UniPAR
Towards Universal Parenthood in Europe
Co-funded by the European Union

CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

The present Conclusions and Recommendations represent the final output of the research undertaken under the EU co-funded project UniPAR – *Towards Universal Parenthood in Europe* (JUST-JCOO-AG-2023-101137859). In the light of an overall examination of the current legislation, case law and practices on the private international law issues concerning parenthood in the European judicial space, the present document aims at rationalizing the main issues on which further reflection and possible intervention by the lawmaker should be considered. This, also in light of the practical problems addressing current practice by professionals in the EU Member States.

The Conclusions and Recommendations are rationalized in six Sections addressing respectively issues of jurisdiction, applicable law, adoption, recognition of decisions and of birth certificates, cooperation and with a final part on the possible advantages of adopting common rules.

Particular reference is made to the Commission's Proposal for 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(20220) 695 final), in the light of its potential in enhancing, *inter alia*, legal certainty and predictability about the rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood. At the same time, private international law issues surrounding

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parenthood are addressed globally, also considering the relationships occurring with third Countries.

The present Conclusions and Recommendations are thus designed to be addressed not only to lawmakers at national and EU level, bot also to lawyers, judges, notaries, staff at central authorities, civil servants, as well as authorities in the field of children's rights, child welfare organizations or authorities, academics, mediators, NGOs, interest groups and professional associations.

RECOMMENDATIONS ON PIL RULES ON PARENTHOOD

JURISDICTION

The rules on jurisdiction in parenthood matters determine the courts of which state are competent when judicial intervention is needed, for instance, in order to establish or contest parenthood in cross-border situations, setting the framework for all subsequent questions of applicable law and recognition. These rules should be distinguished from the ones which regulate the system of civil status, including birth registration.

Jurisdition under Current National Rules

Currently, jurisdiction in parenthood matters is regulated in EU Member States both in their domestic statutes and bilateral agreements.

General jurisdictional rules apply and provide for the jurisdiction of the courts of a given state on the basis of domicile or habitual res-idence of the defendant (*actor sequitur forum rei* principle). Other general rules, like the one on forum necessitatis, come into play as well. Additionally, special jurisdictional rules apply. They provide for alternative grounds of jurisdiction, so that each of them might grant jurisdiction to the courts of a given Member State in addition to the grounds listed in general provisions. Different combinations of jurisdictional grounds are used, but some common denominators can be identified. Jurisdictional grounds are of personal nature, as they refer to the child or a parent, parents or parties to the proceedings and their nationality, domicile, habitual residence or residence. If a time factor is clearly stated, it is the time when the proceeding was initiated.

Domestic laws differ as to jurisdiction for the purpose of establishing parenthood being an incidental question in proceedings on other matters.

The above multitude of rules is supplemented with such rules in-cluded in bilateral agreements in place in different Member States.

Jurisdition under the Parenthood Proposal

Adoption of common jurisdictional rules in parenthood matters on the basis of Article 81(3) TFEU would limit the number of different private international law regimes applicable in EU Member States. Adoption of these rules within enhanced cooperation mechanism leaves the space for jurisdictional rules resulting from the network of bilateral agreements in place in different EU Member States. These abundance of legal sources hinders predictability and stability of the legal status.

Recommendations

1. It is advisable that the potential future instrument on parenthood provides for exclusivity of its jurisdictional rules, and therefore no residual jurisdiction derived from domestic rules exists. Such an approach was already adopted in other, modern EU private international law instruments (for instance, Maintenance Regulation).

2. Shaping grounds of jurisdiction regires a carful consideration taking into account an adequate degree of proximity between the forum and a child. Mechanisms aimed at addressing challenges linked with migration, like subsidiary jurisdiction based on the presence of a child and forum necessitatis needs to be included.

3. Exclusion of party autonomy would be justified by the nature of parenthood as a legal institution, which affects the civil status and fundamental rights of a child.

4. A clear rule on incidental question inspired by its counterpart in-cluded in Brussels II ter Regulation is welcomed. Similarily, procedural mechnisms (for instance, lis pendens rule) can also be modelled after other EU PIL instruments.

Applicable Law

1. *Clarification regarding the subject matter of the connecting factors for the applicable law - whether limited to "parenthood" or covering "the establishment, contestation, extinction, or termination of parenthood."*

Article 17 of the Proposal determines the law applicable to the establishment of parenthood. However, this does not mean that other matters relating to parenthood are not covered by said applicable law. Article 4(3) defines the establishment of parenthood as "*the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously*". The contesting is also referred to in Article 18, letter „a". Recital 33 expressly states that where relevant, the Regulation should also apply to the extinction or termination of parenthood. All these confirm that the establishment of parenthood encompasses a broad range of matters beyond the initial connection between the child and his or her parent. For the sake of clarity and legal certainty, it is recommended that, when determining the applicable law, reference be made either exclusively to "parenthood" (as in Regulation No 650/2012 on ju-

risdiction, 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, pp. 107–134) as regards the notion of succession) or alternatively to "the establishment, contestation, extinction, or termination of parenthood" (as employed in Regulation (EU) 2019/1111 (Brussels II ter) 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, pp. 1–115) in relation to the concept of parental responsibility).

2. *Introduction of specific rules on post-birth establishment or contestation of parenthood*

Article 17(1) of the Parenthood Proposal establishes that the law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time of birth. While this provision serves as a practical rule for the determination of the applicable law in cross-border parenthood cases, it presents certain challenges. Specifically, this rule is not applicable in situations where a significant period of time has elapsed between the birth of the child and the moment when parenthood needs to be established or contested.

Furthermore, the alternative connecting factor - the law of the state of birth of the child - is only applicable in the event that the habitual residence of the person giving birth cannot be determined. This leaves unresolved situations, such as cases where parenthood is contested years after birth and the habitual residence of the person giving birth is known.

It is suggested that the text be refined to include provisions addressing cases where parenthood is contested or established post-birth. A dedicated conflict-of-laws rule based on the

child's habitual residence at that moment should be introduced to cover such scenarios.

3. *Ex officio application of the exception introduced by Article 17(2), ensuring legal recognition of both parents and broadening the scope of the exception.*

Article 17(2) of the Parenthood Proposal provides an exception where, if the applicable law under paragraph 1 results in the establishment of parenthood with respect to only one parent, the law of the state of nationality of either parent or the law of the state of birth of the child may apply to establish parenthood for the second parent. This exception is triggered only when the applicable law results in the establishment of parenthood for only one parent. Parenthood established under any designated applicable law must be recognized across all Member States (Recital 52). This provision is a consequence of the Court of Justice ruling in the Pancharevo case. It may also apply in cases of surrogacy, where parenthood is established with respect to only one parent. It provides legal certainty and predictability for parents. To achieve this result, it is advisable that its application be *ex officio*, rather than at the discretion of the relevant authority or court.

4. *Including a provision that allows application of the exeptions if it is "more favorable for the child," extending beyond cases that simply enable parenthood for both parents*

National legal systems, such as the Bulgarian Private International Law (Article 83(1) CPIL), offer broader provisions, permitting the application of an exception to the main rule if it is "more favorable for the child". Bulgarian case law ultimately accepts that "more favorable" refers to the establishment of parenthood for both parents (Decision No. 513 of 17.02.2020 by the Sofia Court of Appeal). However, real-life situations may

arise in which another law could prove "more favourable" for determining parenthood in different circumstances, i.e. not only when it leads to the possibility to establish parenthood from the second parent. Therefore, the exception in Article 17(2) may be extended to allow for the application of a more favorable law not only in a limited situation where parenthood is established for both parents. This approach is also reflected in Belgium's PIL, which includes an escape clause allowing the application of another law if it is more closely connected to the case. Similarly, Croatian Private International Law (Article 41) permits the application of a law other than that of the habitual residence of the child if it serves the best interests of the child. Italian law (Article 33 of Law 218/1995) similarly allows the application of a more favorable law if it benefits the child.

5. *Clarification and expansion of the scope of the applicable law, including reference to the conditions for establishing parenthood rather than procedural aspects, as well as covering substantive parenthood matters alongside adoption-related issues.*

Article 18 of the draft Regulation specifies that the scope of the applicable law encompasses in a non-exhaustive way (a) the procedures for the establishment or contestation of parenthood; (b) the binding legal consequences and/or evidentiary effects of authentic instruments; (c) the procedural standing of individuals in proceedings related to the establishment or contestation of parenthood; and (d) time limits for the establishment or contestation of parenthood.

Evidently, certain aspects mentioned in Article 18 are procedural under national laws, while others are substantive. It is necessary to clarify whether the determination of the applicable law extends to procedural matters such as the burden of proof. For instance, Article 20(2) of the draft Regulation men-

tions that an act intended to have legal effect on the establishment of parenthood may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in paragraph 1 under which that act is formally valid, provided that such mode of proof can be administered by the forum, but it is not clear whether the mode of proof is included under the "procedures" under Article 18, letter "a" of the Proposal. Additionally, the assessment of evidence in establishing parenthood is mentioned in Article 20(2) but lacks sufficient clarification. National laws, such as Belgium's PIL (Article 63), include these procedural aspects explicitly within the scope of the applicable law, ensuring consistency.

Finally, the Regulation does not clearly address whether within the scope of the applicable law fall the consequences of establishing parenthood, i.e. the filiation between the child and the parents. For example, Italian law (Article 33 of Law 218/1995) covers both the requirements and effects of establishing parenthood, while the draft Regulation remains ambiguous on this point.

Naturally, these specified issues could be further clarified (such as by referring to conditions for establishing parenthood rather than procedure) and expanded upon (for instance, concerning adoption matters).

6. *Inclusion of overriding mandatory provisions*.

The draft Regulation does not contain a rule on overriding mandatory provisions, which are common in national legal systems, particularly in cases where national laws seek to protect children from abusive or fraudulent practices, such as fraudulent acknowledgments of parenthood. The Belgium PIL includes specific provision regarding "sham acknowledgement", but the proposal may address this as an overriding mandatory provision.

7. *Addressing fundamental rights considerations under the Charter in a recital modelled by Regulation No 650/2012.*

The second rule in Article 22(2), is novel for applicable law instruments. It specifies that the public policy exception shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination. It is considered that this rule limits the application of public policy, with suggestions to expand its scope to encompass all fundamental rights under the Charter, particularly to accommodate Article 24 (Rights of the Child).The aim of the rule is clear: to restrict the possibility of invoking public policy against the application of foreign law that is discriminatory (for example, on grounds of sexual orientation, birth, etc.). This clarification should remain, but it would appear more appropriate to be included as a recital, as was done in Regulation (EU) No 650/2012 (Recital 58). In this way, the content of public policy would be determined without such limitation, but the recital would clearly emphasize the need to take into account the specific provisions of the Charter.

8. *Governing the regulations with existing Legal Aid Treaties*

The draft Regulation explicitly states in Article 66(1) that it "shall not affect" international conventions to which one or more Member States are party, and which lay down provisions on matters governed by the Regulation. However, these treaties, which predate the free movement of persons within the EU, primarily focused on cases where nationals of one state resided in another. This raises practical challenges in determining how the Regulation interacts with such treaties, particularly when multiple jurisdictions are involved.

To ensure legal certainty, the Regulation could include a list of international conventions that continue to apply alongside

the Regulation. A recital should be included to guide national courts in resolving conflicts between international treaties and EU law, particularly drawing from the recent CJEU judgment in Case C-395/23 (Anikovi). This would provide clarity on the relationship between the Regulation and international legal aid treaties.

ADOPTION

Forms of adoption

Adoption law distinguishes between intercountry and domestic adoptions. Intercountry adoptions imply that the child changed countries as a result of the adoption. This form of adoption became prevalent between the 1980s and early 2000s, but started to decline after 2004. Now far fewer children are adopted internationally, and some countries have even suspended this form of adoption. All countries included in the UniPar project are parties to the Hague Adoption Convention of 1993, which provides safeguards for adopted children and establishes a system of cooperation between Contracting States to ensure these safeguards are respected. The Convention also aims to secure the recognition of adoptions carried out in accordance with its provisions.

Even if they contain a foreign element, domestic adoptions are regulated by domestic law and by domestic private international law. Domestic private international law would for instance determine which connecting factors to use if one of the adopting parents has a foreign nationality or lives in another country. This form of adoption would only be available with respect to children that are in the country where the adoption is about to take place – there is in other words no transfer of the habitual residence of the child due to or as a consequence of the adoption.

Another distinction that is made in adoption law is the distinction between the adoption of a known child and adoption of an unknown child. Adoption of a known child is typically an intra-family or step-parent adoption. Adoption of an unknown child entails providing a solution for a child that was abandoned at birth or whose parents cannot take care of them.

Intercountry adoption

As intercountry adoption decreased, international surrogacy and medically assisted reproduction increased. In some situations, in order to establish the legal filiation after surrogacy, the intending parents use adoption. Sometimes the filiation link is established in another way for one of the parents, but adoption is the only way for the other intending parent to become a legal parent. These cases are most often domestic adoptions, as the child is already in the country where they will be living after the adoption, even if the child was born in another country as the result of an international surrogacy. Where surrogacy is permitted, this adoption might be in line with the law, but where surrogacy is not regulated, adoption is often used as the only option to find a solution.

In countries where surrogacy is not regulated, the use of international surrogacy agreements to conceive a child may be seen as a circumvention of the rules on intercountry adoption: intending parents go and 'get' a child in another country. It is a circumvention because the procedure of intercountry adoption under the Hague Convention, in force in more than 100 States, contains many safeguards to guarantee the best interests of the child, but is not applied. At the same time, and in a paradoxical way, not recognising the rights of children born after international surrogacy (and not allowing adoption in order to establish filiation) can be contrary to the European Convention of Human Rights (as the European Court of Human Rights found

in Menneson v. France (App. No. 65192/11, judgment of 26 June 2014) and subsequent cases).

It is important to acknowledge this inextricable link between surrogacy and adoption. Adoption has been around for much longer, and many malpractices have emerged. These malpractices include creating a market for children, mistakes or fraud, and inadequate registration of information on origin. Societies are now in the process of addressing these mistakes of intercountry adoption. At the same time they should avoid repeating those mistakes in the context of surrogacy.

Domestic Adoption after surrogacy

In surrogacy cases, the adoption would be one for a known child. This adoption can take place in the country of the surrogacy, or the country where the intending parents live. Both can be problematic, as explained above.

The success of such adoption procedure depends on various aspects, among others the availability of adoption to same-sex couples. The remaining part of this section will give an overview of the countries investigated in the UniPar project.

In Poland adoption by same-sex couples is not permitted. Adoption by a married couple is possible if the biological parents consent before a court. This could be the situation where one of the couple is a biological parent (usually the male father) and that parent agrees to the adoption, while the surrogate mother relinquished the child beforehand or consents to the adoption. If the intending parents are not married adoption is not possible.

The situation is the same in Croatia, although a step-parent adoption is an available option for spouses as well as co-habiting partners. This is exclusively open to different-sex spouses or partners; same-sex cohabiting partners can only get parental responsibility over children, but filiation cannot be established for them.

In Bulgaria step-parent adoption is also possible only by two spouses of different sex, after consent by the biological parent(s).

In Italy, step-parent adoption is possible after an international surrogacy. Such adoption is possible by the intending (male) parent who is not the registered (biological) parent. The pursuant adoption is not a full adoption. The Italian Constitutional Court found that this amounts to discrimination, and also found that adoption after surrogacy is not an adequate solution as it requires consent by the biological parent(s).

Spanish law also permits adoption after surrogacy, for same-sex and different-sex parents. Consent is also necessary, as well as acceptance by the public entity. The Spanish Supreme Court accepted that adoption is a solution that takes account of the best interests of the child.

In Belgium domestic adoption is not often used after surrogacy. Step-parent adoption is a possibility, and this process is open to same-sex and different-sex couples. Consent is necessary as well.

Recommendations

1. When undertaking adoption after surrogacy, authorities (both in the country of the surrogacy and in the country where the intending parents live) must take care that this does not amount to a circumvention of intercountry adoption rules.

2. The European Commission and national legislators should carefully consider elements that could undermine the 1993 Hague Adoption Convention.

3. When legislating on assisted reproduction or surrogacy, legislators should take care not to repeat the mistakes made in intercountry adoption. Therefore they should:

- ensure that children's rights, particularly the right to birth registration and the right to identity, are respected and prioritised, and avoid a market-driven approach based on the demands of intended parents, donated gametes and surrogate mothers;
- set procedures in place for adequate registration and preservation of personal information, so that the children can at a later stage find their origins.
- create a system of access to information, with assistance where the child needs assistance.

RECOGNITION OF DECISIONS AND OF BIRTH CERTIFICATES

A. Recognition of judgments

Parenthood is usually established by operation of the law. Judicial decisions are rather exceptional. They mainly result from disputes over paternity or when parenthood is constituted by a competent authority like in the case of adoption or pre-birth judgments in connection to ART.

The recognition of foreign judgments is a classic field of Private International Law. Recognition entails that the procedural effects of the judgment are accepted. Since parenthood is a civil status establishing the position of a person in respect to a family enforcement is not an issue. Parenthood gives rise to several rights and duties between the child and their parents or family and is also the source of rights under public law in areas such as Social Security or Nationality law. These derived rights and obligations may require enforcement whenever they are not voluntarily complied with but the enforcement of the rights and duties stemming from parenthood is not a matter to be dealt with within parenthood.

The recognition of parenthood judgments arises usually in connection to the entry or the update of an entry in a Public Register or incidentally within judicial proceedings related to

the effects of parenthood. For all other purposes, e.g. in connection with social security benefits or health insurance, parenthood is proven by means of birth certificates which are issued following the registration of the judgment.

Recognition under Current National Rules

National reports show that there are no specific rules for the recognition of parenthood judgments. General recognition provisions apply. There are hardly Treaty obligations in this area of the law except for some bilateral Conventions, e.g. between Poland and Bulgaria.

National rules for the recognition and enforcement of judgments vary quite significantly. In some of the investigated Member States like Belgium and Italy the automatic recognition principle applies, meaning that special judicial proceedings for the recognition of judgments are not required. The situation in Spain comes very close. While the recognition of foreign judgments is subject to exequatur the entry or modification of an entry in the Civil Registry or the recognition of the foreign judgments in the framework of other judicial proceedings can take place directly. Bulgaria, Croatia and Poland on the contrary require the intervention of a court, if there are objections to recognition.

The refusal grounds most frequently mentioned in the national UNIPAR reports are indirect jurisdiction and public policy. Indirect jurisdiction requires checking whether the jurisdiction of the court of the State issuing the judgment is based on a reasonable connection. It is generally presumed that jurisdiction of the court of origin is reasonable if the ground of jurisdiction is identical or similar to that used in the rules of direct jurisdiction of the requested State. In this regard national rules show a varying degree of flexibility. Controlling indirect juris-

diction is, however, always time consuming since it requires ascertaining which is the ground of jurisdiction used by the court of origin and evaluating whether this ground is reasonable.

Public policy does not seem to play a role in connection with traditional paternity judgments- i.e, when the judgment establishes or terminates paternity. By contrast it is a major issue in judgments on parenthood related to ART, particularly surrogacy.

Recognition under the Parenthood Proposal

The recognition rules proposed by the Commission are closely inspired by those contained in Regulation Brussels II ter. In general, no fundamental objections against the proposed rules have been raised, except as regards certain provisions that blindly copy from Regulation 2019/1111 and fail to consider the specificities of parenthood, a concept distinct from parental responsibility. As regards the ground of refusal based on the irreconcilability with a court decision from a Member State or third State, Art. 31(1)(e) PP has taken over art. 39 of the Parental Responsibility Regulation without realizing that it is exceptional to give priority to the later decision. This is only justified by the special nature of parental responsibility decisions which are never truly final and need to be adjustable to changing circumstances. Parenthood, however, is about status, about the position of a child in a family and in society. There is no reason to depart from the *res iudicata* rule that gives priority to the earlier decision. As noted by the Marburg group court decisions on parenthood are primarily based on unchangeable circumstances at the time of birth. If parenthood is successfully contested at a later stage in one Member State and recognition of this decision is sought, there would be no irreconcilability with a prior decision since different people would be regarded as parents.

Another contentious matter is the role that must be given to the hearing of the child. If parenthood decisions deal with the biological descent of the child, the hearing of the child is most often not required and should therefore not justify the refusal of recognition.

Since parenthood decisions are either declaratory or constitutive they do not require enforcement. This entails that in this area the advantages of the Brussels system are quite limited, especially in those Member States that do not require a special exequatur procedure or where the exequatur procedure does not need to be pursued for the update of a Civil Register or when the recognition of a foreign court decision is raised as an incidental question in judicial proceedings.

It would thus seem that the simplification of the recognition regime will have a varying impact depending on the current national rules on the recognition of judgments.

The main factor of simplification as regards the recognition of foreign decision is that the jurisdiction of the court of origin of the foreign decision is no longer reviewed under the proposed rules. As is the case with other EU Regulations this is brought about because of the unification of the jurisdiction rules.

Whether the public policy exception will be curtailed as suggested by several Recitals in the Proposal is questionable. Public policy concerns arise frequently in connection with ART and Surrogacy and are not necessarily connected exclusively with discrimination on grounds of sexual orientation but rather with different positions in relation to bioethical matters. The best interests of the child principle which applies in all Member States is subject to divergent interpretations and does not necessarily lead to the recognition of a status acquired abroad if basic rghts of the child and other persons have been breached.

B. *Recognition of Birth Certificates*

Judicial decisions on filiation are rather exceptional. Most often filiation results from the operation of the law with a birth certificate being issued as evidence of filiation. Even where filiation results from a legal act, for example of acknowledgment, or a judgment, States are under the obligation of providing for updated birth certificates. Birth certificates do not disclose how filiation was established.

A birth certificate is a vital record that documents a person's birth, including their name, date and place of birth. It also records the identity of the woman who gave birth to the child. That this woman is the legal mother of the child does however not result from the birth certificate but from the law applicable to filiation which may or may not be the law of the State issuing the certificate. It is also this law that establishes the status *vis-a-vis* the spouse of the woman giving birth.

Birth certificates produce evidentiary effects. In line with the ELI-Enhancing Child Protection project it is useful to distinguish between general or formal evidentiary effects and substantial or extended evidentiary effects.

In Romano-Germanic legal systems, authentic acts issued by notaries or civil status registrars have general or formal evidentiary effects. This means that the elements directly ascertained by the issuing authority are presumed to be correct and accurate. For birth certificates, these effects pertain to the date the birth was declared, the identity of the declarant, and the fact that a declaration was made. In certain systems, these evidentiary effects have been extended by law to include the birth itself, even if the Registrar did not witness it personally. However, filiation is not covered by these general or formal evidentiary effects, which primarily address factual matters.

In addition to general or formal evidentiary effects, authentic acts can also have more substantial or extended evidentiary effects concerning the legal content of the act. For instance, with filiation, which results from legal reasoning rather than being purely factual, the individual named as mother or father on the

birth certificate may assert that status. This presumption serves as an evidentiary mechanism: it does not establish filiation but facilitates the assertion of this status and may only be contested through judicial proceedings.

In cross-border cases, parents and children may seek to rely on a foreign birth certificate as evidence of the existence of filiation. Acceptance of the parenthood presumption deriving from the birth certificate suffices in most scenarios, for claiming social security benefits or medical insurance or requesting residence permits, for example.

Birth certificates qualify as public documents since they are issued by a public authority. As is the case with public documents generally two issues are at stake. First, the authenticity and the evidential value of the document itself (*instrumentum*) and second the authority of the legal situation evidenced in the document, i.e. its content (*negotium*).

Reognition of the document as such usually requires providing for a translation into the official language of the requested State and the legalisation or obtention of an apostille to prove its authenticity. These matters are covered by 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. This Regulation provides, in relation to certain public documents which are issued by the authorities of a Member State, and which have to be presented to the authorities of another Member State, for a system of exemption from legalisation or similar formality. A translation is generally not required if the document is accompanied, by a multilingual standard form

Recognition under Current National Rules

The national systems analysed all seem to provide rather straightfor-ward systems for the recognition of foreign birth

certificates. Leaving aside formalities such as translation and legalization which have been considerably simplifed when birth certificates originate from another Member State by virtue of Regulation 2016/1191, the jurisdictions reviewed are mostly ready to accept the general or formal evidentiary effect that was alluded before i.e. that the fact of the birth occurred and the place and date of birth as recorded in the birth certificate.

When it comes to recognizing the extended evidentiary effects, the situation differs between Member States that subject the recognition of the bond of filiation to a choice-of-law test and those that do not. In the latter case the national report of Croatia mentions that this practice is not in accordance with the rule establishing that choice- of-law rules bind all authorities in Croatia. The Italian report also suggests some inconsistencies as regards the limited role of civil registrars.

This is an area of the law, where the law in the books and the law in action seem likely to differ quite significantly. In the absence of empirical evidence, one cannot know with certainty whether choice-of-law tests are undertaken or not, but it is suggested that there are deficiencies. Authorities in civil registries are probably not well equipped to deal with foreign law in many countries and content themselves to transcribing the foreign birth certificate as it is presented unless essential information is missing or the content is manifestly contrary to public policy.

Recognition under the Parenthood Proposal

The rules as regards authentic instruments are among the most controversial of the proposed Regulation.The Proposal distinguishes between birth certificates with binding legal effect and birth certificates with non- binding legal effect. The categorization is unclear. If what the Commission means are birth certificates that establish parenthood with constitutive effect the category might be unnecessary since in accordance

with the CJEU finding in the Senatsverwaltung case such authentic instruments might qualify as court decisions and thus be subjected to the legal rules on the recognition of decisions. In any case it seems that there is a very limited number of such certificates which might therefore not require a new special regime.

In a cross-border scenario what parents and children need is the acceptance of the extended or substantive evidentiary effects of the foreign birth certificate, namely that the persons named in the certificate are presumed to be the legal parents of the child.

In connection with authentic instruments the Commission proposes that, in line with Art. 59 Succession Regulation, Art. 58 of the Matrimonial Property Regulation and Art. 58 of the Partnership Regulation, an authentic instrument which has evidentiary effects in the Member State of origin should have the same evidentiary effects in another Member State as it has in the Member State of origin. To ensure that the extended evidentiary effects – namely the presumption that the persons named in the certificate are the egal parents of the child- are also accepted, Member states should as well be required to accept the evidentiary effects provided by the law governing filiation. In this respect it is of course beneficial to have uniform applicable law provisions, which is where the real value of the proposed Regulation lies.

Recommendations

1. In practice, it seems that the main difficulties in connection with the recognition of judgments in matters of parenthood arise from the need to review the jurisdiction of the State of origin. To do so, authorities in the requested State must first investigate the grounds on which the issuing court asserted its jurisdiction and then assess whether such ground is reasonable and justified by virtue of proximity. The fact that the PP is a

complete instrument with uniform jurisdiction rules justifiifies that checks of indirect jurisdiction are dispensed with, thus simplifying the recognition process and contributing to legal certainty.

2. The recognition rules proposed are in principle adequate but would require some adjustments. Parenthood is a matter of civil status and in the case of irreconcilable decisions the *res iudicata* principle should be fully respected by giving priority to the prior decision.

3. The weight of the child's opinion varies greatly in judicial proceedings depending on whether parenthood is merely ascertained because it is a matter of fact based on biological descent or parenthood is constituted by an act of authority like in adoption. In the first case the opinion of the child (or of any other person) is largely irrelevant while it would be a major issue in the second case. The hearing of the child should thus not be a general ground for refusal of recognition applying to all parenthood judgments.

4. The requirements for the recognition of birth certificates are twofold. As regards the recognition of the authentic instrument as such, the EU has already made a major contribution. *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* provides, in relation to certain public documents which are issued by the authorities of a Member State, and which have to be presented to the authorities of another Member State, for a system of exemption from legalisation or similar formality. A translation is generally not required if the document is accompanied, by a multilingual standard form. Further action in this respect is not required.

5. The focus should be the portability of the content of the authentic instrument. Most documents do not establish parenthood; in other words they do not have constitutive effect. Birth certificates create a presumption that the individuals named in the birth certificate are the child's parents. Challenging this presumption would require initiating judicial proceedings. To make birth cerificates portable Member States should be required not only to accept the evidentiary effect of the document itself according to the law of the State of origin (namely that the facts of the birth are as stated in the document) as proposed in the PP but also the evidentiary effects about the content of the document created by the law governing parenthood. In this respect the PP greatly facilitates the process since it contains choice-of-law rules. If such rules were simplified mutual trust would justify that in the requested Member State, birth certficates issued in another Member State were merely transcribed.

Cooperation

A. The point of departure – Parenthood Proposal as it is

The Impact Assessment accompanying the Proposal (SWD(2022) 391 final) emphasized that the protection of children in matters of parenthood should not depend exclusively on the traditional mechanisms of jurisdiction, applicable law, and recognition and enforcement, but should also be supported by "non-legislative measures." In illustrating this concept, the Parenthood Proposal expressly refers to the enhancement of cooperation among public authorities competent in parenthood-related matters.

The vast majority of stakeholders and public authorities consulted during the Impact Assessment concurred that fostering cooperation among national authorities would be instrumental

in improving mutual understanding of the issues at stake and in identifying common solutions aimed at avoiding instances of "limping parenthood." Nonetheless, the measures proposed were confined to non-legislative initiatives, such as strengthening cooperation and exchanges between authorities, organizing judicial training sessions or thematic meetings within the framework of the EJN-Civil, issuing interpretative guidance to Member States on the recognition of parenthood, and raising public awareness regarding the existing challenges in this domain.

Administrative and judicial cooperation constitutes a standard ancillary component of the EU's private international law instruments affecting children. The proposed Regulation on Parenthood, however, departs from this established approach. It contains no specific provisions on administrative cooperation, neither it envisages the establishment of a network of central authorities nor delineates general or specific tasks to be undertaken within such a framework.

Conversely, the Parenthood Proposal approaches judicial cooperation in a more conventional manner. From the outset of the drafting process, particular importance was accorded to the European Judicial Network in Civil and Commercial Matters (EJN-Civil), which would be entrusted with facilitating the practical application of the Regulation—mirroring its role under other EU instruments in the field of civil law with cross-border implications.

From the very outset, cooperation under the Parenthood Proposal has been conceived in close alignment with the broader EU framework on digitalised cooperation (Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters). The establishment of a decentralised IT system and a European electronic access point—intended to facilitate the effective digitalisation of procedures across various areas of cross-border judicial cooperation in civil and family matters—

relies on the development of an IT infrastructure that can be readily extended to encompass the Parenthood Regulation as well (see the UniPAR Impact Report on Parentage in the EU acquis, p. 77). 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. Consistency of Parenthood proposal with the Digitalisation Regulation is ensured by Article 58 of the Proposal, establishing a base for electronical communication of Member State courts or other competent authorities in proceedings for a decision that there are no grounds for the refusal of recognition of a court decision or an authentic instrument on parenthood, or proceedings for the refusal of recognition of a court decision or an authentic instrument on parenthood, as well as communication of Member State courts or other competent authorities should communicate with citizens through the European electronic access point only where the citizen has given prior express consent to the use of this means of communication (see Recital 82 and Article 58). The European electronic access point should allow natural persons or their legal representatives to launch a request for a European Certificate of Parenthood and to receive and send that Certificate electronically.

B. *Possible amendments of the Proposal*

Empowering Central authority established under other regulations to cooperate under the parenthood scope as well

The benefits traditionally associated with establishing a network of central authorities for administrative cooperation have been outweighed by the system's inherent complexity and inadequate resources, which lead to delays in communication

and loosened expected cooperation effects. Legislator calculated to rule out the entire central authority system out of the Parenthood Proposal, focusing solely on available means of electronic communication established by general civil justice framework. It is also a fact that cooperation among authorities would be multi-tracked, as authorities may use the channels of cooperation in taking evidence and service established under relevant EU rules (see the UniPAR Impact Report on Parentage in the EU acquis, p. 65-72). Nonetheless, the continued relevance of central authority system is implicitly acknowledged in the recitals of the Parenthood Proposal.

At the Union level, several legislative instruments address the rights of children in cross-border situations, most notably Council Regulation (EC) No 4/2009 and Council Regulation (EU) 2019/1111. However, neither of these instruments contains provisions concerning the establishment or recognition of parenthood. Likewise, Regulation (EU) 2016/1191 of the European Parliament and of the Council encompasses public documents relating to birth, parenthood, and adoption within its material scope. Yet, this Regulation is confined to matters of authenticity and translation of such documents and does not extend to the recognition of their substantive content or legal effects in another Member State.

It has also been confirmed by UNIPAR Impact Report on Parentage in the EU acquis (p. 6) that the establishment of parentage constitutes an essential precondition for the effective functioning of other EU private international law instruments relating to children. A closer examination of the cooperation mechanisms established under other EU family law regulations leads to Article 80 of Regulation (EU) 2019/1111, which provides that "*the Central Authorities shall provide any information relevant to proceedings concerning parental responsibility in the requesting Member State, in particular regarding the situation of a parent, relative or another person who may be suitable to care for the child*". Such information may encompass the existence

of proceedings concerning parenthood. This provision must be read in conjunction with Article 79(b) of the same Regulation, which assigns to the Central Authorities the specific task of "collecting and exchanging information relevant to proceedings in matters of parental responsibility". Article 80 further specifies the scope of this information, stipulating that the Central Authority shall, where available, provide or draw up and provide a report on: (ii) any ongoing proceedings in matters of parental responsibility concerning the child; or (iii) decisions taken in such matters.

Both of these provisions are closely connected to parenthood, insofar as it is entirely possible that an ongoing proceeding concerning the acquisition of parental responsibility raises, as a preliminary issue, the determination of parentage between the child and the individual seeking parental authority. Similarly, the existence of a prior determination of parentage may serve as the basis for the subsequent granting of parental responsibility to that parent. In addition, the Central Authority is obliged to provide any other information relevant to proceedings in matters of parental responsibility in the requesting Member State, particularly regarding the situation of a parent, relative, or other suitable person, where the circumstances of the child so require.

In addition to the examples already mentioned, other types of information may also be relevant to proceedings concerning parental responsibility—most notably, the initiation of proceedings to contest or establish parenthood. The outcome of such proceedings may have a direct and significant impact not only on the allocation of parental responsibility but also on the legal determination of parentage itself.

In light of the foregoing, the Proposal should duly reflect these considerations and explicitly empower the Central Authorities to exchange information and cooperate in matters of parenthood within the framework of other relevant EU regulations.

Introducing a European Parenthood Register

The ELI Project (Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695 final. ELI 2025., draft version, p. 170) recommends the establishment of a centralised register to complement the practical functioning of the European Certificate of Parenthood (ECF) and to enable all national authorities to retrieve certificates from a single, unified database. The proposed amendments envisage a confidential yet accessible system, in which sensitive medical records are safeguarded through strict secrecy provisions and stored in an encrypted database linked to the EU centralised register via an ECF electronic identification number.

The ECF electronic numbering system would serve as the technical backbone of this framework, obliging adoption centres, hospitals, and fertility clinics to submit complete documentation, while requiring authorised registrars to verify the integrity of all files prior to their upload. Furthermore, it is proposed to introduce a new Article 58a (or *58bis*) to regulate the operation of the database containing anonymised information concerning the child's origins.

This collaborative mechanism would not only enhance the efficiency and transparency of cross-border parenthood recognition but also foster European integration and strengthen mutual trust among Member States**.**

Recommendations

1. The Parenthood Proposal should explicitly empower the Central Authorities to exchange information and cooperate in matters of parenthood within the framework of other relevant EU regulations.

2. A collaborative mechanism, in the form of a centralised registry to complement the practical functioning of the European Certificate of Parenthood (ECF), should be introduced not only to enhance the efficiency and transparency of cross-border parenthood recognition but also to foster European integration and strengthen mutual trust among Member States.

ADVANTAGES OF COMMON RULES

The need for common private international law rules

Parenthood is the typical field where efforts toward the adoption of a common legal framework of reference is needed: the relationship between parents and children is the backbone of every society, States tend to regulate such a relationship by following their own traditions and needs, with the consequence that there might be relevant differences from one national law to another.

Parenthood is also a very difficult topic to regulate, since the needs of the society are rapidly changing. People are facing problems in having children and science has tried to solve this problems by providing artificial reproductive techniques (ARTs), which may challenge the foundation of parenthood (such as the principle *mater semper certa est*) and which may be differently appreciated/accepted by the States. Such different appreciation may give rise to a real polarization of positions in some cases: with reference to surrogacy, the divide between States allowing it and States opposing it is growing.

A market of laws in the field of parenthood exists and those wanting to become parents frequently move in search of the legal order envisaging the best solution for them.

This is clearly a field where private international law rules are needed, given the cross-border elements inherent to the described situations and the high risk of limping situations.

But private international law rules are needed also in a more modern perspective: private international rules could (and probably should) be shaped, interpreted and applied with a view to promote the protection of human rights.

Ongoing efforts to develop a common legal framework

Cross-border parenthood issues necessarily involves the interaction between human rights law and private international law and efforts to promote the adoption of common rules and principles exist in both field.

With reference to the field of human rights, the focus is mainly on parenthood following international surrogacy agreements (ISA), where soft law instruments have been adopted.

At global level, on the one side, 3 reports have been adopted under the aegis of the United Nations: (i) the 2018 Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective; (ii) the 2019 Report of the Special Rapporteur on sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; (iii) the 2025 Report of the Special Rapporteur on violence against women and girls, its causes and consequences.

On the other side, the ISS has developed common soft law principles (so-called Verona principles) for the protection of children's rights.

At regional level, the Council of Europe has tried to harmonize the substantive law of the Member States concerning the status of children, but it never attempted to harmonize rules in relation to surrogacy: reference should be made to the 1975 European Convention on the Legal Status of Children Born Out of Wedlock (ETS No 85), which considered the protection of children against discrimination based on their parents' status. Relevant is also the Draft recommendation on the rights and legal

status of children and parental responsibilities (May 2010) of the Committee of Experts in Family law of the Council of Europe, which – whilst recommending the adoption of rules related to legal parentage in the context of medically assisted reproduction – does not attempt to harmonise practices on surrogacy. As regard surrogacy, an *ad hoc* committee of experts on progress in the biomedical science (CAHBI) in a 1989 report on human artificial procreation stated some principles on human artificial procreation, among which there is principle 15 stating as follows: "*1. No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother. 2. Any contract or agreement between surrogate mother and the person or couple for whom she carried the child shall be unenforceable. 3. Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited. 4. However, states may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph 2 of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that: a. the surrogate mother obtains no material benefit from the operation; b. the surrogate mother has the choice at birth of keeping the child*".

The necessary interaction between human rights law and private international law rules is highlighted by the Resolution on human rights and private international law adopted in 2021 by the Institute of International Law, which envisages specific rules on parenthood.

With reference the private international law perspective, two main projects are ognoing: the first is the one of the Hague Conference of Private International Law, at global level, and the second is the proposal from the European Commission.

The main differences between the two, beside the fact that the first is global in nature, whilst the second being of a (potentially) regional dimension, are that (i) the Hague Conference's project envisages a specific and separate regime for parenthood arising from surrogacy whilst the EU does not introduce such a distinction; (ii) the EU's project also introduces the parenthood certificate, which facilitate the circulation of such a status.

Advantages of common principles and rules in the field of human rights

A *de minimis* common framework of reference in the field of human rights when parenthood is at stake is necessary, in particular when ARTs are concerned.

The most significant efforts, in the present moment, have been made with reference to parenthood following international surrogacy agreements.

But continuous reflection/speculation is needed: further scientific developments are expected and there is a need to think not only in the short-middle term, but also in the long term, by considering future generations, the future society.

The *de minimis* common framework deriving from such a reflection shall be the source of inspiration in shaping the private international law rules (from the key notion of public policy, to the possibility to envisage overriding mandatory provisions, but also to conflict-of-laws rules), which therefore can be instrument of promotion of interests and value.

The European Court of Human Rights' advisory opinion of 10 April 2019 (request n. P16-2018-001) has in fact set a standard of protection of the right to family life in the field of parenthood following an international surrogacy agreement, by giving relevance to the biological link between the intended parent and the child and by envisaging the path that the non-biological intending parent shall follow to become parent.

Advantages of common rules in the field of private international law

There are traditional and inherent advantages in having common rules in the field of private international law, which are certainty, foreseeability and avoiding limping situation.

With specific reference to parenthood, the need to grant continuity of status is particularly urgent, given that children enjoy important rights deriving from it.

On the other hand, the continuity of status for children already born tends to be already granted by virtue of human rights law instruments, such as the ECHR (as mentioned), and with specific reference to the EU context, by virtue of the exercise of the freedom of movement of EU citizens.

In this respect, therefore, private international law rules adopted at EU level would increase certainty and overcome the case-by-case approach.

The most significant advantages for the national legal orders would be:

- To have common rules on jurisdiction and on conflict-of-laws rules which depart from the element of connection of nationality (which is frequently used in national private international law rules), which might not be significant in term of proximity with the situation;
- To reduce the scope of application of the public policy exception;
- To eliminate any exequatur procedure for the recognition of decisions and, therefore, to increase continuity of status across EU borders and, possibly, to increase mutual trust;
- To have a common certificate on parenthood.

However, the proposal as it is now is not likely to be adopted, given the lack of unanimity (Italy and France have already declared that they are not going to vote in favour).

It might be adopted by virtue of enhanced cooperation (if 9 Member States will ask for it and the Council will accept), but this would not increase very much the possibility to reach the goals for which the proposal was adopted and it would also limit the advantages mentioned to the countries adhering to the proposal.

It shall be also considered that, in light of the previous experiences of acts in the field of civil judicial cooperation adopted by virtue of enhanced cooperation, it is not likely that future adhesions by the Member States which do not promote the enhance cooperation will occur.

Further possible advantages in light of the present situation

What common private international law rules could do is to promote further goals, such as the protection of the fundamental rights of the persons involved and, among them, of the children in particular.

This revolution is still ongoing.

Whilst the HCCH's project tries to stay neutral in this respect, the EU's proposal clearly declares that its main goal is the protection of fundamental rights.

The focus of the ongoing proposal seems to be on the principle of non-discrimination, which shall apply in respect of the adults involved as well as of the children.

Whilst the need to avoid any discrimination was a goal at the time the proposal was made, perhaps the situation now is different.

Significant changes in the geopolitical situation have occurred and further information on parenthood and in particular in parenthood following ISAs (which, traditionally, is a topic where official information and data are lacking) have been collected.

The 2025 UN report reports an alarming situation of exploita-

tion of surrogacy and also of risks for the children born following the surrogacy agreement.

Meanwhile the EU has adopted the directive 2024/1712/EU amending the directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims. Exploitation of surrogacy is now included among the offences provided by Article 2, para. 3 of the directive 2011/36/EU. According to recital 6 of the directive 2024/1712/EU, "*[...] in view of the gravity of those practices, and in order to tackle the steady increase in the number and relevance of offences concerning trafficking in human beings committed for purposes other than sexual or labour exploitation, the exploitation of surrogacy, of forced marriage or of illegal adoption should be included as forms of exploitation in that Directive, in so far as they fulfil the constitutive elements of trafficking in human beings, including the means criterion. More specifically, as regards trafficking for the exploitation of surrogacy, this Directive targets those who coerce or deceive women into acting as surrogate mothers*".

Such recent developments and concerns need to be addressed. A possible new scenario might be considered, where:

1. The notion "exploitation of surrogacy" under Directive 2024/1712 is further clarified, with a view to make it possible to distinguish it from acceptable forms of surrogacy;
2. The 2022 Commission's proposal is re-considered and *ad hoc* private international law rules are envisaged for parenthood arising from international surrogacy agreements;
3. An "*a priori*" identification of *de minimis* safeguards is provided with a view to develop an acceptable surrogacy agreement capable of producing effects across the EU Member States;

4. The *de minimis* safeguards are characterized as overriding mandatory provisions or, as an alternative, the national rules implementing the *de minimis* safeguards are characterized as such in the case where some margin of appreciation on them is left to the Member States (following the solution envisaged under art. 29 of the Directive 2024/1760 on corporate social responsibility).