (e) measures for the protection of the child relating to the administration, conservation or disposal of the property of a child*”. To this extent (a) usually is vested in the parents and therefore dependent of the prior determination of parenthood. (b), (c) and (e) are more indirectly connected to parenthood since these institutions usually come into play when parents have died or found unable or unfit to care for their children.

Special mention should be made of (d) “the placement of a child in institutional or foster care”; Recital (11) (and Art. 82.2) of Regulation 2019/1111) expressly excludes from its scope cases of placement with a view to adoption, placement with a parent or, where applicable, with any other close relative as declared by the receiving Member State. Therefore, in order to know whether a given placement is excluded or not, it is necessary to determine parenthood.

Finally, Art. 1(4) of Regulation 2019/1111 lists the excluded matters. Parenthood is expressly excluded in paragraph (a): “*This Regulation does not apply to: (a) the*

⁴ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019, p. 1–115.

establishment or the contesting of a parent-child relationship". The matters listed in paragraphs (b) to (f) are closely related to it, or require, and therefore presume, a prior determination of the parent-child relationship.

The provisions of the instrument on incidental questions and the interplay with parenthood matters

Art. 16 (1) of the Regulation (EU) 2019/1111, establishes that in the event that the "*outcome of proceedings in a matter not falling within the scope of this Regulation, before a court of a Member State, depends on the determination of an incidental question relating to parental responsibility, a court in that Member State may determine that question for the purposes of those proceedings, even if that Member State does not have jurisdiction under this Regulation*". Therefore, if in proceedings other than parental responsibility, determining parental responsibility becomes necessary as an incidental question, the courts that are hearing the main case may also hear the incidental question even if they do not have jurisdiction under Regulation (EU) 2019/1111. Paragraph 2 of Art. 16 of Regulation (EU) 2019/1111 expressly provides that the determination of an incidental question *shall produce effects only in the proceedings for which that determination was made*.

Parenthood matters might come up in connection to the application of Art. 16 mainly because parental responsibility is frequently vested on parents. The issue would be whether the court hearing a succession case can decide about parenthood in connection to parental responsibility. This is not solved by Regulation 2019/1111.

Preliminary questions arise in connection to the determination of the scope of application of the Regulation as examined above.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 15 Regulation 2019/1111	<p>This Article provides, in matters of provisional measures, including protective ones, for the jurisdiction of either (i) the courts in whose Member State the child is located or (ii) the courts in whose Member State the child's property is located. While another court may have jurisdiction to hear the merits of the case, one interim measure that could be taken would be the suspension of the parental rights of the parent whose paternity is in dispute. It is also possible to suspend the parent whose paternity is in dispute from administering the property of the child.⁵</p> <p>Another case, although much less likely due to the fact that the parent-child bond does not yet exist, is, for example, in parenthood proceedings, when the parent already lives with the child whose parenthood is being claimed, provisional</p>

⁵ RIVERO HERNÁNDEZ F., *Las acciones de filiación en el Código de familia catalán*, Barcelona, 2001. p. 166-167.

	measures can be adopted that grant him or her, to a greater or lesser extent, certain powers inherent to parental responsibility. This would be the case, for example, of children who live with stepparents and who, given the emotional and family ties they share, apply for adoption. ⁶
Art. 30 Regulation 2019/1111	Art. 30 of Regulation 2019/1111 covers decisions on subjects that fall under the scope of application of the Regulation. Having this in mind, a problem that could emerge is that of a decision both on parental responsibility and parenthood matters. In these cases, solely the part of the decision dealing with parental responsibility will be recognized under the provisions of Regulation 2019/1111. The part on parenthood will be recognized following the rules on recognition of the <i>lex fori</i> , since parenthood matters are excluded from the scope of application of Regulation 2019/1111 and there are no uniform European rules in force.
Art. 30(5) Regulation 2019/1111	The recognition of a foreign decision could happen in two ways: (i) as the main cause of a recognition proceeding or (ii) as an incidental recognition during another proceeding. If the recognition is incidental, then it would only have effect in the framework of that proceeding. The incidental recognition of a foreign judgement could be necessary, for instance, " <i>when a foreign decision is raised by one of the parties in support of a plea of res judicata or when the decision on the principal claim requires the resolution of a preliminary issue that was the subject of the foreign judgment</i> ". ⁷ Art. 30 (5) of Regulation 2019/1111 provides that " <i>where the recognition of a decision is raised as an incidental question before a court of a Member State, that court may determine that issue</i> ". If the object of the proceeding is a parental responsibility issue one of the parties might bring in a foreign decision on parenthood. This decision would answer the preliminary issue of who is the child's legal parent. In this case, the judge may "incidentally recognize" that decision. This, however, will not fall within the scope of Art. 30(5) Regulation 2019/1111, since parenthood matters are excluded from the scope of application of the Regulation.
Art. 71 Regulation 2019/1111	When decisions made in another Member State are recognized, they cannot in any event be subject to review as

⁶ RIVERO HERNÁNDEZ F., *Las acciones de filiación en el Código de familia catalán*, cit., p. 167.

⁷ PRETELLI I., *Article 30. Recognition of a Decision*, in GONZÁLEZ C., CARPANETO L., KRUGER T., PRETELLI I., ŽUPAN M. (eds), *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters (a Commentary on Regulation 2019/1111 (Brussels IIb))*, Cheltenham, 2023, p. 331.

	<p>to their substance, which would mean, for instance, that it would be impossible to revise what was used to determine the parental responsibility, including, for example, whether the determination of the parent-child bond, which may have been done beforehand and on which the acquisition of parental responsibility by that parent is based, is 'correct' or 'incorrect'. In other words, it cannot be argued that the State of origin made an error of fact or law in order to not recognize a court decision.</p>
<p>Art. 80 Regulation 2019/1111</p>	<p>It is a specific task of the central authorities, as stated in Art. 79 b) of Regulation 2019/1111, to "<i>collect and exchange information relevant in procedures in matters of parental responsibility.</i>" Art. 80 regulates, inter alia, what this information comprises. Along these lines, the Central Authority "<i>shall, where available provide, or draw up and provide a report on:</i></p> <ul style="list-style-type: none"> <i>(ii) any ongoing procedures in matters of parental responsibility for the child; or</i> <i>(iii) decisions taken in matters of parental responsibility for the child;</i>" <p>Both the second and third points are related to parenthood insofar as it is perfectly possible that there is an open proceeding for the acquisition of parental authority in which the prior question of determining parenthood between the child and the parent who wishes to acquire parental responsibility was raised, and/or that parenthood has already been determined and parental responsibility granted to that parent.</p> <p>The Central Authority shall also provide any other information relevant in procedures in matters of parental responsibility in the requesting Member State, in particular about the situation of a parent, a relative or another person who may be suitable to care for the child, if the situation of the child so requires.</p> <p>In addition to those already mentioned, other relevant information to proceedings in matters of parental responsibility may be: the opening of proceedings to contest or claim parenthood, the outcome of which will have a clear impact not only on parental responsibility but also on the determination of parenthood. For example, A contests the paternity of B who also has parental responsibility. In the same proceedings, he claims the paternity of C. If the judgment is upheld, C would become the legal parent of A and, most likely, would also acquire at least some of the rights included in parental responsibility.</p>

The possible relevance and impact of a future Parenthood Regulation

Since parental responsibility is usually vested on parents the future Parenthood Proposal is directly relevant for the application of Regulation 2019/1111. Uniform rules on Parenthood would facilitate the uniform application of the Parental responsibility Regulation.

REGULATION (EU) NO 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 4 JULY 2012 ON JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF DECISIONS AND ACCEPTANCE AND ENFORCEMENT OF AUTHENTIC INSTRUMENTS IN MATTERS OF SUCCESSION AND ON THE CREATION OF A EUROPEAN CERTIFICATE OF SUCCESSION

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The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation 650/2012⁸ applies since 17 August 2015 to the succession of persons deceased starting from this date. It applies in all EU Member States except Denmark and Ireland. It provides for uniform rules on jurisdiction and choice-of-law rules of universal application. There are separate choice-of-law rules with respect to succession in general, with respect to material validity of dispositions of property upon death and formal validity of such dispositions. Regulation 650/2012 contains also rules on recognition and enforcement of decisions in succession matters as between EU Member States, as well as the acceptance and enforcement of authentic instruments in matters of succession as between EU Member States. It also establishes a new instrument called European Certificate of Succession (“ECS”) and governs procedure of the issuance of an ECS in an EU Member State and its effects in other EU Member States for the purpose of succession matters.

Parenthood matters are indeed relevant within the scope of the Regulation 650/2012. On the one hand, the Regulation 650/2012 excludes “*the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects*” from its scope (Art. 1(2)(a)). On the other hand, the establishment of family relationships, including parenthood, is often essential for the demonstration of the quality of the beneficiary (for instance, an heir) to the estate of the deceased or of a person entitled to the reserved share or a claim against the estate or other beneficiaries.⁹ It is the law applicable to succession (*lex successionis*), as designated by the choice-of-law rules of the Regulation 650/2012, which decides who are these beneficiaries (Art. 23(2)(b)) or persons entitled to the reserved share (Art. 23(2)(h)). For example, the applicable substantive law (*lex successionis*) might indicate (and almost universally does) that “children” are statutory heirs and are entitled to some kind of reserved share. The question whether a given person is a “child” of the deceased is an incidental question in succession matter left outside the scope of the Regulation 650/2012.

⁸Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.

⁹WELLER M., *Article 1*, in CALVO CARAVACA A.-L., DAVI A., MANSEL H.-P., *The EU Succession Regulation. A Commentary*, Cambridge, 2016, p. 81.

The provisions of the instrument on incidental questions and the interplay with parenthood matters

The Regulation 650/2012 does not provide for any provision on how the authorities of the EU Member State seized with succession matters should decide on the incidental question of family relation, including parenthood, between the deceased and potential beneficiary, as this matter is expressively excluded from the scope of the Regulation. The answer to this question is left entirely to domestic laws of the EU Member States¹⁰. The question arises as to how to deal with an incidental question (namely, a question whether a given person is a “child” of the deceased for the purpose of a succession case). Two approaches are suggested in the legal literature¹¹. In accordance with the first one, in order to decide on the incidental question, the law of the forum (*lex fori*) should be applied. In accordance with the second one, in order to decide on the incidental question, the law applicable to the main question (here, law applicable to succession – *lex successionis*, as designated by the choice-of-law rules of the Regulation 650/2012) should be applied (*lex causae*). Application of the law of a given state, no matter if under *lex fori* approach or *lex causae* approach, might - depending on the case - include application of its choice-of-law rules indicating applicable substantive law or its rules on recognition.¹² Due to lack of unification in that respect, choice-of-law rules on parenthood differ among EU Member States as different connecting factors (for instance, nationality, domicile or habitual residence) are used to designate the law applicable to establishment of parenthood¹³. Similarly, there might be different rules on recognition. Obviously, also substantive laws on establishment of parenthood differ among EU Member State, which has an impact on recognition as a result of the use of public policy clause (what is perfectly illustrated by the *Pancharevo*¹⁴ and *Rzecznik Praw Obywatelskich*¹⁵ cases).

Please note that the Regulation 650/2012 does speak of “incidental question” in Art. 39(3), Art. 59(4) and related Recital (64) and Recital (66), however in a different context. These provisions do not cover the problem of the existence of parenthood relationship between the deceased and potential beneficiary. It refers to one of the matters decided within succession proceeding being the incidental question for the purpose of other proceedings.

¹⁰ WELLER M., *Article I*, cit., p. 80.

¹¹ WELLER M., *Article I*, cit., p. 81.

¹² BONOMI A., *Incidental (preliminary) question* in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO P. (eds), *Encyclopedia of Private International Law*, Cheltenham, 2017, p. 913.

¹³ WELLER M., *Article I*, cit., p. 81.

¹⁴ Judgment of the Court (Grand Chamber) of 14 December 2021, V.M.A. v Stolichna obshtina, rayon „Pancharevo“, Case C-490/20, ECLI:EU:C:2021:1008.

¹⁵ Order of the Court (Tenth Chamber) of 24 June 2022 *Rzecznik Praw Obywatelskich v K.S. and Others*, Case C-2/21, ECLI:EU:C:2022:502.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1(2)(a) Regulation 650/2012	This provision excludes from the scope of application of this instrument " <i>the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects.</i> " Parenthood is therefore excluded from the scope of the Succession Regulation.
Art. 4 and Art. 21(1) Regulation 650/2012	Regulation 650/2012 (just as numerous other instruments on private international law) uses "habitual residence" (of a deceased) as a connecting factor to determine which court has jurisdiction in the succession case and which law is applicable to the case. According to Recital (23) Regulation 650/2012, in order to determine the habitual residence, an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death should be made, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. Determination of a child's habitual residence is based on different criteria, one of them being a degree of the child's integration into the social and family environment. Often, although not always, it will be assumed that a child has the same habitual residence as the parent who has direct custody. In the <i>Mercredi</i> ¹⁶ case the CJEU explained that the younger the child, the more this rule is relevant, as an infant is totally dependent on the caretakers, and therefore the environment of a young child is usually almost completely reduced to the family environment. To conclude, the existence of family relationship might have influence on the determination of habitual residence, and therefore, on determination of jurisdiction and applicable law in succession matters.
Art. 23(2)(b) Regulation 650/2012	It provides that the law applicable to succession (<i>lex successionis</i>) governs, among others, " <i>the determination of the beneficiaries</i> ". Among these beneficiaries substantive succession laws list "children" and also "parents".

¹⁶ Judgment of the Court (First Chamber) of 22 December 2010, Barbara Mercredi v Richard Chaffe, Case C-497/10, ECLI:EU:C:2010:829.

Art. 23(2)(h) Regulation 650/2012	It provides that the law applicable to succession (<i>lex successionis</i>) governs, among others, “ <i>the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs</i> ”. These persons “close to the deceased”, which may have claims against estate of the heirs include “children and might include “parents”.
Art. 65(3)(b) Regulation 650/2012	When filling for the European Certificate of Succession the applicant has to indicate “ <i>the relationship with the deceased</i> .” One of such relationships is obviously parent-child relationship.

The possible relevance and impact of a future Parenthood Regulation

The future Parenthood Regulation¹⁷ would indeed have an impact on the application of the Regulation 650/2012.

In its Recital (11) the future Parenthood Regulation lists “succession rights” as one of the rights that are derived from parenthood. It reminds that:

“Children derive a number of rights from parenthood, including (...) succession rights (...). The non-recognition in a Member State of the parenthood established in another Member State can have serious adverse consequences on children’s fundamental rights and on the rights that they derive from national law (emphasis added)”.

The future Parenthood Regulation seems to take a stand on the application of *lex fori* approach to parenthood being an incidental question within another proceeding. In Recital (45) it explains, using the example of a succession case, that:

“(...) if the object of the proceedings is, for instance, a succession dispute in which the parent-child relationship between the deceased and the child must be established for the purposes of those proceedings, the Member State having jurisdiction for the succession dispute should be allowed to determine that question for the pending proceedings, regardless of whether it has jurisdiction for parenthood matters under this Regulation. Any such determination should be made in accordance with the applicable law designated by this Regulation and should only produce effects in the proceedings for which it was made (emphasis added)”.

Please note however that Art. 10 of the future Parenthood Regulation, which is devoted to and even called “Incidental question” focuses on jurisdiction only. Apart from the wording of Recital (45), the future Parenthood Regulation remains silent on which approach to incidental question should be applied. It would be advisable to regulate approach to incidental question in the normative part of the future Parenthood Regulation in accordance with what is stated in Recital (45).

¹⁷ Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM/2022/695 final.

The future Parenthood Regulation might have an impact on determination of the child's habitual residence as establishment of the parenthood relation will be recognized in all the EU Member States. Consequently, the future Parenthood Regulation might have an impact on the indication of the jurisdiction and law applicable to the succession case of a minor.

The future Parenthood Regulation allows the parenthood, which is decided in a court decision, to be recognized in the course of a preventive action regulated in its Art. 24(1) so that the matter would not have to be decided *ad hoc* as an incidental question in other proceedings. Recognition of decisions and authentic instruments with binding legal effect, as well as acceptance of authentic instruments which have no binding legal effect is subject to public policy clause (Art. 31(1)(a); Art. 39(1)(a) and Art. 45(1)). Hence, one can imagine attempts to question parenthood based on public policy clause (for instance, because a child was born by a surrogate mother to same-sex couple). At the same time, the proposal of the future Parenthood Regulation indicates in which kind of situations public policy clause should not be applied. It states that:

"When assessing a possible refusal of the recognition of parenthood on grounds of public policy, Member State authorities must take into account the child's interests, in particular the protection of the rights of the child, including the preservation of genuine family links between the child and the parents. The ground for the refusal of recognition based on public policy (ordre public) is to be used exceptionally and in the light of the circumstances of each particular case, that is, not in an abstract manner to set aside the recognition of the parenthood of a child where, for example, same-sex parents are involved. In a given case, such recognition would have to be manifestly incompatible with the public policy of the Member State where recognition is sought because, for example, the fundamental rights of a person have been infringed in the conception, birth or adoption of the child or in the establishment of the parenthood of the child. The courts or other competent authorities should not be able to refuse to recognise a court decision or an authentic instrument issued in another Member State where doing so would be contrary to the Charter and, in particular, Article 21 thereof, which prohibits discrimination, including of children. Member State authorities could not thus refuse on public policy grounds the recognition of a court decision or an authentic instrument establishing parenthood through adoption by a single man, or establishing parenthood as regards two parents in a same-sex couple merely on the ground that the parents are of the same sex (emphasis added)."

COUNCIL REGULATION (EC) NO 4/2009 OF 18 DECEMBER 2008 ON JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF DECISIONS AND COOPERATION IN MATTERS RELATING TO MAINTENANCE OBLIGATIONS

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The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation 4/2009¹⁸ applies to all maintenance obligations arising from a family relationship, parentage, marriage, and affinity (Art. 1). This provision appears to be very broad at first, but the full range of its scope may not be applicable in all cases.

The Regulation 4/2009 is applicable in Member States from 18 June 2011 (Art. 76). It specifies that it will apply only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established after the date of application of the Regulation (Art. 75(1)).

The Regulation is directly applicable in all Member States of the European Union. Exceptionally, Denmark participates in Regulation 4/2009 only as far as its provisions amend the Brussels I Regulation. Pursuant to an Agreement, the provisions of the Regulation are 4/2009 applied to relations between other Member States and Denmark with the exception of the provisions in Chapters III (Applicable Law) and VII (Cooperation between Central Authorities).¹⁹

Regulation 4/2009 contains the rules on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation of central authorities in matters relating to maintenance. Regarding the applicable law, Art. 15 of the Regulation implies the application of the Hague 2007 Maintenance Protocol.²⁰

The definition of 'maintenance' is not included in the Regulation. Recital 11 reminds us that it should be interpreted autonomously. The relevant applicable law will determine whether a maintenance obligation exists under the Regulation. According to Regulation 4/2009, namely the 2007 Hague Protocol, the rules on the conflict of laws determine only the law applicable to maintenance obligations and do not determine the law applicable to establishing family relationships, which forms a legal basis of the maintenance obligation. The existence and nature of the relationships that may give rise to the maintenance obligation are covered by the national law of the Member States.

The application of the Regulation is confined only to maintenance matters. Vice versa, the application of the Regulation does not entail any legal effect on the underlying family relation. To put additional emphasis on this concept, Art. 22 confirms that the

¹⁸ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L7, 10.1.2009, p. 1–79.

¹⁹ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2013] OJ L 251/1.

²⁰ HCCH, Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=133>.

recognition and enforcement of a decision on maintenance shall not in any way imply the recognition of the family relationship, parentage, marriage, or affinity underlying the maintenance obligation which gave rise to the decision.

The stance of the 2007 Hague Maintenance Protocol is similar. The Protocol shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage, or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents (Art. 1(1)). Regarding the question of the existence of such a relationship, the decisions rendered in the application of this Protocol shall be without prejudice to the existence of any of the relationships referred to in the first paragraph (Art. 1(2)). The Explanatory Report clarifies that the autonomous connection of the maintenance obligation implies that the law applicable to the family relationships to which Article 1(1) refers needs to be determined, in each Contracting State, on the basis of the rules of conflicts of laws in force and generally applicable in that state. This raises no difficulty when the existence or non-existence of the family relationship is the principal issue of the proceedings concerned (e.g. when the claim relates to the proof of parenthood).²¹

In more recent times, new questions relating to maintenance duty appear with the variety of medical methods of conceiving children. One of the open issues relates to maintenance of a child conceived with assisted reproductive technology and surrogacy. Domestic legal solutions to surrogacy matters differ widely among jurisdictions. The question of to whom the parent is obliged to pay the maintenance for the child therefore gets more complicated. No reference to these issues can be tracked either with the preparatory or final acts in relation to the 2007 Hague Child Support Convention or the Regulation 4/2009. However, three theoretical situations which can result in a claim for maintenance involving surrogacy may be identified. First, the situation where the surrogate mother decides to keep the child and seeks child maintenance from the intended father and/or intended mother; second, the situation where the intended father and/or the intended mother make a claim for child maintenance against the surrogate mother; and third, the situation where, following the breakdown of the relationship of the intended parents, one of the intended parents seeks child maintenance from the other intended parent or from the surrogate mother. The issues concerning applicable law that do not provide for certain relationships (e.g. same sex unions, social family / parenthood) were elaborated in the course of the First Meeting of the Special Commission to review the practical operation of 2007 Child Support Convention or Convention and the 2007 Maintenance Protocol. It was concluded that the application of the 2007 Maintenance protocol should be encouraged, as is already the case in a number of States, based on the understanding that it is for the applicable law to determine whether, to what extent and from whom the creditor may claim maintenance (Art11(a)), and that decision rendered in application of the Protocol shall be without prejudice to the existence of any of the

²¹ BONOMI A., *Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, The Hague, HCCH Publications, 2013, para. 24.

relationships referred to in the Protocol (Art 1(2)). As well, it was concluded that the public policy exception (Art 13) should be used in a cautious and limited way.²²

The provisions of the instrument on incidental questions and the interplay with parenthood matters

The problem may arise when the issue of existence of the family relationship arises on a preliminary basis in the course of proceedings with the maintenance as the principal claim (e.g. if the debtor disputes the existence of the parenthood).

The Regulation 4/2009 does not provide for any provision on how the authorities of the EU Member State seized with maintenance matters should decide on the incidental question of family relation, including parenthood, between the debtor and creditor.

The Explanatory Report on the 2007 Hague Protocol advocates the employment of the dependency method with such preliminary issues. It leans on the attitude embraced by its 1956 and 1973 predecessors. Consequently, the law designated to govern the maintenance obligation should also apply to the preliminary issue of the existence of a family relationship within the meaning of Art. 1(1). Although the solution offered in the Explanatory Report is not binding on the Contracting States, it is considered to be a preferable theoretical approach to preliminary questions in international conventions in general. While it offers space for controversies, it also contributes to the procedural efficiency and consistency of decision-making under the Protocol.²³

The matter was further elaborated during the First Meeting of the Special Commission. Two trends in State practices were identified when it comes to the application of preliminary/incidental questions. In the first, the preliminary/incidental question is governed by the law governing the principal issue in relation to maintenance obligations as designated by the 2007 Maintenance Protocol. In the second, the law applicable to the preliminary/incidental question of the law applicable to the issue arising on a preliminary/incidental basis as designated by the generally applicable rules on conflict of laws of the forum. The Conclusion is that, if possible, between those two options, the one most favourable to the creditor should be used.²⁴

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1(1) Regulation 4/2009	Definition of the term 'maintenance' is not included in the Regulation. Recital 11 reminds it should be interpreted autonomously. The existence and nature of the relationships that may give rise to the maintenance obligation are covered by the national law of the Member States.

²² First Meeting of the Special Commission to review the practical operation of 2007 Child Support Convention or Convention and the 2007 Maintenance Protocol that was held in The Hague from 17 to 19 May 2022. Conclusions and Recommendation, <https://assets.hcch.net/docs/ee328db7-1d7a-4e8a-b765-2e35e937a466.pdf>, p. 18.

²³ BONOMI A., *Explanatory Report on the Hague Protocol*, cit., para 24.

²⁴ Conclusions and Recommendations, cit., p. 17-18.

Art. 3 Regulation 4/2009	The existence of a family relationship is an important factor while determining habitual residence. The Regulation stipulates that the jurisdiction to maintenance can be auxiliary to the jurisdiction for the proceedings concerning the status of person. Parenthood may be a main cause of action to which jurisdiction in a maintenance dispute will be attached. This will only be possible if the parenthood jurisdiction established by domestic private international law has not been exclusively linked to the criterion of nationality of one of the parties.
Art. 15	According to the 2007 Maintenance Protocol, the rules on the conflict of laws determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment of family relationships which forms a legal basis of the maintenance obligation. Some guidelines regarding that matter can be found in the 2007 Maintenance Explanatory Report and 1 st Special Commission Conclusions and Recommendations.
Art. 22	The recognition and enforcement on maintenance decision does not imply the recognition of parenthood.

The possible relevance and impact of a future Parenthood Regulation

Future Parenthood Regulation explicitly stresses the maintenance right as one of the children's rights that derive from parenthood:

"Children derive a number of rights from parenthood, including the right to an identity, a name, nationality (where governed by ius sanguinis), custody and access rights by their parents, maintenance rights, succession rights and the right to be legally represented by their parents. The non-recognition in a Member State of the parenthood established in another Member State can have serious adverse consequences on children's fundamental rights and on the rights that they derive from national law" (Recital 11).

Recital 45 discusses proceedings depending on the determination of an incidental question falling within the scope of Parenthood Regulation. The example used is related to succession, but the same analogy can be applied to maintenance matters as well.

"In the interests of procedural economy and procedural efficiency, if the outcome of proceedings before a court of a Member State not having jurisdiction under this Regulation depends on the determination of an incidental question falling within the scope of this Regulation, the courts of that Member State should not be prevented by this Regulation from determining that question. Therefore, if the object of the proceedings is, for instance, a succession dispute in which the parent-child relationship between the deceased and the child must be established for the purposes of those proceedings, the Member State having jurisdiction for the succession dispute

should be allowed to determine that question for the pending proceedings, regardless of whether it has jurisdiction for parenthood matters under this Regulation. Any such determination should be made in accordance with the applicable law designated by this Regulation and should only produce effects in the proceedings for which it was made”(Recital 45).

Article 10 regulates incidental questions relating to parenthood. However, it does not regulate the law applicable to those questions, in contrast to the Recital 45. By doing so, the wording of the recital does not have a binding nature: “1. *If the outcome of proceedings in a matter not falling within the scope of this Regulation before a court of a Member State depends on the determination of an incidental question relating to parenthood, a court in that Member State may determine that question for the purposes of those proceedings even if that Member State does not have jurisdiction under this Regulation.*

2. The determination of an incidental question pursuant to paragraph 1 shall produce effects only in the proceedings for which that determination was made”.

COUNCIL REGULATION (EU) 2016/1103 OF 24 JUNE 2016 IMPLEMENTING ENHANCED COOPERATION IN THE AREA OF JURISDICTION, APPLICABLE LAW AND THE RECOGNITION AND ENFORCEMENT OF DECISIONS IN MATTERS OF MATRIMONIAL PROPERTY REGIMES

B. Musseva, T. Dimitrova

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

The Regulation (EU) 2016/1103²⁵ applies to matrimonial property regimes. According to Article 3 (1) (a), *“for the purposes of this Regulation of (a) ‘matrimonial property regime’ means a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution.”*

As explained in recital 18 of Regulation 2016/1103, *“The scope of this Regulation should include all civil-law aspects of matrimonial property regimes, both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple’s separation or the death of one of the spouses. For the purposes of this Regulation, the term ‘matrimonial property regime’ should be interpreted autonomously and should encompass not only rules from which the spouses may not derogate but also any optional rules to which the spouses may agree in accordance with the applicable law, as well as any default rules of the applicable law. It includes not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any property relationships, between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof.”*

The scope of Regulation 2016/1103 is defined in a negative sense by Article 1(2) thereof. Article 1(2) provides that *“(a) the legal capacity of spouses”; “(b) the existence, validity or recognition of a marriage”; “(c) maintenance obligations”; “(d) the succession to the estate of a deceased spouse”; “(e) social security”; “(f) the entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage”; “(g) the nature of rights in rem relating to a property”; and “(h) any recording in a register of rights in immovable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register”* are to be excluded from its scope.

Further guidance on the scope of the Regulation is provided by the provisions on the scope of the applicable law determined pursuant to the conflict-of-law rules of Regulation 2016/1103. Article 27 of the Regulation provides that the law applicable to the matrimonial property regime shall govern, inter alia: *“(a) the classification of property of either or both spouses into different categories during and after marriage”; “(b) the transfer of property from one category to the other one”; “(c) the responsibility*

²⁵ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, p. 1–29.

of one spouse for liabilities and debts of the other spouse”; “(d) the powers, rights and obligations of either or both spouses with regard to property”; “(e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property”; “(f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties”; and “(g) the material validity of a matrimonial property agreement.”

Additionally, AG Szpunar in the Opinion delivered in Mahnkopf²⁶ states that there are no reasons for placing a different interpretation on the terms “*rights in property arising out of a matrimonial relationship*” and “*questions relating to matrimonial property regimes*” in the light of the EU conflict-of-law rules. In p. 83 of the Opinion, AG Szpunar underlines that in its case-law the Court has devoted a great deal of attention to the interpretation of point 1 of the second paragraph of Article 1 of the Brussels Convention, which excluded “rights in property arising out of a matrimonial relationship” (*les régimes matrimoniaux*) from the scope of the Convention and gives examples with the judgment in W²⁷ and judgment in van den Boogaard²⁸.

In general, the Regulation applies to matrimonial property regime and the parenthood matters might arise as a preliminary/incidental question in the following scenarios:

- Regulation 2016/1103 covers the property relationships between the spouses and in their relations with third parties, including their child(ren).
- Parenthood might arise as a preliminary/incidental question to other preliminary/incidental questions. For instance, recital 20 expressly states that the Regulation should not apply to questions of general legal capacity of the spouses. However, this might be relevant if one of the spouses has not reached the age for full (or marital) legal capacity and dependent on the provisions of national law, might need approval from the parent to enter into marriage.
- Parenthood, e.g. the existence of children in marriage and taking care of them might be among the factors to be taken into consideration when establishing the habitual residence of a spouse for the purposes of determining jurisdiction and/or applicable law under the rules of the Regulation.
- Since the scope of the Regulation covers also the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property among spouses, the parenthood and taking care of the child might be relevant material factor in the applicable law to the distribution of the property, in particular: assignment of the family home to the spouse taking care of the child after the dissolution of marriage.
- Parenthood to be established via applicable law, recognition/acceptance of an authentic instrument released by a public authority (birth certificate included) or by recognition of a court decision.

²⁶ Opinion of AG Szpunar delivered on 13 December 2017, Doris Margret Lisette Mahnkopf and Sven Mahnkopf, Case C-558/16, p. 87.

²⁷ CJEU, Judgment of the Court of 31 March 1982, C.H.W. v G.J.H., Case 25/81.

²⁸ CJEU, Judgment of the Court of 27 February 1997, Antonius van den Boogaard v Paula Laumen, Case C-220/95.

The provisions of the instrument on preliminary/incidental questions and the interplay with parenthood matters

According to Recital 21, the Regulation should not apply to other preliminary questions such as the existence, validity or recognition of a marriage, which continue to be covered by the national law of the Member States, including their rules of private international law.

The Regulation is silent of the parenthood matters, but they undoubtedly are not covered by it even as a preliminary question.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1(2)(a) Regulation 2016/1103	The Regulation does not apply to the legal capacity of spouses, e.g. it also does not apply to the parenthood approval for marriage capacity (prior reaching full legal capacity).
Art. 1(2)(b) Regulation 2016/1103	The Regulation does not apply to the existence, validity or recognition of a marriage, e.g. it also does not apply to parenthood by operation of law.
Art. 1(2)(c) Regulation 2016/1103	The Regulation does not apply to maintenance obligation, e.g. it also does not apply to maintenance based on parenthood.
Art. 1(2)(d) Regulation 2016/1103	The Regulation does not apply to succession, e.g. it also does not apply to children as heirs by operation of law or a will.
Art. 4 Regulation 2016/1103	Children as heirs if the court is seized with a matter of the succession of a spouse pursuant to Regulation (EU) No 650/2012.
Art. 5 Regulation 2016/1103	Children as parties to divorce procedures after a death or as third parties to annulment claim (Judgment of the court of 13 October 2016, Case C-294/15, Mikołajczyk).
Art. 6 Regulation 2016/1103	Parenthood and taking care of a child as a criterion when determining the habitual residence of the spouse.
Art. 10 Regulation 2016/1103	Child as (co)owner of a property in general or in specific cases for example is the subsidiary jurisdiction applicable;
Art. 13 Regulation 2016/1103	Child as (co)owner of a property in limitation of proceedings;
Art. 17 Regulation 2016/1103	Child as (co)owner of a property in <i>lis pendens</i> .
Art. 18 Regulation 2016/1103	Dispute as regards parenthood relevant for the family home or the maintenance of a child as a related action.
Art. 19 Regulation 2016/1103	Provisional, including protective measures if dependent on the care of the child;

Art. 22 Regulation 2016/1103	Is the child bound by the choice of applicable law?
Art. 26 Regulation 2016/1103	The child as a third party with rights deriving from the objectively applicable law.
Art. 27(f) and Article 28 Regulation 2016/1103	The effect of the matrimonial property regime on a legal relationship between a spouse and the child as a third party;
Art. 29 Regulation 2016/1103	Adaption of rights in rem if related to the care of the child;
Art. 30 Regulation 2016/1103	Overriding mandatory rules as regards the family home where the care of the child plays a role;
Art. 31 Regulation 2016/1103	The child-parent relationship and the public policy;
Art. 36 Regulation 2016/1103	The recognition of decisions on parenthood is excluded but may be of relevance for example as regards the family home;
Art. 55 Regulation 2016/1103	Parenthood and its relevance for legal aid.
Art. 58 Regulation 2016/1103	Recognition of authentic instrument on parenthood excluded but may be of relevance for example as regards the family home;

The possible relevance and impact of a future Parenthood Regulation

As indicated in the Proposal, in the absence of Union rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood in another Member State for the purposes of the rights that a child derives from parenthood under national law, these matters are currently governed by the law of each Member State.

The adoption of common rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood in another Member State would complement current Union legislation on family law and succession and facilitate its application, as the parenthood of a child is a preliminary question that must be resolved before applying existing Union rules on parental responsibility, maintenance and succession as regards the child.

As illustrated above, these conclusions are also of relevance for the cross-border matrimonial property matters in situations where a child is involved as co-owner of matrimonial property, or the applicable law takes into consideration the interest of the child and/or the spouse taking care of the child when deciding on matrimonial property matters. The parenthood might be a factor also for the terms of the matrimonial property agreement and clear rules of parenthood might give the spouses more flexibility and predictability.

The European Certificate of Parenthood will also facilitate the free movement of spouses.

COUNCIL REGULATION (EU) 2016/1104 OF 24 JUNE 2016 IMPLEMENTING ENHANCED COOPERATION IN THE AREA OF JURISDICTION, APPLICABLE LAW AND THE RECOGNITION AND ENFORCEMENT OF DECISIONS IN MATTERS OF THE PROPERTY CONSEQUENCES OF REGISTERED PARTNERSHIPS

I. Queirolo, L. Carpaneto, F. Pesce, S. Dominelli, F. Maoli

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation 2016/1104²⁹ introduces uniform rules of private international law on the property consequences of registered partnerships. Adopted in the framework of an enhanced cooperation between eighteen Member States,³⁰ it applies to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019.³¹ The Regulation applies to situations having cross-border implications.³² As concerns the material scope of the instrument, Regulation 2016/1104 applies to all civil-law aspects of the property consequences of registered partnerships (Article 1(1)).³³ Accordingly, Article 1(2) excludes from the scope of the Regulation some related issues that are nevertheless not addressed by the discipline, and are often governed by other instruments of EU judicial cooperation in civil matters.

The Regulation is clear in limiting its scope of application to 'legal' partnerships, which are registered before a public authority and have an official nature (Recital 16). Therefore, registration by a public authority recognized by domestic law is a prerequisite for its consideration under the Regulation 2016/1104. More in detail, Article 3(1)(a) and Article 3(1)(b) contain an express definition of registered partnerships and their property consequences.

The regulation does not require a Member State to recognise a registered partnership concluded in another Member State. The existence, validity or recognition of a registered partnership is excluded from the material scope of the instrument (Article 1(2)(b)). This is further stressed in Recital 21, which states that such preliminary matters "continue to be covered by the national law of the Member States, including their rules of private international law". Therefore, the authorities of the relevant Member State should autonomously verify the existence of any registered partnership, its validity and recognition, including union between same-sex individuals.

²⁹ Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, p. 30–56. As is known, the instrument has extensive similarities with its "twin" Regulation (EU) 2016/1103 on matrimonial property regimes.

³⁰ Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria, Finland and Cyprus.

³¹ Art. 69 Regulation 2016/1104.

³² Recital 14 Regulation 2016/1104. On the existence of an international element, see recently CJEU, Judgment of the Court of 8 February 2024, *Inkreal s.r.o. v Dúha reality s.r.o.*, case C-566/22.

³³ RODRÍGUEZ BENOT A., *Article 1*, in VIARENGO I., FRANZINA P. (eds), *The EU Regulations on the Property Regimes of International Couples: A Commentary*, Cheltenham, 2020, p. 17.

The Regulation does not mention parenthood: a number of issues explicitly excluded from the material scope of application of the instrument are connected with parenthood matters, which may arise as a preliminary/incidental question. Parenthood matters are therefore not explicitly linked to the scope of application and the provisions of the Regulation. In principle, the private international law rules on the property consequences of registered partnerships should not be directly impacted by parenthood matters.

In principle, it cannot be excluded that some of the issues that may be affected by the existence of a parent-child relationship in respect of one of the partners may be relevant in the context of national provisions of the *lex causae*. Those issues may include:

- 1) The incidence of the existence of a parent-child relationship in respect of one of the partners on the constitution or the dissolution of a property regime.
- 2) The incidence of the existence of a parent-child relationship on the possibility for the partners to dispose of some property.
- 3) In the context of the dissolution of the property regime, the incidence of the existence of a parent-child relationship (including sons or daughters from a previous union) on the the division and distribution of the parties' property.

This is a matter that needs to be assessed on the basis of the Member State's law concerned: the best place to carry out such an analysis is in a nationwide research.

The provisions of the instrument on preliminary/incidental questions and the interplay with parenthood matters

Regulation 2016/1104 does not contain any provision which specifically address preliminary or incidental questions. Therefore, this aspect is regulated on the basis of domestic law, depending on the Member State concerned on a case-by-case basis.

The Regulation only mentions "incidental questions" in two provisions, namely:

- Article 36(3) (concerning recognition of decisions): "*If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question*".
- Article 58(4) (concerning acceptance of authentic instruments): "*If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of property consequences of registered partnerships, that court shall have jurisdiction over that question*".

Apparently, no provision of the Regulation is clearly connected with preliminary questions concerning the existence of parenthood relationships. Again, there may hypothetically be national laws governing the economic aspects of registered partnerships which, for a number of reasons, may give relevance to the existence of a parent-child relationship. However, this depends on the *lex causae* and a more accurate analysis should be made on the basis of the domestic laws of EU Member States.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Article 4 Regulation 2016/1104	<p>This provision provides for a ground of jurisdiction which applies every time a court of a Member State is seized in matters of the succession of a registered partner under Regulation (EU) No 650/2012. In this case, "<i>the courts of that State shall have jurisdiction to rule on matters of the property consequences of the registered partnership arising in connection with that succession case</i>".</p> <p>This provision has the effect to concentrate jurisdiction upon the court competent for the succession. Within that proceedings, status question may indeed become relevant.</p>
Article 27 Regulation 2016/1104	<p>This provision regulates, albeit not in a comprehensive way, the scope of the law applicable to the property consequences of registered partnerships pursuant to the Regulation. This include: (a) the classification of property of either or both partners into different categories during and after the registered partnership, (b) the transfer of property from one category to the other one, (c) the responsibility of one partner for liabilities and debts of the other partner, (d) the powers, rights and obligations of either or both partners with regard to property, (e) the partition, distribution or liquidation of the property upon dissolution of the registered partnership, (f) the effects of the property consequences of registered partnerships on a legal relationship between a partner and third parties, and (g) the material validity of a partnership property agreement.</p> <p>Some of the issues regulated by the <i>lex causae</i> (such as the ones mentioned above) may potentially raise some questions depending on the existence of a parent-child relationship in respect of one of the parties.</p>

The possible relevance and impact of a future Parenthood Regulation

As mentioned, the seems to be little or no incidence of legal issues concerning parenthood on the Property Regimes Regulation.

The Regulation provides for a specific ground of jurisdiction in the case where a court of a Member State is seized in matters of the succession of a registered partner under Regulation (EU) No 650/2012³⁴. In this case, "*the courts of that State shall have*

³⁴ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.

jurisdiction to rule on matters of the property consequences of the registered partnership arising in connection with that succession case". Parenthood matters are clearly relevant within matters of succession, since the establishment of family relationships is often essential for the demonstration of the quality of the beneficiary to the estate of the deceased: this aspect mainly concerns the application of Regulation 650/2012 and is therefore discussed in depth in the dedicated section of the present report.

Another issue that may highlight the incidence of parenthood on property regimes of registered partnerships concerns the right of habitation in the family home, as a consequence of the dissolution of the union. This right is explicitly mentioned only in Recital 52 of the Regulation, as an example of overriding mandatory provisions³⁵ which may constitute an exception to the application of the law applicable to the property consequences of registered partnerships. Again, the issue can be examined under the perspective of domestic law. National authorities of Member States may have to apply overriding mandatory provisions of the *lex fori* providing for the right of habitation in the family home in favour of the non-owning partner. Some domestic law (explicitly, or as a result of interpretation and application by national courts) may grant this right only with a view to protecting the interest of children³⁶. Thus, the preliminary issue of the ascertainment of a parent-child relationship for the purposes of application of the right to habitation.

³⁵ Contrary to the Regulation 650/2012 (Article 30), the instrument under examination does not contain any provision for special rules imposing restrictions in respect of certain assets, inter alia on the basis of family considerations. See GEBAUER M., *Article 30*, in VIARENGO I., FRANZINA P. (eds), *The EU Regulations on the Property Regimes*, cit., p. 297.

³⁶ It is the case of Italy, albeit in the different case of dissolution of marriage: Article 337-*sexies* of the Civil Code establishes that the court may assign the family home "giving priority consideration to the best interests of the children". In that hypothesis, the case law tends to recognize the right to habitation to the non-owning spouse in presence of non-self-sufficient children (Cassazione Civile, I, 20th November 2023, No 32151). The rules may be analogically applied to the case of dissolution of the registered partnership.

REGULATION (EU) 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2012 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (RECAST)

T. Kruger, T. Van Hof

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation 1215/2012,³⁷ also referred to as Brussels Ia Regulation, is a broad instrument regulating jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The concept 'civil and commercial' has been interpreted broadly,³⁸ but does not include *acta iure imperii*.³⁹ Brussels Ia explicitly provides that it does not apply to "*the status or legal capacity of natural persons...*" (Art. 1(2)a)), as do many of the other regulations in EU private international law.

Parenthood matters can be relevant where a minor enters into a contract and has to be represented by a legal representative. Who that legal representative is, is a matter of parental responsibility, and falls in the scope of the Brussels II b Regulation (Regulation 2019/1111). In order to determine parental responsibility, parenthood must be established first. In this sense, the establishment of parenthood can be relevant for a contractual dispute in which a minor is involved, but only in an indirect manner. This indirect relevance of parenthood for contractual disputes in Brussels Ia is similar to the relevance in Rome I (Regulation 593/2008).

The provisions of the instrument on incidental questions and the interplay with parenthood matters

The Brussels Ia Regulation does not explicitly regulate the fate of incidental questions. The Court of Justice of the European Union (CJEU) found that if the subject-matter of the legal action is an excluded matter, the Regulation does not apply. This was the case where a court was requested to authorise the sale of a share of an immovable property by a person lacking full legal capacity.⁴⁰ Since the subject of the action was not the sale but the protection of the interests of the person, the Regulation was not applicable. If a minor wishes to sell property of which they are the owner, they would (under the applicable law) have to be represented by a person with parental responsibility. In order to determine who that is, the question of parenthood might arise. If the dispute

³⁷ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1–32.

³⁸ CJEU, Judgment of the Court of 23 October 2014, FlyLAL Lithuanian Airlines v. Air Baltic, Case C-302/13; CJEU, Judgment of the Court of 16 July 2020, Belgain State v. Movic, Case C-73/19; CJEU, Judgment of the Court of 22 December 2022, iEurelec trading v. Ministre de l'Économie et des Finances, Case C-98/22.

³⁹ CJEU, Judgment of the Court of 14 October 1976, LTU v. Eurocontrol, Case 29/76; CJEU, Judgment of the Court of 15 November 2018, Greece v. Kuhn, Case C-308/17; CJEU, Judgment of the Court of 6 October 2021, Skarb Panstwa Poland v. TOTO, Case C-581/20.

⁴⁰ CJEU, Judgment of the Court of 3 October 2013, Scheider, Case C-386/12, para. 29.

is about who can represent the child and whether the representative is the child's legal parent, the matter would fall outside the scope of the Regulation. If however the main dispute concerns a contractual matter, Brussels Ia applies. If in the course of the main dispute, the court has to decide on parenthood incidentally, it would have to investigate its jurisdiction under its national private international law. The same type of situation can arise with respect to delict. Where a minor committed a tort, the question might arise who bears responsibility to pay damages to the victim. That might be the child's parent under the applicable delict law. The question of who is a parent would then be an incidental question. If this is disputed, the question arises whether the court has jurisdiction to decide the issue. If the court has to decide the issue, it would have to examine its jurisdiction on the basis of its domestic private international law.

This reasoning is in line with the CJEU's case law on Brussels IIa (Regulation 2201/2003, the predecessor of Brussels IIb). The CJEU decided in *Matouškova* that a court that has jurisdiction over a succession dispute does not have jurisdiction over the incidental question concerning an agreement for the sharing-out of an estate concluded by a guardian ad litem on behalf of minor children. The latter was, according to the CJEU, a matter relating to parental responsibility and therefore fell under the Brussels IIa Regulation. The legislator changed this state of the law in the recast, the Brussels II b Regulation, by providing explicitly that a court other than the court with jurisdiction under the Regulation may decide incidental questions for purposes of the case at hand (Art. 16).⁴¹ In the absence of such provision in Brussels Ia, the logical conclusion is that a court does not have jurisdiction to deal with out-of-scope incidental questions.

Lastly, that part of the judgment deciding on the incidental issue would not benefit from the recognition and enforcement regime of Brussels Ia.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1(2)(a) Regulation 1212/2012	This Regulation does not apply to the status or legal capacity of natural persons.

The possible relevance and impact of a future Parenthood Regulation

If a Parenthood Regulation were adopted, the incidental question of who is the parent who might be the bearer of parental responsibility for purposes of representing the child would no longer be determined by national law, but by this Regulation. This is also true for incidental questions in delict cases, or in any other civil and commercial cases falling within the scope of Brussels Ia.

Moreover, the question whether the court can decide on the incidental issue, would be determined by the Parenthood Regulation. The decision would benefit from recognition and enforcement under the Parenthood Regulation.

⁴¹ See the discussion on Brussels IIb in this Impact Report.

REGULATION (EC) NO 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 JUNE 2008 ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME I)

A. Wysocka-Bar, E. Kamarad

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the above-mentioned scope

Regulation 593/2008⁴² applies to contracts concluded as from 17 December 2009 in all EU Member States except from Denmark. It provides for uniform choice-of-law law rules with respect to contractual obligations in civil and commercial matters of universal application. There are separate choice-of-law rules with respect to different types of contracts and with respect to existence and material validity, as well as formal validity.

Just like other instruments (for instance Regulation 650/2012), Regulation 593/2008 excludes "*questions involving the status*" from its scope (Art. 1(2)(a)). If there is any incidental question of a family relationship in a matter involving contractual obligation as a main question, this incidental question is left outside the scope of the Regulation 593/2008.

Regulation 593/2008 excludes "*obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects*" from its scope. Recital 8 explains that "family relationships" covers, among others, parentage. Hence, depending on the existence of the family relationship between the parties, a given obligation (for example, to maintain a given child) might be classified as covered by the scope of the Regulation 593/2008 or left outside of this scope.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

The Regulation 593/2008 does not contain any provision on how the authorities of the EU Member States seized with civil and commercial matter should decide on the preliminary question. The answer to this question is left entirely to domestic laws of the EU Member States (for further details: see comments on Regulation 650/2012 in this Impact Report).

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1(2)(a) Regulation 593/2008	Questions involving the status are excluded from the scope of this regulation.

⁴²Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

Art. 1(2) (b) Regulation 593/2008	Obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects are excluded from the scope of this regulation.
For example, Art. 4(1)(a) Regulation 593/2008	Just like other instruments (for instance Regulation 650/2012), Regulation 593/2008 uses “habitual residence” as a connecting factor to determine the law applicable. The existence of the family relationship might influence the determination of the habitual residence, even if such family relationship would be of a lesser importance for this determination in case of contractual obligations than in family or succession matters.
Art. 10 Regulation 593/2008	Similar issue might appear in the case when one of the parties of a contractual obligation is a child, who lacks capacity to enter into a contract. In such a situation, the question of a representation will arise, which usually will be connected with the determination of a parental responsibility and therefore it will be crucial to determine who the parent is.

The possible relevance and impact of a future Parenthood Regulation

Assuming that in certain cases also within the proceedings covered by the Regulation 593/2008 parenthood might arise as an incidental question, comments on the Regulation 650/2012 under '*The possible relevance and impact of a future Parenthood Regulation*' remain adequate also with respect to the Regulation 593/2008.

Future Parenthood Regulation will have an impact on the scope of the Regulation 593/2008 and its uniform application. If the legal relationship is classified as parenthood under the Parenthood Regulation, then the obligation arising out of this relationship will not fall within the scope of Regulation 593/2008. If, on the other hand, it is not a parentage or other family relationship under the provisions of the Parenthood Regulation, then the exclusion under Article 1(2)(b) will not apply to it.

Regulation 593/2008 uses a habitual residence as a connecting factor to determine the law applicable, therefore the future Parenthood Regulation might have an impact on the indication of the law applicable to the contractual obligations in which one party is a minor. Comments on the Regulation 650/2012 under '*The possible relevance and impact of a future Parenthood Regulation*' remain adequate also with respect to the Regulation 593/2008 for that matter.

REGULATION (EC) NO 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 JULY 2007 ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II)

C. Gonzalez Beilfuss, O. Cazzola Carmona

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation (EC) 864/2007⁴³ applies *ratione temporis* to events that gives rise to damage that occurred after January 11th 2009. It is also binding and directly applicable in all Member States except Denmark.

Regarding its material scope, Art. 1 (1) of Regulation (EC) 864/2007 states that this regulation shall apply to non-contractual obligations in civil and commercial matters, in situations involving a conflict of laws. Paragraph (1) goes on to list a number of exceptions: (i) revenue, (ii) customs or administrative matters and (iii) the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). In addition, paragraph (2) states a more exhaustive list of exclusions. Among them, it is important to highlight, for our purposes, the exception of Art. 1 (2) a), that is: "2. *The following shall be excluded from the scope of this Regulation: (a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations (...)*". This provision should be complemented by Recital 10 of the Regulation clarifying that the term "family relationships" "*should cover parentage, marriage, affinity and collateral relatives*".

The Regulation itself does not clarify which is the applicable law to determine whether a family relationship exists. However, according to Recital 10 the law of the Member States whose court is seised should determine whether a relationship has comparable effects to marriage and other family relationships. It therefore seems adequate to also apply the *lex fori* to the question of whether a relationship is a family relationship.

It is generally understood that this designation is not limited to the substantive law rules of the *lex fori* but covers also its choice of law rules. In connection to parenthood the fact that such rules are not uniform may lead to different results in different Member States, entailing that the determination of the scope of application of the Rome II Regulation is not uniform

On the basis of Art. 1(2)(a) of Regulation (EC) 864/2007 one could reach the conclusion that when a tort arises between two persons who are family members, the application of the Regulation is automatically excluded. However, this would be a hasty conclusion, as this is not always the case. For example, damage resulting from a traffic accident should not be excluded from the scope of Rome II simply because the person who caused the damage and the person who sustained it are siblings⁴⁴. Such an injury

⁴³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31/07/2007, p. 40–49.

⁴⁴ RODRÍGUEZ PINEAU E., *The Law Applicable to Intra-Family Torts*, in *Journal of Private International Law*, 2012, p. 117.

should be considered a regular tort and, therefore, "*standard conflict rules on tort should apply*".⁴⁵

To know whether an intra family tort is excluded from Regulation (EC) 864/2007, the key criterion is the breach of a family duty.⁴⁶ As an example, we can use the one given by the Commission itself in its Explanatory Memorandum,⁴⁷ where it states that although "*family obligations do not in general arise from a tort or delict*", one case that may arise is that of "*an action for compensation for damage caused by late payment of a maintenance obligation*". Another example would be compensation to a child who has suffered corporal punishment by a parent or foster parent. Corporal punishment should be analysed as a breach of the duty to educate the child, which means that the matter is outside the scope of the Rome II Regulation falling instead under the law applying to parental responsibility. It is thus not governed by the *lex loci delicti* but by the law of the child's habitual residence.

The Commission concluded that, in the absence of harmonized conflict rules about family relationships, it was preferable to leave outside the scope of Regulation (EC) 864/2007 non-contractual obligations arising from these relationships.⁴⁸

Finally, it should be noted that a Member State may decide to apply Rome II by analogy to matters excluded from the Regulation. This is the case of Art. 10:159 of Title 10.14 "Non-contractual obligations" of Book 10 Private International Law of the Dutch Civil Code⁴⁹. However, it should be noted that this mechanism would be an exclusive decision of the Member State⁵⁰ and, as can be deduced, it does not occur in all of them.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

With respect to incidental questions there is no provision in Regulation (EC) 864/2007 (Rome II), which is to be expected as it is a Regulation on applicable law and not on international jurisdiction.

Preliminary questions appear when "*before applying the legal rule it is necessary to interpret the legal concept and to decide whether the legal relationship or the legal status exists or does not exist*",⁵¹ and with it emerges the issue of determining under which law shall the preliminary question be decided.⁵² In other words, "*shall the judge apply the choice-of-law rules of the lex fori or shall he apply the choice-of-law rules of the lex causae?*"⁵³

⁴⁵ RODRÍGUEZ PINEAU E., *The Law Applicable to Intra-Family Torts*, cit., p. 121.

⁴⁶ RODRÍGUEZ PINEAU E., *The Law Applicable to Intra-Family Torts*, cit., p. 117.

⁴⁷ Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), (COM/2003/0427 final) - COD 2003/0168., p.8.

⁴⁸ COM (2003) 427 final., p. 8.

⁴⁹ RODRÍGUEZ PINEAU E., *The Law Applicable to Intra-Family Torts*, cit., p. 126.

⁵⁰ MANKOWSKI P., *Article 1*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume II, Rome II Regulation*, Köln, 2019, p. 96.

⁵¹ SVENNE SCHMIDT T., *The Incidental Question in Private International Law*, in *The Hague Academy Collected Courses / Recueil des cours de l'Académie de La Haye, Volume 233*, 1992, p. 316.

⁵² SVENNE SCHMIDT T., *The Incidental Question in Private International Law*, p. 316.

⁵³ SVENNE SCHMIDT T., *The Incidental Question in Private International Law*, p. 316.

Having explained the above, it is difficult to imagine a scenario where the judge must face the problem of establishing which law shall be applied to the preliminary question of determining parenthood and that this same scenario falls within the material scope of application of the Regulation, since in cases of standard torts (not intra-family torts), which are those included in Regulation (EC) 864/2007, it is irrelevant whether the person sustaining the damage and the person liable are family or not and, when it is relevant, because, i.e. the tort derives from a family obligation, it is excluded from the scope of application of the Regulation.⁵⁴

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 10(1) Regulation 864/2007	<p>As mentioned above, the exclusion in Art. 1(2)(a) means that the cases in which Regulation (EC) 864/2007 can be applied to parenthood matters are limited.</p> <p>One possibility is in the area of unjust enrichment, but it is controversial. Art. 10(1) of Regulation (EC) 864/2007 provides that if <i>“a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship”</i>. It has been argued that this provision would apply in cases where a maintenance obligation based on a family relationship has been paid when in fact such an obligation did not exist.⁵⁵ Such a case is neither a case of determining the law applicable to the maintenance obligation, which would fall outside the scope of Regulation (EC) 864/2007, nor a case of determining the law applicable to the family relationship in question, which would also be totally excluded.⁵⁶ Rather, it is a question of determining the law applicable to unjust enrichment, a matter that falls within the scope of Regulation (EC) 864/2007. Under this interpretation it could be argued that Art. 10 applies in a case of undue payment, for 15 years, of a maintenance obligation by a man who turns out not to be the father of the child. The law applicable to unjust enrichment would be the law governing the maintenance obligation which is itself based on a link of parenthood that has been found non-existent.</p>

⁵⁴ RODRÍGUEZ PINEAU E., *The Law Applicable to Intra-Family Torts*, cit., p. 117.

⁵⁵ MANKOWSKI P., *Article 10*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume II, Rome II Regulation*, Köln, 2019, p. 373.

⁵⁶ MANKOWSKI P., *Article 10*, cit., p. 373.

	<p>Other authors however argue that such a case would not fall under the scope of application of Regulation Rome II⁵⁷ and that the restitution of the undue payments is directly subject to The Hague Protocol on the law applicable to maintenance obligations.</p>
<p>Art. 15(f) Regulation 864/2007</p>	<p>This article establishes that the applicable law, by virtue of Regulation (EC) 864/2007, shall regulate in particular “<i>the persons entitled to compensation for damage sustained personally</i>”. The Explanatory Memorandum⁵⁸ states that “<i>this concept particularly refers to the question whether a person other than the “direct victim” can obtain compensation for damage sustained on a “knock-on” basis, following damage sustained by the victim. Such damage might be non-material, as in the pain and suffering caused by (...) the loss sustained by the children or spouse of a deceased person.</i>” Thus, the applicable law may determine that, for example, the parents are entitled to damages for the loss of a child, but the determination of the existence of the relationship between the parents and their children will be a preliminary question to be resolved. Such a determination will be made based on the law applicable to that relationship and not on the basis of the law applicable to the non-contractual obligation.</p> <p>As an example, we could pose the following case: A is the daughter of B and C. She dies in a car accident that took place in State Y. According to State Y’s national law, the parents have a right for compensation for the death of their child. So, by virtue of Art. 15 f) Regulation 864/2007, if the law applicable is the law of State Y, the same law would also regulate the persons who have the right for compensation. In this case, B and C will have this right. However, if we have to determine that, for example, B is the father of A in order to know if B has the right for compensation, this would be a preliminary question to resolve, and we would have to apply the law governing the family relationship.</p>
<p>Art. 15(g) Regulation 864/2007</p>	<p>This article establishes that the applicable law, by virtue of Regulation (EC) 864/2007, shall regulate in particular “<i>(...) the liability for the acts of another person</i>”. The aforementioned Explanatory Memorandum⁵⁹ provides that <i>the liability of parents for their children</i> is included. Therefore, the determination of the existence of the relationship between</p>

⁵⁷ One opposing argument to this possibility is the fact that Art. 1 (2) a) of Regulation (EC) 864/2007 excludes all family matters from its scope of application and makes no mention of Art. 10. See RODRÍGUEZ PINEAU E., *The Law Applicable to Intra-Family Torts*, cit., p. 132.

⁵⁸ COM (2003) 427 final., p. 24.

⁵⁹ COM (2003) 427 final., p. 24.

	<p>the parents and their children will be a preliminary question to be determined by the law applicable to that relationship and not by the law applicable to the non-contractual obligation.⁶⁰ It is interesting to emphasize that such a preliminary question would be related to both parenthood and parental responsibility.</p> <p>As an example we could pose the following case: A, a minor, and with habitual residence in State Z, is with his parents on vacation in State X. While skiing he runs over a woman, who claims compensation for injuries to herself and her skiing equipment. In this situation, the law applicable to the non-contractual obligation would be that of State X, which is the place where the damage occurs. However, if the need arises to determine the existence of the relationship between A and his parents, who would be liable for such damages, this determination will be made under the law of State Z, which is the law governing the family relationship.</p>
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The possible relevance and impact of a future Parenthood Regulation

As analysed, parenthood and parental responsibility are relevant both as regards the substantive scope of application and the scope of the applicable law. Since there are at present no uniform choice of law provisions on parenthood, national PIL provisions apply with the result that there is no uniformity of interpretation. A future Parenthood Regulation would significantly contribute to a uniform interpretation of key provisions of the Rome II Regulation.

⁶⁰ MANKOWSKI P., *Article 10*, cit., p. 373

COUNCIL REGULATION (EU) 1259/2010 OF 20 DECEMBER 2010 IMPLEMENTING ENHANCED COOPERATION IN THE AREA OF THE LAW TO DIVORCE AND LEGAL SEPARATION (ROME III)

T. Kruger, T. Van Hof

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation 1259/2010,⁶¹ also known as Rome III, applies since 21 June 2012 to divorce and legal separation, in situations which involve a conflict of law (Art. 17 on the obligation of participating member states to provide information already applies since 21 June 2011). The Regulation is one of enhanced cooperation and applies in Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. It provides for uniform rules on applicable law of universal application.

The Regulation excludes matters of parental responsibility from its material scope, even if they arise “*merely as a preliminary question within the context of divorce or legal separation proceedings*” (Art. 1(2)). Other matters for which parental bonds could be relevant are also excluded from the scope of the Regulation (i.e. maintenance obligations, the name of the spouses, trusts or successions).

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

Recital 10 of the Regulation mentions that “*preliminary questions such as legal capacity and the validity of the marriage should be determined by the conflict-of-laws rules applicable in the participating Member State concerned*”. In order to decide on preliminary questions, the conflict-of-law rules of the forum (*lex fori*) should thus be applied.

A preliminary question on parental responsibility and consequently on parenthood matters might arise in case of divorce proceedings in which the spouses have children. Some jurisdictions require a parenting plan as a prior condition to have access to divorce proceedings (e.g. the Netherlands).⁶² Whether this first preliminary question arises, depends on the law of the state where jurisdiction lies or on the law applicable to the divorce proceedings.

If the member state which has jurisdiction over the divorce proceedings according to the Brussels IIb Regulation requires such a parenting plan to gain access to the divorce proceedings, the preliminary question arises. If the existence of a parenting plan is

⁶¹ 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 L 343, 29.12.2010, p. 10–16.

⁶² The requirement of a parenting plan is laid down in Art. 815 Dutch Civil Code of Procedure, and Art. 1:247 and 1:247a of the Dutch Civil Code (hereinafter DCC); implemented by Wet Bevordering Voortgezet Ouderschap en zorgvuldige scheiding, 01/03/2009. Important to note is that the Netherlands is not a participating member state to the Rome III Regulation.

considered a procedural prerequisite,⁶³ the competent court could uphold this prerequisite even if the application of the state's conflict-of-laws rules would point to the law of another (Member) State as the law applicable to the content of the parenting plan.⁶⁴ However, if this question is not considered a merely procedural prerequisite and the conflict-of-law rules of the *lex fori* have to be applied, the question of characterization of the parenting plan arises. While a parenting plan can be a requirement to gain access to the divorce proceedings, the parenting plan itself has to be seen as a matter of parental responsibility to which the Brussels IIb Regulation (for jurisdiction) and the 1996 Child Protection Convention (for applicable law) have to be applied.⁶⁵ Dutch courts of first instance have indeed concluded that spouses are not required to submit a parenting plan to access divorce proceedings if the competence to rule on the content of the plan lies with the courts of another member state based on the rules on parental responsibility of the Brussels IIa (now: Brussels IIb) Regulation.⁶⁶

It is further possible that the divorce proceedings are brought before a court of a member state in which a parenting plan is not required to gain access to divorce proceedings, but that the application of Rome III leads to the law of a state in which such a plan is a prerequisite. If the prerequisite of having a parenting plan is considered part of the applicable law, and not merely a procedural aspect, the court will have to determine whether such a plan exists before being able to rule on the main issue of the divorce.

This preliminary question on the requirement of a parenting plan can give rise to a preliminary question on parenthood: are the spouses the parents of the child(ren) and do they bear parental responsibility? A parenting plan is only required if this is the case.⁶⁷ If a dispute about parenthood arises, the court will have to examine whether it has jurisdiction to rule on this preliminary question based on its national private international law rules.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Recital 10	Preliminary questions such as legal capacity and the validity of the marriage, and matters such as the effects of divorce or legal separation on property, name, parental responsibility, maintenance obligations or any other ancillary measures

⁶³ In the Netherlands, the requirement of a parenting plan is indeed 'formulated in the law as a procedural requirement', it is 'the gateway to divorce proceedings' (own translation; Kamerstukken II 2004/05, 30 145, nr. 3, 6 (parliamentary documents of the Netherlands)).

⁶⁴ Based on the principle of private international law that matters of procedure are governed by the *lex fori* (see on this i.a. PANAGOPOULOS G., *Substance and Procedure in Private International Law*, in *Journal of Private International Law*, 2005, p. 69).

⁶⁵ This because the objective of such a plan is mainly to make arrangements related to i.a. custody and access (see e.g. the requirements in Art. 815(3) Dutch Civil Code of Procedure).

⁶⁶ Court of First Instance the Hague, 06/11/2015, Case 483711, ECLI:NL:RBDHA:2015:15914; Court of First Instance the Hague, 29/01/2016, Case 490662, ECLI:NL:RBDHA:2016:1836.

⁶⁷ At least under the Dutch rules (see Art. 815(2) Dutch Civil Code of Procedure).

	should be determined by the conflict-of-laws rules applicable in the participating Member State concerned.
Art. 1(2)	This Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings: (d) the name of the spouses; (f) parental responsibility; (g) maintenance obligations; (h) trusts or successions.

The possible relevance and impact of a future Parenthood Regulation

A future Parenthood Regulation would be relevant if a dispute arises about whether the spouses are the parents of the children (second preliminary question discussed above). The relevance would be the same as for the Brussels Ia Regulation.

REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 MAY 2015 ON INSOLVENCY PROCEEDINGS (RECAST)

B. Musseva, T. Dimitrova

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation (EU) 2015/848⁶⁸ applies, according to Article 1(1) of it, to public⁶⁹ collective⁷⁰ proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation: (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by a court; or (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b). Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities. The proceedings referred to in this paragraph are listed in Annex A. In other words, the scope of the Regulation encompasses 'pre-insolvency' and 'hybrid' proceedings.⁷¹

The scope of the Regulation is explained also in recital 9, namely: *"This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual"*⁷². Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation".

Recital 1 of the Regulation stipulates that: *"The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. It should also extend to proceedings*

⁶⁸ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 5.6.2015, p. 19–72.

⁶⁹ About the meaning of "public" proceedings under the scope of the Regulation see more BARIATTI S. ET AL., *Part I: Scope of application*, in HESS B. ET AL., *The Implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, Bloomsbury Publishing, 2018, p. 42.

⁷⁰ About the meaning of "collective" proceedings under the scope of the Regulation see more BARIATTI S. ET AL., *Part I: Scope of application*, cit, p. 43.

⁷¹ See BARIATTI S. ET AL., *Part I: Scope of application*, cit, p. 36.

⁷² See a bout the personal scope of the Regulation BARIATTI S. ET AL., *Part I: Scope of application*, cit, p.39.

providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor. Since such proceedings do not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court”.

According to Recital 11 of the Regulation, *“This Regulation should also apply to procedures which grant a temporary stay on enforcement actions brought by individual creditors where such actions could adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business. Such procedures should not be detrimental to the general body of creditors and, if no agreement on a restructuring plan can be reached, should be preliminary to other procedures covered by this Regulation”.*

Further, Recital 12 elaborates that *“This Regulation should apply to proceedings the opening of which is subject to publicity in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings.”*

Recital 16 further explains that: *“This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provision for payment to creditors.”⁷³*

Additionally, the scope of the Regulation is explained in recital 17: *“This Regulation's scope should extend to proceedings which are triggered by situations in which the debtor faces non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months or even longer in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.”*

In general, the Regulation applies to insolvency proceedings and the parenthood matters might arise as a preliminary/incidental question in the following scenarios:

- Where a child acts as debtor or creditor and the child-parent relationship shows who will represent the child in the insolvency proceedings.
- The parenthood might be among the factors to be taken into consideration when establishing the habitual residence as connecting factor.
- Parenthood might be relevant as regards the related persons in avoidance actions.

⁷³ More about restructuring operation not within the scope of the EIR Recast – RINGE W., *Insolvency Forum Shopping, Revisited*, in: LAZIĆ, V, STUJIC S., *Recasting the Insolvency Regulation, Improvements and Missed Opportunities*, Asser Press, Springer, 2020.

- Parenthood might become relevant in the interplay between insolvency and maintenance obligations – the liquidator may be responsible for outstanding or ongoing child maintenance and has to establish the parent-child relationship.
- Parenthood to be established via applicable law, recognition/acceptance of an authentic instrument released by a public authority (birth certificate included) or by recognition of a court decision.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

The Regulation is silent of the parenthood matters, but they undoubtedly are not covered by it even as a preliminary question.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1 (1) Regulation 2015/848	In light of the notion of “debtor” and “creditor” being children and the consequent relevance of the parenthood for the representation.
Art. 2 Regulation 2015/848	Definitions e.g. “debtor in possession” (child as debtor), “insolvency proceedings” (insolvency against children), “...assets are situated” (relevance of the habitual residence), “establishment” (child carrying out a non-transitory economic activity with human means and assets), “local creditor” (children) and “foreign creditor” (child and the habitual residence).
Art. 3 Regulation 2015/848	COMI of children and their habitual residence or habitual residence of adults and the factors related to the children.
Art. 6 Regulation 2015/848	Actions deriving directly from insolvency proceedings and closely linked with them against children, children as co-defendant, children as debtors in possession and children as related persons.
Art. 7 Regulation 2015/848	The issues covered by the applicable law – e.g. letters a), c), e), f), i), k), l).
Art. 8 Regulation 2015/848	Children and as holders of third parties' rights <i>in rem</i> .
Art. 9 Regulation 2015/848	Set-off of children's claims.
Art. 10 Regulation 2015/848	Children as purchaser or seller of assets based on a reservation of title.
Art. 11 Regulation 2015/848	Children as a party to contracts relating to immovable property.

Art. 13 Regulation 2015/848	Children as a party to contracts of employment.
Art. 16 Regulation 2015/848	Children as persons who benefited from an act detrimental to all the creditors.
Art. 17 Regulation 2015/848	Children as debtors or as third-party purchasers.
Art. 18 Regulation 2015/848	Effects of insolvency proceedings on pending lawsuits or arbitral proceedings affecting children.
Art. 19-20 Regulation 2015/848	The recognition of decisions on parenthood is excluded but may be of relevance for example as regards the representation of a child as debtor or creditor.
Art. 23 Regulation 2015/848	Child as creditor with an obligation to return.
Art. 31 Regulation 2015/848	Honouring of an obligation to a debtor who is a child.
Chapter III Regulation 2015/848	Secondary insolvency proceedings of a child (debtor) or a child as a creditor, in particular in light of Article 45.
Chapter IV Regulation 2015/848	Provision of information to children as creditors and the lodgement of their claim, <i>inter alia</i> considering the parenthood in light of the child's representation.

The possible relevance and impact of a future Parenthood Regulation

As said in the Proposal, in the absence of Union rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood in another Member State for the purposes of the rights that a child derives from parenthood under national law, these matters are currently governed by the law of each Member State.

The adoption of common rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood in another Member State would complement current Union legislation on family law and succession and facilitate its application, as the parenthood of a child is a preliminary question that must be resolved before applying existing Union rules on parental responsibility, maintenance and succession as regards the child. These conclusions are also of relevance for the cross-border insolvency matters.

In particular, in the light of the above considerations, it is evident that the parenthood is relevant in situations where child is a shareholder in an insolvent company; where a parent is declared insolvent and the insolvency practitioner, based on the applicable law, shall consider the maintenance of the insolvent parent, taking into account necessary expenses for a child; when a property of insolvent debtor is co-owned by a child and the parent's consent and/or will is needed. Parenthood is also relevant in

insolvency actions where the child-debtor or creditor shall be properly represented by its parent by operation of law and/or in avoidance actions the child was a party to certain transaction. All these scenarios require clear and predicable rules of establishing parenthood and the existence of European Certificate of Parenthood can only facilitate the insolvency proceedings.

REGULATION (EU) 606/2013 OF 12 JUNE 2013 ON MUTUAL RECOGNITION OF PROTECTION MEASURES IN CIVIL MATTERS

I. Queiroló, L. Carpaneto, F. Pesce, S. Dominelli, F. Maoli

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation 606/2013⁷⁴ introduces uniform rules aimed at ensuring continuity of protection afforded to a natural person when is exercising his/her legitimate right to move, to reside freely within the EU area. In this view, the Regulation wants to guarantee rapid and simple recognition as well as (where applicable) enforcement in a Member States of protection measures ordered in another Member State.⁷⁵

The scope of application *ratione materiae* of the Regulation is limited to protection measures issued under the law of a Member State after the 11th of January 2015⁷⁶ with a view to protect a person when serious grounds for considering that that person's life, physical and psychological integrity, personal liberty, security or sexual integrity is at risk. Measures preventing any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion are included.⁷⁷

The Regulation includes in its scope of application *ratione personae*, on the one side, all the natural persons "causing risk"⁷⁸ who shall respect the measure of protection and, on the other one, all natural persons who are the "object of protection",⁷⁹ including victims of gender-based-violence.

In this respect, Recital 19 of the Regulation clarifies that the protection measures covered by it should afford protection to the protected person not only at his or her place of residence or place of work, but also "*at another place which that person visits on a regular basis, such as the residence of close relatives or the school or educational establishment attended by his or her child, irrespective of whether the place in question or the extend of the area covered by the protection measure is described in the protection measure by one or more specific addressed*", since "*the recognition of the obligation imposed by the protection measure relates to the purpose which the place serves for the protected person rather than to the specific address*".

The key rule of the Regulation is the "mutual recognition" rule under Art. 4, establishing that a protection measure ordered in a Member State shall be recognised in another

⁷⁴ Regulation (EU) 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181 29.6.2013, p. 4–12.

⁷⁵ The cross-border element is defined under Art. 2 of the Regulation, where it is stated that "a case shall be deemed to be a cross-border case where the recognition of a protection measure ordered in one Member State is sought in another Member State".

⁷⁶ Art. 22.

⁷⁷ Recital 6.

⁷⁸ Art. 2.2, (3) where the Regulation states that "person causing the risk" means a natural person on whom one or more of the obligations referred to in point (1) have been imposed.

⁷⁹ Art. 2.2 (2) where the Regulation states that "protected person" means a natural person who is the object of the protection afforded by a protection measure.

Member State without any special procedure and shall be also immediately enforceable, provided that the certificate envisaged under Art. 5 is issued.

Once certified, the protection measure shall benefit from the special regime of recognition and enforcement for 12 months, irrespective of whether the protection measure has a longer duration.⁸⁰

The Regulation has, therefore, a very limited scope of application and it does not mention parenthood matters, which are therefore not explicitly linked to the scope of application and the provisions of the Regulation. The Regulation should not directly impact on parenthood matters and, vice-versa, should not be directly impacted by parenthood matters.

This is further confirmed by Art. 2.2 of the Regulation which excludes from its scope of application “*protection measures falling within the scope of Regulation (EC) No 2201/2003*” (now Regulation 2019/1111).

Therefore, the existence of a parent-child relationship may be relevant from different perspectives. Firstly, it is necessary to highlight when those measures aimed at protecting the child may fall within the scope of application of Regulation 2019/1111 or, on the other hand, they are to be disciplined by the Regulation 606/2013.

If the person harming the child is also the holder of parental responsibility, Regulation 2019/1111 shall apply. On the topic, Recital 7 of the last mentioned instrument states that “*In order to ensure equality for all children, this Regulation should cover all decisions on parental responsibility, including measures for the protection of the child, independent of any link with matrimonial proceedings or other proceedings*”.

On the contrary, outside this situation, the relevant instrument is the Regulation 606/2013. In certain cases, it might be important to know whether the person in question is a parent.

Secondly, with regard to the content of the protection measure itself, to the moment of its issuing as well as its interpretation, as suggested by Recital 19, the protection shall be granted to a person not only at his/her habitual residence or place of work, but also extended to places where a person regularly goes, such for example the school where kids go.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

Regulation 606/2013 does not contain any provision which specifically addresses preliminary questions. Therefore, this aspect is regulated on the basis of domestic law, depending on the Member State concerned on a case-by-case basis.

The possible relevance and impact of a future Parenthood Regulation

It seems to be no direct incidence of legal issues concerning parenthood on the Regulation 606/2013. The only issue has been raised above, namely the incidence of a

⁸⁰ Art. 4.4.

parent-child relationship over the scope of application of Regulation 606/2013 *vis a vis* the Regulation 2019/1111.

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 MAY 2008 ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS

I. Queirolo, L. Carpaneto, F. Pesce, S. Dominelli, F. Maoli

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

The Directive 2008/52/EC (hereinafter, also Mediation Directive)⁸¹ was introduced with the scope to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes, in particular by encouraging the use of mediation, in civil and commercial cross-border disputes⁸². In particular, reference is made to disputes among parties having their domicile or habitual residence in different Member States at the time when the mediation proceedings has started. At the same time, Member States have not been prevented to extend the discipline to merely internal disputes (Recital 18).

The Directive is intended to apply to every “civil and commercial matters”, except as regards “*rights and obligations which are not at the parties’ disposal under the relevant applicable law*”. However, the Directive’s scope of application does not exclude matters that are traditionally left aside by other instruments – such as the Brussels Ia Regulation: for instance, the status or legal capacity of natural persons, wills and succession, the rights of property arising out of a matrimonial relationship. As concerns the rights and obligations which are not at the parties’ disposal, Recital 10 explains that this may be the frequent case in family law and employment law. As specified by Article 1(2) of the Directive, this distinction may vary depending on the applicable domestic law.

The Directive does not mention parenthood. Provided that the Directive also excludes its application when the rights and obligations under dispute are not at the parties’ disposal, it seems that parenthood matters are not much connected with the content and scope of the Directive.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

The Directive does not contain any provision which specifically address the issue of preliminary questions.

⁸¹ Article 1 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3–8.

⁸² CARPANETO L., *International and EU Perspective on Mediation : The 2008/52 Directive on Mediation on Civil and Commercial Matters*, in PESCE F., RONE D. (eds), *Mediation to Foster European Wide Settlement of Disputes*, Roma, 2016, p. 169; DOMINELLI S., *La mediazione familiare tra autonomia privata e tutela dell’interesse superiore del minore nel diritto europeo ed internazionale*, in QUEIROLO I., BENEDETTI A.M., CARPANETO L., *Le nuove famiglie tra globalizzazione e identità statuali*, Roma, 2014, p. 251.

Relevant provisions of the instrument in connection with parenthood matters

There are no provisions of the Mediation Directive which show a direct or indirect connection with parenthood matters. Therefore, this aspect is regulated on the basis of domestic law, depending on the Member State concerned on a case-by-case basis. This does not mean that preliminary or incidental questions bear no relevance in mediation: indeed, there may be a situation in which the parents are mediating on parental responsibility and a dispute about parenthood is raised. In that circumstance, since the existence of a parent-child relationship cannot be the object of a mediation, it is reasonable to believe that the outcome will depend on a court decision.

The possible relevance and impact of a future Parenthood Regulation

Mediation has become a pretty popular form of alternative dispute resolution to use in family law cases, especially in separation cases and cases concerning child custody. However, the operation of the Directive *per se* does not seem to be affected by parenthood matters. Therefore the future Parenthood Regulation will probably not have much impact on the Mediation Directive.

The only possible aspect that may interests dispute litigation and the mediation process, which may also depend on the ascertainment of a parent-child relationship, is the one of representation. In case of a dispute which involves a person of minor age, the issue of his or her legal representation becomes inevitably essential. At the same time, this issue is not addressed by the Mediation Directive.

REGULATION (EC) 805/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 APRIL 2004 CREATING A EUROPEAN ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS

B. Musseva, T. Dimitrova

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

The purpose of Regulation (EC) 805/2004⁸³ is to create a European Enforcement Order for uncontested claims to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement.

According to Article 1(1) of Regulation 805/2004, it applies in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ("*acta iure imperii*"). According to Article 1(2) of Regulation 805/2004, it shall also not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration.

Further, Article 3 of the Regulation elaborates that it shall apply to judgments, court settlements and authentic instruments on uncontested claims where a claim shall be regarded as uncontested⁸⁴ if: (a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or (b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or (c) the debtor has not appeared⁸⁵ or been represented⁸⁶ at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor

⁸³ Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims OJ L 143, 30.4.2004, p. 15–39.

⁸⁴ See CJEU, Judgment of the Court of 16 June 2016, *Pebros Servizi Srl v Aston Martin Lagonda Ltd*, Case C-511/14, p. 45: "*the conditions according to which, in the case of a judgment by default, a claim is to be regarded as 'uncontested', within the meaning of the second subparagraph of Article 3(1)(b) of Regulation No 805/2004, must be assessed autonomously, solely in accordance with that regulation.*"

⁸⁵ See CJEU, Judgment of the Court of 27 June 2019, *RD v SC*, Case C-518/18, where the Court confirms that where a court is unable to obtain the defendant's address, it does not allow a judicial decision relating to a debt, made following a hearing attended by neither the defendant nor the guardian ad litem appointed for the purpose of the proceedings, to be certified as a European Enforcement Order.

⁸⁶ See CJEU, Judgment of the Court of 28 February 2018, *Collect Inkasso OÜ and Others v Rain Aint and Others*, Case C-289/17 where the Court explains that a court judgment delivered without the debtor having been informed of the address of the court to which to respond or before which to appear, or, as appropriate, before which an appeal can be lodged against such a decision, cannot be certified as a European Enforcement Order.

under the law of the Member State of origin; or (d) the debtor has expressly agreed to it in an authentic instrument.

Additionally, relevant is Article 4: Definitions in particular:

1. "judgment": *any judgment given by a court or tribunal of a Member State*, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court⁸⁷;
2. "claim": a claim for payment of a specific sum of money that has fallen due or for which the due date is indicated in the judgment, court settlement or authentic instrument;
3. "authentic instrument": b) an arrangement relating to *maintenance obligations* concluded with administrative authorities or authenticated by them;

In general, as explained in Judgment of the Court (Seventh Chamber) of 14 December 2017, Grzegorz Chudaś and Irena Chudaś v DA Deutsche Allgemeine Versicherung Aktiengesellschaft AG, Case C-66/17, p. 27: *"The scope ratione materiae of Regulation No 805/2004 can be inferred, inter alia, from Article 2(1), read in the light of Article 3(1) and Article 4(2), of that regulation, according to which that regulation is to apply in civil and commercial matters, to judgments, court settlements and authentic instruments on uncontested claims, the latter being defined as claims for payment of a specific sum of money that has fallen due or for which the due date is indicated in such judgments, court settlements or authentic instruments."* Hence, parenthood matters might arise as a preliminary/incidental question in the following scenarios:

- In the light of maintenance obligations and establishing the child-parent relationship in terms of creditor/debtor and/or with respect to establishing the legal representative of the child in all types of claims and proceedings;
- Parenthood to be established via applicable law, recognition/acceptance of an authentic instrument released by a public authority (birth certificate included) or by recognition of a court decision.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

The Regulation is silent of the parenthood matters, but they undoubtedly are not covered by it even as a preliminary question.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1 Regulation 805/2004	Child as a creditor or debtor of uncontested claim.

⁸⁷ See CJEU, Judgment of the Court of 14 December 2017, Grzegorz Chudaś and Irena Chudaś v DA Deutsche Allgemeine Versicherung Aktiengesellschaft AG, Case C-66/17 where the Court concludes that an enforceable decision on the amount of costs related to court proceedings, contained in a judgment which does not relate to an uncontested claim, cannot be certified as a European Enforcement Order.

Art. 2(1) Regulation 805/2004	Civil and commercial matters including maintenance obligations.
Art. 2(2) Regulation 805/2004	Excluded matters – parenthood not expressly excluded but out of the scope.
Art. 3 Regulation 805/2004	Uncontested claims of children, children as debtors or the procedural role of the child in maintenance proceedings.
Art. 4(2) Regulation 805/2004	As regards the notion of claim of children.
Art. 4(3)(b) Regulation 805/2004	As regards the authentic instrument as an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them.
Art. 7 Regulation 805/2004	Requirements for certification – child in light of the grounds of jurisdictions and debtor’s domicile if a child.
Art. 8 Regulation 805/2004	Partial enforcement – maintenance of a spouse and of a child.
Art. 10 Regulation 805/2004	Rectification or withdrawal if the certificate concerns children.
Art. 13 Regulation 805/2004	Service to children.
Art. 14 Regulation 805/2004	Address of children stemming from the address of the parent.
Art. 14(1)(a) Regulation 805/2004	Service on parents when they have conflicting interests with the children.
Art. 15 Regulation 805/2004	Service on child’s representatives in the scope of Article 15.
Art. 17 Regulation 805/2004	Provision to the debtor of due information about the procedural steps necessary to contest the claim.

The possible relevance and impact of a future Parenthood Regulation

As explained in the Proposal, in the absence of Union rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood in another Member State for the purposes of the rights that a child derives from parenthood under national law, these matters are currently governed by the law of each Member State. The adoption of common rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood in another Member State would complement current Union legislation on family law and succession and facilitate its application, as the parenthood of a child is a preliminary

question that must be resolved before applying existing Union rules on parental responsibility, maintenance and succession as regards the child.

These conclusions are also of relevance for the application of Regulation 805/2004. In particular, given the strict requirements for certification as a European Enforcement Order, including but not limited the proper and effective notice to the debtor and its procedural activity. In situations where the debtor is a child, the parenthood becomes of relevance in terms of address of delivery of notices; legal representation of the child-debtor, etc.

REGULATION (EU) 1896/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 CREATING A EUROPEAN ORDER FOR PAYMENT PROCEDURE (AS AMENDED BY REGULATION 2015/2421 OF 16 DECEMBER 2015)

T. Kruger, T. Van Hof

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

The Regulation 1896/2006 on a European order for payment⁸⁸ applies to civil and commercial matters (Art. 2(1)). In this sense its scope is the same as that of the Brussels Ia Regulation, discussed above. The extent of "civil and commercial matters" should be interpreted in the same way as under Brussels Ia.

The Regulation on a European order for payment does not explicitly exclude matters of status or parenthood, but their exclusion follows from the fact that the Regulation only covers pecuniary claims for specific amounts that have fallen due at the time of the application (Art. 4). Under the Regulation on a European order for payment, service is crucial. The service is essential to guarantee the rights of the defendant, who is not present or represented in the first phase of the procedure. Therefore, the same issues can arise as under the Service Regulation.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

The Regulation on a European order for payment is silent about preliminary questions. Since the scope is limited to pecuniary claims for specific amounts, it is hard to see where a parenthood issue can arise. As explained above in the context of the Brussels Ia Regulation, parenthood issues can arise with respect to representation of minors in contract or delict cases. In these cases, the dispute would concern the validity of a contract or the question of who is liable. There would not yet be a claim for a specified amount. If a claimant attempts to obtain an order for payment in such a case, the defendant would probably oppose the order (under Art. 16). If this happens, the proceedings will be continued under the domestic procedural rules of the competent court (Art. 17). Then the position of incidental questions on parenthood will be dealt with as under the Brussels Ia Regulation.

Relevant provisions of the instrument in connection with parenthood matters

There are no provisions of the instrument which show a direct or indirect connection with parenthood matters.

The possible relevance and impact of a future Parenthood Regulation

⁸⁸ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1–32.

No direct relevance. Concerning issues of service of documents, the impact will be the same as for the Service Regulation.

REGULATION (EU) 861/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 JULY 2007 ESTABLISHING A EUROPEAN SMALL CLAIMS PROCEDURE (AS AMENDED BY REGULATION 2015/2421 OF 16 DECEMBER 2015)

T. Kruger, T. Van Hof

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Like the Brussels Ia Regulation, the Regulation on the small claims procedure applies to civil and commercial matters (Art. 2(1)). The scope, as well as the meaning of “civil and commercial matters” should be interpreted in the same way as under Brussels Ia. The Regulation on a small claims procedure excludes status and legal capacity of natural persons from its scope (Art. 2(2)(a)). Thus, parenthood matters are excluded from the scope.

Parenthood matters can be relevant where a minor is involved in a contractual or a delictual dispute and the question arises of who can represent the minor. These issues are similar to those raised in the context of Brussels Ia (see above).

The Regulation on a small claims procedure also regulates service as part of the unified procedure (Art. 13). Therefore, the same issues can arise as under the Service Regulation, for instance when service is effected on a child.

The Regulation on a small claims procedure also encompasses rules on the taking of evidence (Art. 9). Therefore, the same issues can arise as with respect to the Evidence Regulation.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

The Regulation on a small claims procedure is silent about preliminary questions. As explained above in the context of the Brussels Ia Regulation, parenthood issues can arise when a minor has entered into a contract or caused delictual damage. In these cases, the dispute could concern the validity of a contract or the question of who is liable.

The Regulation on a small claims procedure does not contain its own rules on international jurisdiction, but relies for this purpose on Brussels Ia. Thus the position of incidental questions on parenthood will be dealt with as under the Brussels Ia Regulation.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 2(2)(a) Regulation 861/2007	The Regulation excludes status and legal capacity from its scope of application.

The possible relevance and impact of a future Parenthood Regulation

The relevance will be the same as in the other Regulations discussed, particularly Brussels Ia, the Service Regulation and the Evidence Regulation.

REGULATION (EU) 2020/1783 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 25 NOVEMBER 2020 ON COOPERATION BETWEEN THE COURTS OF THE MEMBER STATES IN THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS (TAKING OF EVIDENCE) (RECAST)

C. Gonzalez Beilfuss, O. Cazzola Carmona

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation 2020/1783⁸⁹ applies *ratione temporis* from July 1st 2022. It is also binding and directly applicable in all Member States except Denmark.

The material scope of application of Regulation 2020/1783 is set out in its Art. 1, which establishes that in civil or commercial matters there are two methods of taking evidence: (i) the indirect or (ii) the direct methods. There are no exclusions as regards civil matters and the Regulation thus also covers parenthood.

The distinction between the direct and indirect method of taking evidence is important because, when evidence is obtained directly by an authority from the requesting State, coercive measures cannot be exercised. This is particularly relevant in parenthood matters, since, for example, in the case of DNA testing, if the individual does not want to submit voluntarily to such testing, it may be necessary to resort to coercive measures to obtain such evidence, provided that this is legally possible. In such cases, therefore, the evidence could be obtained exclusively by indirect means. On the other hand, Art. 1(2) of Regulation 2020/1783 states that no request may be made to obtain evidence that is not intended to be used in a future or current proceeding. This means that, for example, if what is desired is to obtain a DNA test for the sole purpose of knowing who the biological father is but without the intention of initiating proceedings to claim parenthood, it would not fall within the scope of Regulation 2020/1783 and, therefore, this Regulation would not be applicable to such cases.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

With regard to preliminary questions there is no provision in Regulation 2020/1783, since it is not a Regulation on international jurisdiction nor choice of law.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 12(2) Regulation 2020/1783	This article regulates the general provisions on the execution of a request to obtain evidence by indirect means, that is, the forum court of a Member States requires a court in another Member State to carry out a request to obtain evidence. This request will

⁸⁹ Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2.12.2020, p. 1–39.

	<p>be executed under the national law of the requested State; therefore, the request must be in accordance with the national law of the requested State, which in itself is a challenge given that the laws of the different Member States are not the same and not all legal systems determine parenthood under the same legal mechanisms.</p> <p>With respect to parenthood cases, multiple evidence can be requested, among them, for example: (i) Obtaining DNA testing for paternity, both to claim and to contest paternity, in cases where the alleged father and the minor are in different Member States; (ii) Obtaining foreign testimonies from witnesses who reside in another Member State for paternity disputes. This may include obtaining evidence of electronic communications (emails and other messages) between the parties, as evidence of the relationship, which would be relevant in cases of claiming parenthood based on possession of status and when the <i>exceptio plurium concubentium</i>⁹⁰ is alleged. A court may require detailed digital forensics and certification of the electronic evidence from another Member State to ensure its authenticity and admissibility; (iii) Obtaining foreign medical records as evidence of paternity / consent to assisted reproduction techniques in other Member States.</p>
<p>Art. 15 Regulation 2020/1783</p>	<p>Art. 15 of Regulation 2020/1783 states the possibility, when necessary, to carry out coercive measures in obtaining the test. Therefore, if, for example, a person refuses the DNA test, the judge could order it to be performed against his will.</p> <p>In this regard, it is relevant that there are MSs that do not contemplate the involuntary performance of DNA testing in civil matters, therefore, if the requested State were one of those, it would not be able to execute the request. This might create difficulties in cross-border cases. Legal systems that do not contemplate the use of coercion usually draw legal consequences from the fact that someone refuses to accept DNA testing. E.g: According to Spanish law, the submission to DNA testing in parenthood matters can only be done voluntarily. However, the refusal to perform such test, although it does not imply a confession by the person who refuses (<i>ficta confessio</i>), will be interpreted "<i>as a valuable indication that together with others can lead to the declaration of paternity</i>⁹¹". Therefore, although the use of coercive measures is not contemplated in the taking of DNA samples in parenthood matters, "<i>the refusal to</i></p>

⁹⁰ Legal exception used by the man to prove that he was not the woman's sole sexual partner during the period in which the child was conceived.

⁹¹ QUESADA GONZÁLEZ M. C., *La prueba del ADN en los procesos de filiación*, in *Anuario de Derecho Civil*, 2005, p. 547.

	<p><i>submit to DNA analysis is an indication that generates a presumption against the position taken (...) by the reluctant party</i>⁹² and that, together with other indications, may lead to a declaration of paternity.</p> <p>It is unlikely that a system contemplating the use of coercion has developed similar rules.</p>
Art. 16(1) Regulation 2020/1783	<p>Art. 16 (1) of Regulation 2020/1783 provides that “<i>a request for the examination of a person shall not be executed where the person concerned invokes the right to refuse to give evidence or is prohibited from giving evidence: under the law of the Member State of the requested court; or under the law of the Member State of the requesting court (...)</i>”. Therefore, if, for example, the obstetrician who attended the delivery of the child is called to testify about the identity of the woman who gave birth, this statement may not be possible since such information could be protected under the doctor-patient privilege, rendering a prohibition to testify. Another scenario could be the refusal to testify against family members.</p>
Art. 16(2) Regulation 2020/1783	<p>Art. 16 (2) of Regulation 2020/1783 lists four grounds on which the execution of an application may be refused. We will mention only the first two as they are the most relevant to parenthood matters:</p> <p>a) “<i>The request does not fall within the scope of this Regulation.</i>” E.g. When DNA testing is requested, but with the sole purpose of confirming that the person is the biological father without the intention of initiating legal proceedings. Another example could be when testing is requested, but within the framework of criminal and not civil proceedings.</p> <p>b) “<i>The execution of the request does not fall within the functions of the judiciary under the law of the Member State of the requested court.</i>” E.g.: If the execution of a DNA test is requested involuntarily and in the requested State the judge cannot require or compel submission to such a test, it could be argued that such a request does not fall within the functions of the judiciary.</p>
Art. 19(2) Regulation 2020/1783	<p>Art. 19 of Regulation 2020/1783 sets out the direct taking of evidence by the requesting court. In its paragraph (2) it establishes the prohibition of the use of coercive measures when the direct taking of evidence is being used, therefore evidence can only be taken (by this means) when such evidence is taken voluntarily. E.g.: If a biological test is requested, where an expert from the requesting State goes to the other State to</p>

⁹² QUESADA GONZÁLEZ M. C., *La prueba del ADN en los procesos de filiación*, cit., p. 544.

	<p>carry out the DNA sample extraction, it can only be carried out if the party whose DNA is requested submits to it voluntarily.</p> <p>The direct taking of evidence may have special relevance in DNA testing, since such tests generally require to comply with specific conditions that are set on each domestic law. These could be in terms of their extraction (e.g.: type of sample, laboratory, medical personnel...), transportation, etc. In other words, if certain conditions are not met, such evidence may not be admissible in court.</p>
<p>Art. 19(7) Regulation 2020/1783</p>	<p>Art. 19(7) of Regulation 2020/1783 sets out the grounds on which a request for direct taking of evidence may be refused. These are:</p> <ul style="list-style-type: none"> (a) it does not fall within the scope of this Regulation; (b) it does not contain all of the necessary information referred to in Article 5; or (c) the direct taking of evidence requested is contrary to fundamental principles of law in its Member State. <p>Paragraphs (a) is equivalent to Art. 16 (2) a), so the examples used above are applicable to these cases as well.</p> <p>On the other hand, with regard to paragraph (c), which provides for the possibility of refusing the taking of evidence by direct means when this would be contrary to the fundamental principles of the Member State in whose territory it is to be carried out. For example, when the taking of evidence would cause defenselessness by establishing excessive or impossible demands that cannot be met by the parties.</p>

The possible relevance and impact of a future Parenthood Regulation

The proposed Regulation would not have any impact on the matter since it does not deal with the taking of evidence. This might be a missed opportunity since the taking of evidence in the area of parenthood poses specific difficulties connected to different viewpoints in connection to the use of coercion as regards the collection of samples and special technical requirements as regards how evidence should be collected and samples transmitted.

REGULATION (EU) 2020/1784 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 25 NOVEMBER 2020 ON THE SERVICE IN THE MEMBER STATES OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (SERVICE OF DOCUMENTS) (RECAST)

M. Župan, M. Drventić Bariščin

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

This Regulation applies from 1 July 2022. Exceptionally, Articles 5, 8, and 10 shall apply from 1 May 2025. It is applicable in all EU Member States except Denmark.

The Regulation applies to the cross-border service of judicial and extrajudicial documents in civil or commercial matters. It should not apply to the service of judicial and extrajudicial documents in other matters such as revenue, customs or administrative matters or to the liability of a Member State for actions or omissions in the exercise of state authority (*acta iure imperii*).

Whilst some parenthood matters are administrative, the parties might be deprived of the cross-border service of documents established by Regulation 2020/1784.

The Regulation regulates the transmitting and receiving agencies, central bodies, and means of communication they use. It establishes the rules of transmission and service of judicial and extrajudicial documents that can be done directly between the transmitting and receiving agencies or by other means (transmission by diplomatic or consular channels, service by diplomatic agents or consular officers, service by postal service, electronic service and direct service).

Regulation 2020/1784 introduces the usage of modern communication technologies. It brings novelties, given the introduction of mandatory electronic communication between the agencies and facilitating electronic and direct service. The significant changes concern the e-Codex as the means of communication, electronic service, electronic signature of deeds, documents and forms and assistance in address enquiries. Some of those novelties could greatly contribute to the parenthood procedures, in terms of efficiency and speed.

No later than 1 May 2025, all communication and exchanges of documents between the agencies and bodies designated by the Member States shall be carried out by a secure and reliable decentralised IT system (Art. 5). The Regulation mentions the e-Codex as an example of a decentralised IT system. This provision generally could contribute to the speed and reliability of the procedure. The parenthood proceedings could benefit from this kind of communication in terms of speeding up the procedure, especially when the establishment of parenthood is a prerequisite for exercising other rights.

Regulation 2020/1784 also calls upon applying Regulation 910/2014 to the documents that need to be served through the decentralised IT system.⁹³ Regulation 910/2014

⁹³ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC OJ L 257, 28.8.2014, p. 73–114 (eIDAS Regulation).

generally applies to the electronic transmission of documents. It clarifies that qualified electronic seals or signatures, as defined in it, may be used where documents transmitted require or feature a seal or a handwritten signature. Following that, Regulation 2020/1784 provides that all documents passing between transmitting and receiving agencies will be able to be signed electronically and will not be deprived of legal effect or considered inadmissible simply because they are in electronic format (Art. 6).

Smart or e-governance has become the standard across the EU today, as citizens are able to obtain electronic records (such as birth certificates) from their national e-civil registries, which contain qualified electronic certificates. Such documents should fall under the scope of Art. 6.

Regulation 2020/1784 introduces electronic document service as an additional alternative method of service in cross-border cases. The provision provides for two alternative models of direct electronic service. They are both conditioned by the prior consent of the addressee. The first method is electronic service, which uses qualified electronic registered delivery services within the meaning of the Regulation 910/2014, where the addressee must give prior express consent to the use of electronic means for the service of documents in the course of legal proceedings. The second method provides the electronic service via simple email. In this case, the addressee must express its prior consent regarding specific court proceedings. The provision provides that direct service can be effected only by electronic means available for domestic service under the law of the Member States. This solution pre-conditions the general use of electronic service for its development in Member States, where the national solution greatly differs. The provision as well permits the Member States to predict additional requirements to guarantee the safety of the transmission. Such conditions could address issues such as the identification of the sender and the recipient, the integrity of the documents sent and the protection of the transmission against outside interference.

Genuinely, the parenthood proceedings could benefit from electronic service, which is why it would be useful to encourage the competent authorities to choose this service method. Still, the institute's strict conditions indicate that the full benefits of electronic service at the EU level are generally hardly reachable.

Finally, inside the Final Provisions of Regulation 2020/1784, Article 22 provides a rule for situations where the defendant did not enter an appearance. Under certain circumstances ((a) the defendant, without any fault on the defendant's part, did not have knowledge of the document in sufficient time to enter a defence or did not have knowledge of the judgment in sufficient time to appeal; and (b) the defendant has raised a prima facie defence to the action on the merits), this rule allows relief from the effects of the expiry of time. However, it is important to note that such a legal remedy is not applicable when it comes to the judgments concerning the status or capacity of persons (Art. 22(5)). The same provision is contained in the Hague Service Convention – Art. 16.⁹⁴ The Practical Handbook explains that the aim of that provision

⁹⁴ HCCH, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=17>.

is to avoid any uncertainty in the area of decisions relating to divorce or annulment of marriage, more specifically to avoid the challenge of marriages celebrated after divorce judgement delivered by default.⁹⁵ A similar benefit could be reflected regarding the avoidance that the e.g. maintenance or succession decision is challenged after the decision on parenthood was issued.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

There are no such provisions in this instrument.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1(1) Regulation 2020/1784	The Regulation excludes administrative matters from its scope. As some parenthood matters are administrative, in such cases the cross-border service of documents will not be available based on the Regulation 2020/1784.
Art. 5(1) Regulation 2020/1784	The parenthood proceedings could benefit from the electronic communication and exchanges of documents between the agencies and bodies, in terms of speeding up the procedure, especially when the establishment parenthood is prerequisite for realization of other rights.
Art. 6 Regulation 2020/1784	Electronic records (such as birth certificates) issued from the national e-civil registries, which contain qualified electronic certificates, should fall under the scope of Art. 6.
Art. 19 Regulation 2020/1784	Genuinely, the parenthood proceedings could benefit from electronic service, and that is why it would be useful to encourage the competent authorities to choose this method of service.
Art. 22(4) and (5) Regulation 2020/1784	The benefit of this provision could be reflected in avoidance that the e.g. maintenance or succession decision is challenged after the decision on parenthood was issued.

The possible relevance and impact of a future Parenthood Regulation

The proposal points toward the application of the Art 22 of the Regulation 2020/1784 in situations where the respondent did not enter an appearance.

⁹⁵ Practical Handbook on the Operation of the Service Convention, 4th ed., The Hague, 2016, <https://www.hcch.net/en/publications-andstudies/details4/?pid=2728&dtid=3>, para 347.

Art. 13 - Examination as to admissibility:

1. Where a respondent habitually resident in a State other than the Member State where the proceedings were instituted does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable the respondent to arrange for a defence, or that all necessary steps have been taken to this end.

2. Article 22 of Regulation (EU) 2020/1784 shall apply instead of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where Regulation (EU) 2020/1784 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

REGULATION (EU) NO 655/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 15 MAY 2014 ESTABLISHING A EUROPEAN ACCOUNT PRESERVATION ORDER PROCEDURE TO FACILITATE CROSS-BORDER DEBT RECOVERY IN CIVIL AND COMMERCIAL MATTERS

M. Župan, M. Drventić Bariščin

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

This Regulation establishes a Union procedure enabling a creditor to obtain a European Account Preservation Order ('Preservation Order' or 'Order') which prevents the subsequent enforcement of the creditor's claim from being jeopardised through the transfer or withdrawal of funds up to the amount specified in the Order which are held by the debtor or on his behalf in a bank account maintained in a Member State.

It is applicable since 18 January 2017 in all European Union Member States, except Denmark.

This Regulation applies to pecuniary claims in civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal concerned (the 'court'). It does not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*'acta iure imperii'*).

Among others, the Regulation does not apply to: rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; and wills and succession, including maintenance obligations arising by reason of death.

EAPO can be used in maintenance claims, where it serves specific social functions, as seeking to enable the most vulnerable to recover debt.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

There are no such provisions in this instrument.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1(2) Regulation 2019/1111	The Regulation excludes administrative matters from its scope. As some parenthood matters are administrative, in such cases the EAPO will not be applicable.

The possible relevance and impact of a future Parenthood Regulation

No relevance.

COUNCIL DIRECTIVE 2002/8/EC OF 27 JANUARY 2003 TO IMPROVE ACCESS TO JUSTICE IN CROSS-BORDER DISPUTES BY ESTABLISHING MINIMUM COMMON RULES RELATING TO LEGAL AID FOR SUCH DISPUTES

A. Wysocka-Bar, E. Kamarad

The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

As the title explains the Directive 2003/8/EC⁹⁶ is aimed at establishing minimum common rules relating to legal aid in cross-border disputes. A cross-border dispute – in accordance with Art. 2(1) Directive 2003/8/EC - means '*one where the party applying for legal aid (...) is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.*' Pursuant to Art. 3(1) Directive 2003/8/EC, a natural persons involved in such cross-border dispute is entitled to receive appropriate legal aid. An appropriate legal aid – in accordance with Art. 3(2) Directive 2003/8/EC - covers pre-litigation advice, as well as legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings. Pursuant to Art. 1(2) Directive 2003/8/EC, it applies to civil and commercial matters whatever the nature of the court or tribunal. It does not extend to revenue, customs or administrative matters. EU Member States had to transpose the Directive 2003/8/EC it into their national laws by 30 November 2004. This Directive applies to all EU Member State, except Denmark.

Parenthood matters do result in cross-border disputes (see for example, judgment of the French *Cour de Cassation* in the case involving recently died French actor Alain Delon⁹⁷). Some of such disputes, depending on the Member State, might be decided not as civil law cases, but administrative ones (see: *Rzecznik Praw Obywatelskich*⁹⁸ case, which was decided by administrative bodies and administrative courts). As administrative matters are excluded from the scope of the Directive 2003/8/EC, some parenthood matters might consequently be left outside of its scope, which means that parties might be deprived of the legal aid in such cases.

According to Art. 5(2) Directive 2003/8/EC family situation and the resources of persons who are financially dependant on the applicant are conditions to grant a legal aid and to decide on its extent. In order to grant legal aid and to determine its extent, the importance of the individual case to the applicant should be considered, as it is explained in Art. 6(3) Directive 2003/8/EC.

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

⁹⁶ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, p. 41–47.

⁹⁷ Cour de cassation, Civ. 1ère, 23 mai 2024, pourvoi n°21-25.206.

⁹⁸ Order of the Court (Tenth Chamber) of 24 June 2022, *Rzecznik Praw Obywatelskich v K.S. and Others*, Case C-2/21.

There are no such provisions in this instrument as it deals with international civil procedure aspects.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 1(2) Directive 2003/8/EC	It excludes “administrative matters” from the scope of the Directive 2003/8/EC. As some parenthood matters are “administrative” ones, no legal aid might be available based on Directive 2003/8/EC.
Art. 5(2) Directive 2003/8/EC	In order to grant legal aid and to determine its extent, the economic situation of a person shall be assessed, in the light of various objective factors, including family situation and the resources of persons who are financially dependent on the applicant.
Art. 6(3) Directive 2003/8/EC	In order to grant legal aid and to determine its extent, the importance of the individual case to the applicant should be taken into account.

The possible relevance and impact of a future Parenthood Regulation

The future Parenthood Regulation deals with legal aid in Art. 43 ‘Legal Aid’. Pursuant to Art. 43(1) future Parenthood Regulation:

“An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the proceedings provided for in Article 25(1) [proceeding seeking recognition of a court decision] and Article 32 [procedure seeking non-recognition of a court decision], to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State in which proceedings are brought”.

Pursuant to Ar. 43(2) future Parenthood Regulation:

“An applicant who, in the Member State of origin, has benefited from free proceedings before an administrative authority communicated to the Commission pursuant to Article 71 shall be entitled, in any procedures provided for in Articles 25(1) and 32, to benefit from legal aid in accordance with paragraph 1 of this Article. To that end, that party shall present a statement from the competent authority in the Member State of origin to the effect that he or she fulfils the financial requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses”.

The above provisions cover both decisions given by courts and administrative authorities but are limited to the moment in time where recognition of a decision handed down in one Member State is sought in another Member State. It is conceivable that parents who are habitually resident in one Member State seek birth registration before an administrative body in another Member State due to the fact that the child was born on the territory of the latter Member State. It seems that such situation is not

covered either by Art. 43 future Parenthood Regulation (as there is no question of "recognition") or Directive 2003/8/EC (as the case might be classified as administrative one).

The future Parenthood Regulation will have an impact on the application of Art. 5(2) Directive 2003/8/EC, as being recognized as a parent has a crucial relevance on person's family and economic situation.

Pursuant to Art. 6(3) Directive 2003/8/EC in order to grant legal aid and to determine its extent, the importance of the individual case to the applicant should be considered. If such a case will fall into a scope of the future Parenthood Regulation, being therefore the case on the parentage relationship, its importance to the applicant would be significantly bigger than a case on the legal relationship of a different character.

REGULATION (EU) 2023/2844 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 13 DECEMBER 2023 ON THE DIGITALISATION OF JUDICIAL COOPERATION AND ACCESS TO JUSTICE IN CROSS-BORDER CIVIL, COMMERCIAL AND CRIMINAL MATTERS, AND AMENDING CERTAIN ACTS IN THE FIELD OF JUDICIAL COOPERATION

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The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

Regulation 2023/2844⁹⁹ shall apply from 1 May 2025. It applies to all EU Member States except Denmark. It establishes a uniform legal framework for using electronic communication in judicial cooperation procedures in civil, commercial and criminal matters. It covers electronic communication between competent authorities and natural or legal persons and competent authorities in civil matters. Regulation lays down rules on using videoconferencing or other distance communication technology for purposes other than the taking of evidence under Regulation (EU) 2020/1783; the application of electronic signatures and electronic seals; the legal effects of electronic documents and electronic payment of fees.

This Regulation should cover the digitalisation of communication in cases with cross-border implications falling under the scope of certain Union legal acts in civil matters listed in Annex I.¹⁰⁰ Regulation, however, does not affect the rules governing cross-

⁹⁹ Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation PE/50/2023/REV/1 OJ L, 2023/2844, 27.12.2023.

¹⁰⁰ (1) Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

(2) Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

(3) Regulation (EC) No 1896/2006 of the European Parliament and of the Council, of 12 December 2006, creating a European order for payment procedures.

(4) Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

(5) Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

(6) Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

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

(8) Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters.

(9) Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

(10) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

(11) Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

border judicial procedures established by the legal acts listed in Annex I, except for the digital communication rules. The requirements under applicable national law concerning the authenticity, accuracy, reliability, trustworthiness and the appropriate legal form of documents or information should remain unaffected, except for the rules related to communication by digital means introduced by this Regulation.¹⁰¹

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

This regulation may affect procedures in matters of parenthood. So far, parental matters are not within the scope of any regulation but may be a preliminary matter to other procedures under the scope of some of the regulations listed in Annex I of the Regulation. In that situation, judicial communication may differ for the preliminary matter on parenthood and the main cause of action.

This regulation is solely relevant to the way judicial cooperation is performed. It entails procedures among competent authorities of different member states and communication of interested parties and competent authorities on different subject matters that may be connected to parenthood. Hence, the main matter would be communicated exclusively electronically, while the preliminary matter should follow the traditional way of communication.

More concrete examples may be presented. For the main cause of action (subject matter under Annex I), communication among competent authorities will be carried out through a secure, efficient, and reliable decentralised IT system. For the communication of competent authorities with interested parties, a European electronic access point has been established on the European e-Justice Portal. The European electronic access point may be used for electronic communication between natural or legal persons or their representatives and competent authorities in:

- proceedings for recognition, a declaration of enforceability or refusal of recognition provided for in regulations listed in Annex I, but most commonly, parenthood procedure would be a preliminary matter in procedures under Regulations (EU) No 650/2012, Council Regulations (EC) No 4/2009, and (EU) 2019/1111.
- procedures for issuing, rectifying and withdrawing extracts and certificates under their regulations.
- communication between natural or legal persons or their representatives with the Central Authorities under Regulation (EC) No 4/2009 and Regulation (EU) 2019/1111 or the competent authorities under Chapter IV of Directive 2003/8/EC.

The European electronic access point would contain information for natural and legal persons on their right to legal aid, would also enable their representatives to act on

(12) Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.

(13) Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

¹⁰¹ Recitals 13 and 14.

their behalf, including in cross-border proceedings The European electronic access point shall allow natural and legal persons, or their representatives, to file claims, launch requests, send and receive procedurally relevant information and communicate with the competent authorities, or be served with judicial or extrajudicial documents.

If none of ICT subject to this regulation is available for procedures in parenthood matters, the procedures in other matters with parenthood as a preliminary matter are losing all the benefits of this regulation as the cooperation in preliminary matter is not swift and electronic but traditional. Thus, the entire system of EU judicial cooperation in civil matters is negatively affected.

Fragmentation of ICT use in cross-border proceedings, typically relying on voluntary application by Member States, has led to weak concrete application. As a result of the disparity in the recognition of ICT in national civil procedures, citizens have not enjoyed equally effective access to justice across the Union, as this largely depended on the level of digitalisation of the national civil law of the Member State where the procedure is conducted, including those with cross-border implications. Of course, Member State may take another, less rigid route, to apply ICT subject to this regulation on entire communication, which is subject to proceedings at hand, the main issue and the preliminary matter.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 3 Regulation 2023/2844	This Regulation introduces an electronic proof of authenticity. Thus, where a document transmitted as part of electronic communication under Article 3 of this Regulation requires a seal or signature by the legal acts listed in Annex I the document shall feature a qualified electronic seal or qualified electronic signature as defined in Regulation (EU) No 910/2014. On the contrary, for parenthood matters, the authenticity has to be confirmed by legalisation subject to The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (HCCH 1961 Apostille Convention).

The possible relevance and impact of a future Parenthood Regulation

Should a Parenthood regulation be adopted, the proceedings in matters of parenthood, either as a main cause of action or parenthood as a preliminary matter, would be communicated electronically. This regulation would bring benefit with swift and secure communication.

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 1024/2012

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The scope of application of the instrument. General consideration on the relevance of parenthood matters within the abovementioned scope

The Regulation (EU) 2016/1191¹⁰² has been adopted with the scope of simplifying the circulation of certain public documents among Member States. It applies to public documents issued by the authorities of a Member State in accordance with its national law which have to be presented to the authorities of another Member State and the primary purpose of which is to establish one or more of the facts listed by Art. 2(1), among which there are (a) birth, (i) parenthood, and (j) adoption.

The Regulation establishes the exemption of certain public documents issued by the authorities of another Member State and their certified copies from an apostille or legalisation for use in relations between the Member States, the use of multilingual standard forms as a translation aid and the recognition of certified translations between Member States.

At the same time, most importantly, 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*" (Art. 2(4) – see also Recital 18).

The provisions of the instrument on preliminary questions and the interplay with parenthood matters

The Regulation is not a PIL instrument concerning jurisdiction or applicable law and does not contain any indication on preliminary questions.

Relevant provisions of the instrument in connection with parenthood matters

Article	Comment
Art. 2(1) Regulation (EU) 2016/1191	The Regulation applies to public documents issued by the authorities of a Member States whose primary purpose is to establish, <i>inter alia</i> , parenthood.
Art. 2(4) Regulation (EU) 2016/1191 – Recital 18	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.

¹⁰² 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 1024/2012, OJ L 200, 26.7.2016, p. 1–136.

The possible relevance and impact of a future Parenthood Regulation

The main objective of the Regulation (EU) 2016/1191 is the one of procedural simplification and ultimately the promotion of the free movement of EU citizens. At the same time, as mentioned, the Regulation does not affect the recognition in one Member State of legal effects relating to the content of a public document issued by the authorities of another Member State. Even if this aspect was considered in the negotiations that preceded the adoption of the instrument, the strong resistance against the mutual recognition of civil status effects made it impossible to extend the proposal to other aspects. Therefore, a *status* recognized in a Member State and certified in a public document accompanied by the form provided for under the Regulation does not necessarily have to be recognized in another Member State if it is in conflict with the public policy of the requesting State.

From the above, it results that the Regulation, while certainly facilitating the free movement of EU citizens and the circulation of public documents – and also supporting the operativity of the future Parenthood Regulation – has a limited impact over the recognition of family status including parenthood.

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