BRIEFING

EU Legislation in Progress

European Parliament

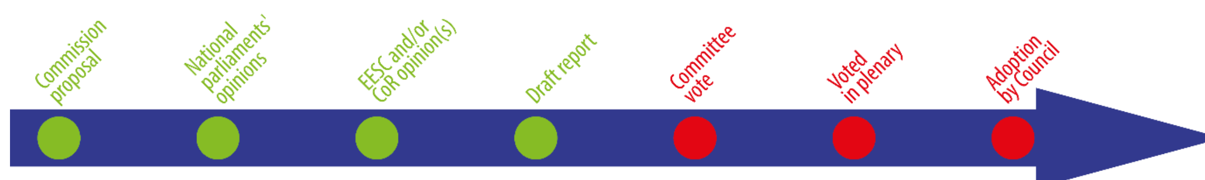
Proposal on the jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood

OVERVIEW

The European Parliament is being consulted on a Commission proposal for a regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood. The regulation would harmonise the rules of jurisdiction and applicable law on parenthood adopted by the individual Member States and facilitate the recognition of parenthood.

Within Parliament, the lead committee for the file is Committee on Legal Affairs (JURI). The Committees on Civil Liberties, Justice and Home Affairs (LIBE) and on Women's Rights and Gender Equality (FEMM) issued their opinions on 9 October and 19 September 2023 respectively. In the Council, the file is being handled by the Working Party on Civil Law Matters (JUSTCIV).

Proposal for a 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		
Committees responsible:	Legal Affairs (JURI), Civil Liberties, Justice and Home Affairs (LIBE), Women's Rights and Gender Equality (FEMM)	COM/2022/695 7.12.2022 2022/0402(CNS)
Rapporteur:	Maria-Manuel Leitão-Marques (S&D, Portugal)	Consultation procedure (CNS) (Unanimity in Council and Parliament's opinion non-binding)
Shadow rapporteurs:	Antonius Manders (EPP, Netherlands), Pierre Karleskind (Renew, France), Sergey Lagodinsky (Greens, Germany), Jorge Buxadé Villalba (ECR, Spain), Alessandra Basso (ID, Italy), Manon Aubry (GUE/NGL, France)	
Next steps expected:	Committee vote	



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Introduction

Families in the European Union (EU) are increasingly likely to move and travel between the EU Member States. Yet, given the differences in Member States' laws, parents can face difficulties in having their parenthood recognised when crossing borders within the EU. Non-recognition in one Member State of parenthood established in another Member State can have significant adverse consequences for children and their parents who are moving to another Member State or returning to their Member State of origin. This situation occurs because:

i) Member States have divergent laws – in the areas of substantive law and private international law (PIL) – on the establishment of parenthood in cross-border situations;

ii) Member States have divergent rules on the recognition of parenthood established in another Member State;

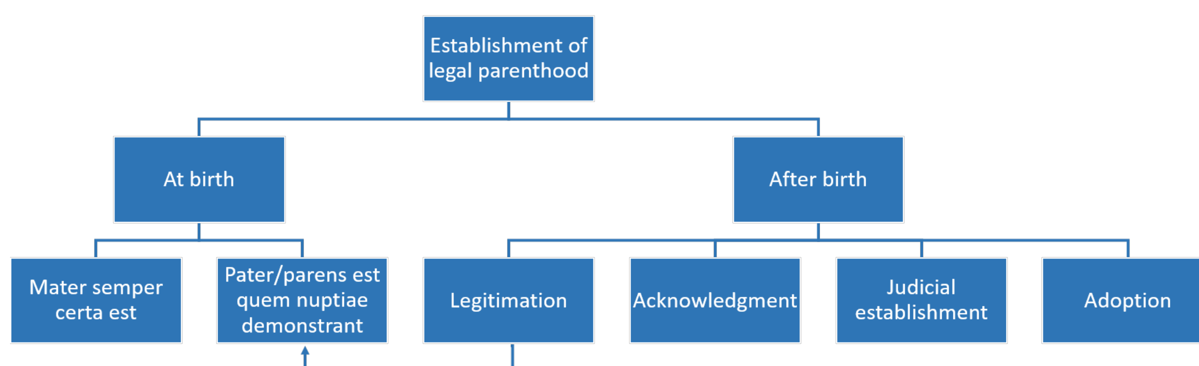
iii) there are no legal instruments at EU or international level guaranteeing the recognition of parenthood.

While these issues are particularly common among rainbow families, they are equally troublesome for different-sex couples, where the recognition of parenthood is not always certain, especially because of differences regarding i) legal presumptions of parenthood in the Member States' substantive laws; or ii) the assessment of any possible incidental questions such as the validity of the parents' marriage or registered partnership.

Consequently, while the proposed regulation does not affect substantive family law, this briefing presents an overview of the different methods by which parenthood is established across the EU, because one Member State may refuse to recognise the parenthood established in another Member State on the grounds of differences in terms of the rules and criteria they apply (such as the use of *pater est* instead of acknowledgment, as explained below).

In essence, there are two sets of circumstances relating to the establishment of parenthood: 1) those established **at birth**; and 2) those established **after birth**. For the latter set, this does not preclude the possibility that, for example, in the case of acknowledgment, the actual establishment of parenthood could also happen before the birth of the child.

Figure 1 – Pathways in the establishment of legal parenthood



Source: Author.

The *ex lege* (that is, by operation of the law) establishment of parenthood at birth can be done by applying the principle of *mater semper certa est* or the principle of *pater est quem nuptiae demonstrant*. The *ex lege* establishment of parenthood means that parenthood exists automatically without the need for any legal action.

The *mater semper certa est* principle means that the person who gave birth to the child is automatically considered the mother of the child. The *pater est* principle means that the spouse of the woman who gives birth to the child is automatically considered the father of the child. In some Member States, this principle has been extended to also apply to registered partnerships and to a same-sex spouse.

Regarding the legal establishment of parenthood after birth, there are in essence four different possibilities, as outlined below.

Legitimation triggers the *pater est* principle retroactively, where the marriage between the parents of the child is concluded after its birth (*legitimatio per subsequens matrimonium*). Following the *Marckx* judgment of the European Court of Human Rights (ECtHR), this approach to the establishment of parenthood started being regarded as discriminatory, as it draws a distinction between children born in and out of wedlock. It however still exists in the legislation of a few Member States (e.g. in Greece).

Voluntary acknowledgment of parenthood is a legal act requiring an expression of intention to establish legal parenthood and – depending on the legal system – the consent of the mother, meaning the person who gave birth to the child. Depending on the legal system, it is possible to acknowledge a child also before they are born. In certain Member States, in the case of the use of assisted reproduction technology (ART), such an acknowledgment by the spouse or partner might also be required. An acknowledgment of motherhood (by the person giving birth) may exceptionally be possible if a foreign state's law is applicable to the establishment of the parenthood link between the woman who gave birth to the child and the child itself, and that state's law does not provide for the *ex lege* establishment of parenthood.

In most cases, the judicial establishment of parenthood is focused on the establishment of fatherhood. There are essentially three different reasons for the legal establishment of parenthood: 1) the parenthood link of another person to the child has to be replaced; 2) the person refuses to acknowledge fatherhood or consent for the acknowledgment is refused; or 3) the person is incapable of making an acknowledgment. In some legal systems, the motherhood of the child can also be established through judicial establishment. Adoptions can be full or simple. In a full adoption (*adoptio plena*), the parenthood ties to the original parents are cut, while in a simple adoption (*adoptio minus plena*), the legal family ties to the original family remain and the child has two families. Some legal systems, such as the Polish one, also provide for *adoptio plenissima*, whereby any traces of the original parenthood are removed entirely and the new parents are placed within the act of birth without any mention of the fact of adoption.

In her 2020 State of the Union speech, European Commission President Ursula von der Leyen announced that she would 'also push for mutual recognition of family relations in the EU. If you are parent in one country, you are parent in every country'.

Accordingly, on 7 December 2022 the Commission published a proposal for a 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, accompanied by an impact assessment.

The proposal sets rules in **private international law (including rules on cases where there are conflicts of laws and conflicts of jurisdictions**), creating common rules on jurisdiction, applicable law and recognition. As it does **not affect substantive family law**, it does not introduce any modes of establishment of parenthood.

Existing situation

Jurisdiction and the rules on parenthood are governed by the Member States' private international law. These rules, just like the substantive family law rules that would remain unaffected by the proposed regulation, can differ greatly. Furthermore, public policy is often invoked in cases where

parenthood was established by means of another procedure or a procedure unknown in the Member State of recognition. There has been an increase in the use of public policy due to the emergence of novel assisted reproduction technology (ART) methods. Public policy is also regularly invoked as grounds where the (civil status) bond between the parents (marriage, registered partnership, etc.) that formed the grounds for the establishment of parenthood (usually *ex lege*) in the context of an incidental question as to the recognition of parenthood, is unknown to the recognising state.

Back in 2016, Regulation 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union provided for the exemption from legalisation or similar formality of public documents, including birth certificates, and the simplification of other formalities, such as translation, by introducing a multilingual standard form that could be used as a translational aid. The regulation however governs only the document itself and does not affect its contents.

The **Court of Justice of the European Union** (CJEU) held in case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, and again in case C-2/21 *Rzecznik Praw Obywatelskich v K.S.*, that the authorities of one Member State are obliged to recognise the parenthood established in another Member State for the purpose of free movement (Directive 2004/38 and Article 21 TFEU). However, this recognition is limited to rights derived from free movement and is, according to the Commission, not applicable to other rights.

The **European Court of Human Rights** (ECtHR) has repeatedly ruled on parenthood established abroad. Most of the ECtHR case law concerning parenthood established abroad is about surrogacy arrangements. However, in *Wagner and J.M.W.L. v Luxembourg* (2007), concerning the Luxembourgish authorities' refusal to recognise an adoption, the focus was on the basic principle for recognition of parenthood established abroad. The adoption had been pronounced in Peru, and the Luxembourgish authorities subsequently refused to recognise the adoption because the adoptive mother was unmarried. The Luxembourgish authorities furthermore refused to grant Luxembourgish nationality (and therefore EU citizenship) to the child, while allowing it to stay with its Luxembourgish adoptive mother, thereby leaving the family in a legal vacuum. The ECtHR considered that 'not having acquired Luxembourg nationality, the second applicant [i.e. the child] does not have the advantage of, for example, Community preference; if she wished to serve an occupational apprenticeship she would not obtain a work permit unless it were shown that an equivalent candidate could not be found on the European employment market. Next, and above all, for more than ten years the minor child has had to be regularly given leave to remain in Luxembourg and has had to obtain a visa in order to visit certain countries, in particular Switzerland. As for the first applicant [i.e. the mother], she indirectly suffers, on a daily basis, the obstacles experienced by her child, since she must, inter alia, carry out all the administrative procedures resulting from the fact that the former has not obtained Luxembourg nationality' (para. 110). The ECtHR found this to be unjustifiable discrimination and a violation of the right to private and family life (Article 8 ECHR).

The *Mennesson v France* judgment (2014) was about surrogacy and the refusal to either recognise or provide a domestic possibility to recognise the parenthood established abroad of a genetically related 'intended parent'.[1] The ECtHR considered that, while it accepts that France wants to prevent its nationals travelling overseas to obtain surrogacy services, a refusal to recognise parenthood established abroad not only affects the intended parents but also 'affect[s] the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected' (para. 99). The ECtHR considered that it 'cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof' (para. 100). This duty to recognise the parenthood of a genetically related 'intended parent' established abroad has since been consistently upheld in surrogacy case law on grounds of the right to private life (Article 8 ECHR).

In nearly all cases concerning genetically related intended parents, the subjects were males who had access to parental acknowledgement procedures. In the only case concerning a female genetically related intended parent (*D. v France* (2020)), the fact of the genetic relation had not been previously disclosed in the national proceedings, rendering it inadmissible (and therefore irrelevant) to the proceedings at the ECtHR. As to a non-genetic parent who is the spouse or partner of a genetically related intended parent, in its very first reference to Protocol 16 (Protocol 16 allows the highest national court to make a preliminary reference to the ECtHR), which concerned the intended mother in *Mennesson*, the ECtHR considered that the parenthood attributed to the non-genetically related intended parent must also be recognised or regularised through other means, such as stepchild adoption (no other form of adoption would be suitable, since it would also cut the legal ties to the genetically related intended parent). This has subsequently also been upheld, and the ECtHR ruled, in *D.B. v Switzerland* (2022) concerning the same-sex partner of the genetically related intended parent, that there had been a violation of Article 8 ECHR since there had been no possibility to regularise the situation, as registered partnerships did not have access to stepchild adoption.

It should be noted, however, that the obligations stemming from ECtHR case law, especially concerning the second non-genetically related parent, apply after the authorities of a Member State have refused to recognise the parenthood established in accordance with private international law. Then national law should provide for some form of **regularisation**, through adoption or another procedure. This regularisation may not, however, be hindered by certain conditions that are usually applied to intercountry adoptions (for example, that consent has not been induced by payment or compensation of any kind, as in the case of *K.K. v Denmark* in 2022).

Comparative elements

In 2010, the Hague Conference of Private International law (HCCH), an intergovernmental organisation that sets itself the goal of achieving 'the progressive unification of the rules of private international law', started considering the possibility of a PIL instrument in the area of surrogacy. Over time, the HCCH widened its focus to activities considering the feasibility of an instrument on parenthood as a whole with a separate protocol on surrogacy. The Council on General Affairs and Policy (CGAP) of the HCCH convened an experts' group to explore the feasibility of advancing work in this area. The experts' group met 11 times and issued a final report in November 2022. In 2023, the CGAP mandated the establishment of a working group on private international law (PIL) matters related to legal parenthood in general, including legal parenthood resulting from an international surrogacy arrangement.

The expert group considered that it is **generally feasible** to develop a binding multilateral instrument dealing with the recognition, by operation of law, of **foreign judicial decisions** on the establishment and contestation of legal parenthood on the basis of uniform indirect grounds of jurisdiction, traditional PIL conditions for the recognition of foreign decisions and optional grounds for refusal of recognition. Since legal parenthood is most often established by **operation of law or following an act** (and not by a judicial decision), the attractiveness of a convention may depend on whether it is possible to develop rules allowing for the continuity of such legal parenthood in those cases. To achieve this, rules on uniform applicable law or the recognition of legal parenthood as a status would be needed. As to the **effects given to foreign documents**, it was considered that these could either constitute a presumption of evidentiary effects, or have the same effects as in the issuing state. Additionally, the expert group considered the possibility of developing an **international certificate** that would function as a translation aid or specify the effects of the document in the issuing state. The first option was considered particularly feasible.

The International Commission on Civil Status (CIEC) has developed a number of conventions in the area of civil status, which however do not directly concern the recognition of parenthood. CIEC conventions that are particularly relevant to the proposed regulation are No 16 (on multilingual extracts), No 33 (on the use of the CIEC platform to communicate civil status data; not yet in force),

and No 34 (update on multilingual extracts and multilingual certificates, for the time being applicable only between Belgium, Germany and Switzerland).

Parliament's starting position

In its resolution of 14 September 2021 on LGBTIQ rights in the EU, the European Parliament called on the Commission 'to propose legislation requiring all Member States to recognise, for the purposes of national law, the adults mentioned on a birth certificate issued in another Member State as the legal parents of the child, regardless of the legal sex or the marital status of the adults, and requiring all Member States to recognise, for the purposes of national law, the marriages or registered partnerships formed in another Member State, in all situations in which the spouses or the registered partners would have a right to equal treatment under the case law of the ECtHR' and emphasised 'the importance of the recognition of birth certificates in all Member States regardless of the sex of the parents, as this would ensure that children do not become stateless when moving to another Member State'.

In its resolution of 5 April 2022, Parliament insisted on the protection of the rights of the child in civil, administrative and family law proceedings, commended the Commission for having put forward a legislative proposal to facilitate mutual recognition of parenthood between Member States, and called on it, 'to take due consideration of Parliament's resolution of 2 February 2017 on cross-border aspects of adoptions, including the annex thereto providing for a regulation on the cross-border recognition of adoption orders, in order to create a clear legal framework and provide families with the necessary legal certainty for adoption orders that are legally issued in one Member State to be recognised in another'. In its resolution of 20 October 2022 on growing hate crimes against LGBTIQ+ people across Europe in light of the recent homophobic murder in Slovakia, the Parliament expressed 'its deepest concerns regarding the discrimination suffered by rainbow families and especially their children in Slovakia, deprived of fundamental human rights on the grounds of sexual orientation, gender identity or expression, or the sex characteristics of parents or partners'.

When on 11 March 2021 it declared the European Union an LGBTIQ freedom zone, the Parliament also stated that 'being a parent in one Member State means that you are a parent in all Member States'.

Preparation of the proposal

While preparing the proposal, the Commission conducted extensive consultations in 2021 and 2022 covering all of the Member States (with the exception of Denmark). The consultations targeted a wide range of stakeholders representing citizens, public authorities, academics, legal professionals, NGOs and other relevant interest groups. The consultations consisted of: i) a survey to obtain public feedback on the inception impact assessment; ii) an open public consultation; iii) a meeting with stakeholders and civil society representatives; and iv) a meeting with experts of the Member States' authorities.

Another set of consultations were conducted by an external contractor. These consisted of: i) online surveys addressed to Member States' civil registrars; ii) written questionnaires to Member States' ministries and the judiciary; and iii) interviews with the Member States' judiciaries and NGOs.

Overall, stakeholders representing children's rights, rainbow families, legal practitioners and civil registrars favoured the plan for the EU to address the current problems related to the recognition of parenthood by adopting binding legislation. In contrast, organisations representing traditional families and those advocating against surrogacy were generally critical of a legislative proposal. The views of the public varied. The feedback received informed the preparation of the proposal and the accompanying impact assessment.

During the preparation of the proposal, the Commission sought the expert advice of the Expert Group on the recognition of parenthood between Member States, which it set up in 2021. The

Commission also participated in experts' meetings on the Parenthood / Surrogacy Project of the Hague Conference on Private International Law and consulted academic literature, reports and studies.

For the preparation of the impact assessment, the Commission relied on a study carried out by an external contractor, who also produced country reports on, among others, the Member States' substantive law and private international law on parenthood. The contractor's study used different tools to analyse the existing problems involved in the recognition of parenthood, the impacts of the present proposal and the policy options considered. These tools included the use of empirical data gathered in different ways (interviews, questionnaires, national reports), as well as statistics and desk research. Where quantitative data were not available, the study used qualitative estimates. The study concluded that the most suitable option for the EU to achieve its policy objectives would be the adoption of a legislative instrument on the recognition of parenthood between Member States, including the creation of a European certificate of parenthood.

The changes the proposal would bring

The proposal has nine chapters. Below is a brief description of each one of them.

Chapter I: Subject matter, scope and definitions

Chapter 1 outline the contents and scope, and provides the definitions. The proposal uses the word 'child' consistently, including where the parenthood or birth certificate of an adult needs to be recognised. Parenthood established by the authorities of third countries is excluded from the scope, as are intercountry adoptions in the sense of the Hague Convention. Domestic adoptions are, in principle, included.

Chapter II: Jurisdiction

The proposal lays down uniform jurisdiction rules on the establishment of parenthood with a cross-border element (within the EU). The rules on jurisdiction avoid parallel proceedings in different Member States with possible conflicting decisions. Alternative grounds of jurisdiction are provided to facilitate access to justice in a Member State.

Chapter III: Applicable law

As a rule, the law applicable to the establishment of parenthood should be the law of the Member State where the person giving birth has their habitual residence (or otherwise the country of birth of the child). Where that rule results in the establishment of parenthood for only one parent, alternative options ensure that parenthood can be established for both parents. The rules have universal application, thus allowing the competent authorities to apply the law of a third country.

Chapter IV: Recognition

Court decisions and **authentic instruments establishing parenthood with binding legal effect** issued in a Member State should be recognised in another Member State without the need for any special procedure.

The list of grounds for a refusal of recognition of parenthood is exhaustive, in line with the proposal's overarching aim to facilitate such recognition. When assessing a possible refusal of recognition of parenthood on grounds of public policy, Member States' authorities would have to take into account the child's interests, in particular the protection of its rights, including the preservation of genuine family links between the child and the parents. The ground for refusal of recognition based on public policy (*ordre public,* as phrased in the proposal) is to be used exceptionally and in the light of the circumstances of each particular case. 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 of Fundamental Rights of the EU (CFR) and, in particular, Article 21 (non-discrimination).

Chapter V: Authentic instruments with no binding legal effect

The proposal also provides for the acceptance of authentic instruments (e.g. a birth certificate) that do not establish parenthood with a binding legal effect in the Member State of origin but have evidentiary effects in that Member State. Such authentic instruments should have the same evidentiary effects – or at least the most comparable effects – in another Member State as they have in the Member State of origin.

The acceptance of authentic instruments with no binding legal effect but with evidentiary effects may only be refused on public policy (*ordre public*) grounds with the same limitations applicable to that refusal ground when applied to court decisions and authentic instruments with a binding legal effect, including as regards compliance with the CFR.

Chapter VI: European certificate of parenthood

The proposal provides for the creation of a European certificate of parenthood. It would be optional for families but Member States would be required to issue it and all other Member States to accept it. The certificate could be requested and used by a child (or a legal representative/parent), who, in another Member State, needs to invoke the child's parenthood status. It would not replace equivalent national documents providing evidence of parenthood (such as a birth certificate), which can still be used.

The certificate would always be drawn up through the procedure laid down in the proposal, be in the standard form included in Annex V to the proposal, and have the same content and effects throughout the EU as specified in the proposal. The certificate would be presumed to demonstrate accurately the elements established under the applicable law designated by the proposal and would not need to be transposed into a national document before it can have access to the relevant register in a Member State. As the certificate form would be available in all EU languages, the need for translations would be reduced significantly.

Given the stability of the parenthood status in most cases, the validity of the certificate and its copies would not be limited in time, without prejudice to the possibility to rectify, modify, suspend or withdraw the certificate as necessary.

Chapter VII: Digital communication

This chapter contains provisions on the electronic communication between natural persons (or their legal representatives) and Member State courts or other competent authorities through a decentralised IT system and the European electronic access point established on the European e- Justice Portal. Member States' courts or other competent authorities would be allowed to communicate with a natural person through the European electronic access point if the natural person has given prior express consent to the use of this means of communication.

Chapter VIII: Delegated acts

If there is a need to amend the standard forms of the attestations accompanying a court decision or an authentic instrument or the European certificate of parenthood annexed to this proposal, the Commission would have the power to adopt delegated acts after the mandatory consultations with the Member States' experts have taken place.

Chapter IX: General and final provisions

This chapter contains, in particular, provisions on the relationship of the proposal with existing international conventions, provisions on data protection and transitional provisions on the use of court decisions and authentic instruments issued before the date of application of the regulation.

The regulation would start to apply from the first day of the month, **18 months** after its entry into force. Five years after this date, the Commission would present a report on the application of the regulation, including an evaluation of any practical problems encountered, supported by information supplied by the Member States. The report would be accompanied, where necessary, by a legislative proposal.

Advisory committees

Neither the European Economic and Social Committee (EESC) nor the European Committee of the Regions (CoR) has produced an own initiative opinion on the proposal.

National parliaments

The Czech Senate and Chamber of Deputies, the German Bundesrat (Upper House, Federal Council), the Irish Houses of Oireachtas (bicameral parliament), the Portuguese Assembleia da República (parliament), the Slovenian National Assembly and the Spanish Cortes Generales (the bicameral legislative chambers) considered the proposal to be in conformity with the principle of subsidiarity.

A political dialogue was held with the Lithuanian Seimas and the Dutch Senate, which wanted further information.

The Italian Senate and the French Senate issued reasoned opinions.

Although in principle the **Italian Senate** agrees with the main objective of the proposal (i.e. to protect children's fundamental rights in cross-border situations), it issued a reasoned opinion based on Article 6 of Protocol 2 TFEU, for the following reasons:

- Article 39 allows the Member States to refuse the effects of the certificate only if manifestly contrary to the public policy of the Member States and on a case-by-case approach;
- the proposal does not allow the Member States to ensure the children's rights by alternative instruments (as recognised in Article 44(1)(d) of the Italian Law No 184 of 4 May 1983);
- the proposal does not envisage the possibility to refuse the European certificate of parenthood on the grounds of public policy. Article 53 states that the certificate would 'produce its effects in all Member States without any special procedure being required'.

According to the Italian Senate, the proposal should envisage the possibility to raise the public policy grounds in general (not on a case-by-case basis), provided alternative and equivalent instruments are in place to ensure children' rights, as is the case in Italy.

The **French Senate** issued a reasoned opinion on the following grounds:

- a study providing an overview of all Member States' laws on parenthood should have been provided in order to make the subsidiarity assessment;
- the French text uses the term *filiation* while the English version uses *parenthood*, even though *filiation* is equally used in English;
- the scope of 'cross-border' is not clear enough;
- explanations are needed to specify how the scope of the proposed regulation relates to third countries, considering that the proposal says that it would not apply to

documents issued by third countries, but that the applicable law could be of a third country due to the universal application of the proposed regulation;

- it is not clear whether the proposed regulation would require the recognition of surrogacy contracted in a Member State, more specifically because it requires taking into account the best interest of the child, but it does not take into account considerations related to human dignity, integrity and non-commercialisation of the human body, and the right of a child to know his or her parents;
- there is no consensus on the definition of family and many Member States have shown reservations about the proposal;
- the Commission should have opted for a directive instead of a regulation when drafting the proposal.

Stakeholder views

ILGA-Europe and the Network of European LGBTIQ* Families (NELFA), considered the proposal 'a major step forward for bringing legal security for children in cross-border situations to have their family life protected and having both their parents recognised across the EU'. The Council of the Notariats of the European Union (CNUE) welcomed this initiative, as it would provide more legal certainty for families that have close links with several Member States for family or professional reasons.

Academic views

A group of German private international law scholars (Marburg Group) approved of the overall structure of the parenthood proposal. Nevertheless, in addition to some technical modifications, the group suggested some fundamental changes. For example, the group believes that there is no room and need for a special recognition regime for authentic instruments with binding legal effect. Instead, the provisions on the recognition of court decisions in Article 24 of the proposal and on the acceptance of authentic instruments in Articles 44 and 45 of the proposal suffice and should not be weakened by another regime. The group considered that 'the European legislator should in a Parenthood Regulation not copy the deficiencies of the Succession Regulation where it is ten years after its adoption still unclear whether national certificates of succession, such as the German Erbschein, circulate within the European Union as decisions or authentic instruments. Such deficiencies would be even more problematic in the area of parenthood, because unlike certificates of succession European citizens have to deal with their civil status documents on a daily basis and there is no place for legal uncertainty here'.

In a study commissioned by the European Parliament – Cross-Border Legal Recognition of Parenthood in the EU – Prof. Alina Tryfonidou considered that EU institutions should not amend the instrument in order to exclude surrogate-born children from its scope, because 1) it would be difficult to justify the exclusion from its protection of surrogate-born children, which would amount to discrimination based on birth contrary to Article 21 of the CFR; and 2) as states – signatories to the ECHR, all EU Member States are already required by ECtHR case law to recognise, in certain circumstances, the parenthood of surrogate-born children established in another country. She also recommended adding an article on the right of the child to know its origins. She furthermore wrote that the Commission should consider extending the territorial scope of application of the proposed regulation to situations where parenthood was established in a third state. She considered that the exclusion of children born in a third state where their parenthood was established would be difficult to justify, as such an exclusion amounts to discrimination based on birth contrary to Article 21 of the CFR. Additionally, as states – signatories to the ECHR, all EU Member States are already required by Article 8 ECHR as interpreted by the ECtHR in its case law to recognise the parenthood of (surrogate-born and adopted) children as established in any country (including in a third country).

Legislative process

The legal basis for the proposal is Article 81(3) TFEU, which provides for a special legislative procedure on family law with cross-border implications (i.e. private international law). The Council acts unanimously after consulting the European Parliament. The opinion of the Parliament is not binding on the Council. The rapporteur for the JURI (lead) committee, Maria-Manuel Leitão-Marques (S&D, Portugal), presented her draft report on 15 June 2023, proposing 53 amendments. A further 593 amendments were tabled in committee.

The LIBE committee, which is related to the file on the basis of Rule 56+, adopted its opinion 9 October 2023.

The FEMM committee, which is related to the file on the basis of Rule 56, adopted its opinion on 19 September 2023.

The JURI committee has yet to vote on the draft report.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Tryfonidou A., Cross-Border Legal Recognition of Parenthood in the EU, Directorate General for Internal Policies, 2023.

OTHER SOURCES

Jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and creation of a European Certificate of Parenthood, Legislative Observatory (OEIL), European Parliament.

ENDNOTES

[1] The 'intended' parent being the person/persons who has/have entered into a surrogacy agreement with a third party for the purposes of becoming parent/parents to the resulting child. If their gametes have been used, then there is also a genetic connection to the child.

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