European Group for Private International Law

Observations on the Proposal for a Council Regulation in matters of Parenthood

Meeting of September 2023

(text adopted on 6.12. 2023)

The European Group for Private International Law,
Taking cognizance of the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM/2022/695 final);
Recalling that the *Proposal for a Convention concerning jurisdiction and the enforcement of judgments in family and succession matters* adopted by the Group on occasion of its meeting in 1993 already contained jurisdiction rules as regards the establishment and contestation of parenthood;
Believes that the following considerations should guide the European Union's action in this field-

1. The Group welcomes that the EU intends to legislate, since parenthood is a status from which persons derive numerous rights and obligations. Lack of continuity is a concern in this area as demonstrated by case law of the CJEU and the ECtHR, since it may amount to an obstacle to free movement and infringe the right to family life.

2. However the Group is of the opinion that there are important shortcomings in the Proposal due to the narrow perspective taken and an insufficient consideration of the legal complexities concerning parenthood in cross-border situations. It therefore encourages a reconsideration of the Proposal, in particular in the light of the points set out below.

3 The Group would also like to recall that the topic is on the agenda of the Hague Conference. In line with other recent EU work in the field of private international law, it is important that legislative work of the EU be carefully coordinated with that of the Hague Conference, of which the EU and its Member States are all members.

Scope and Definitions

4. The Group notes that the Proposal has its main focus on the establishment of parenthood. Since it rightly also covers the contestation and termination of parenthood, the adequacy of the proposed rules should be reconsidered. The proposed rules may also not be appropriate for several other questions that arise in relation to the establishment of parenthood such as the voluntary acknowledgment of parenthood and adoption.

5. The Group is of the view that the spatial scope of application of the proposed rules requires further consideration, since birth certificates are also issued in Member States following the recognition of decisions or documents issued in Third States.

6. The restrictive application of the public policy exception in relation to the recognition of parenthood for the purpose of free movement guaranteed by Union law goes back to the case law of the ECJ in the area of free movement. It is not necessary to confirm, in Article 2, that primary law has priority over secondary law. If at all considered useful, this could be included in the final provisions of the Regulation.

7. The Group thinks that the definitions would need to be reworked. There is a need of clarification in respect of the term “court” and of the term “authentic instruments with binding legal effect”, which are ambiguous and lead to confusion as regards the recognition regime. The definition of a cross-border adoption, which is misleadingly equated to an “*adoption internationale*” in the French text of the Proposal, should be included in the text of the Proposal.

Jurisdiction

8. The general rule on jurisdiction of Article 6 provides for several alternative criteria, which reflects the principle of *favor filiationis*. However, the pertinence of some of these criteria seems doubtful (place of birth of the child, nationality or habitual residence of *either* parent). Even more so if one considers that, by virtue of Art. 3(c) of the Maintenance Regulation and of Art. 4 of the Hague Protocol, these criteria will also determine the jurisdiction (and sometimes the applicable law) to ancillary maintenance claims.

9. This very broad range of options is completed by some uniform rules of subsidiary jurisdiction based on the presence of the child (Art. 7) and on *forum necessitatis* (Art. 9). In this context, the residual application of the national rules of jurisdiction under the law of the Member State, as provided for in Article 8, seems to go too far, and does not reflect the exhaustivity of jurisdictional rules in most recent regulations.

10. The rule of Article 15 concerning the right of children to express their view does not seem to be well-suited to all proceedings for the establishment of parenthood. The optional ground for refusal in case the foreign decision was given “without children having been given an opportunity to express their views” (Art. 31(3), which corresponds to Art. 39(2) Brussels IIter is not appropriate in the present context either, as the hearing of the child is not necessarily established as a fundamental principle in parenthood proceedings in all situation under all applicable laws.

Applicable law

11. The general rule on applicable law in Article 17 points to the law of the State of the habitual residence of the person giving birth, at the time of birth, with a fall-back rule for instances in which the application of this law would lead to the child having only one parent. This rule clearly aims at maintaining the validity of an establishment of parenthood in the context of Assisted Reproductive Technology (ART) or an international surrogacy arrangement. It can be questioned if it is also suitable for other situations, for instance, if parentage is contested or to be established later in the life of the child, the child is not born as the result of ART or a surrogacy arrangement or if the child is adopted.

12. Article 18 on the scope of the applicable law is not exhaustive and, as is customary for such rules in other EU instruments, other matters could be included in scope without being explicitly mentioned. The Group would support this approach. However, an explicit rule concerning the effects of adoption (does it completely sever the ties with the biological parents, can it be repealed?) would be useful as would be a clarification as concerns the methods of proving parenthood. The use of the term "procedure" under (a)

is unfortunate since procedural matters usually follow the *lex fori*: it should read "the conditions".

13. Article 20 governs the formal validity of unilateral acts intended to have legal effect on the establishment of parenthood. In practice, the most common such act is the acknowledgment of paternity. However, false acknowledgments are not uncommon – *inter alia* for migration purposes – and the proposal is unclear on whether the generally applicable law under Article 18 should apply also to the substantive validity of such unilateral acts.

14. Article 23 contains a rule on the law applicable where the law specified by the Regulation is the law of a State which comprises several territorial units, each of which has its own rules in respect of parenthood. However, there are also many States that have systems of personal laws for matters concerning personal status, applying different rules for different ethnic or religious groups. It would be useful if a rule for such situations, e.g. modelled on Article 37 of the Succession Regulation, were included.

15. Article 22(2) emphasises that the use of the public policy exception in order to refuse the application of the law of a foreign country must comply with the Charter's prohibition of discrimination. However, assuming that such reference is considered necessary, the Group is of the view that it is too narrow, since fundamental rights must be considered as a whole and the various rights guaranteed in the Charter must be balanced. Therefore, reference should also be made to other provisions of the Charter [e.g. in particular article 24 (Rights of the Child)].

16. The Group considers that the introduction of an exception clause would be helpful as it would be relevant where the situation is essentially located in a single jurisdiction which is not the habitual residence of the person giving birth at the time of birth. Further clarification in the form of a specific provision dealing with simulation of parenthood or parentage of convenience should also be considered, as there is a lot of litigation about fraud in relation to residence permits.

Recognition

17. The Group notes that the provisions on recognition of court decisions essentially replicate the corresponding provisions of Regulation (EU) 2019/1111 ("Brussels IIter"). Although this technique has its merits, several provisions included are not suitable for the recognition of decisions on parenthood. This applies in particular to Art. 31(1)(d) and (e) which provide that recognition of a decision shall be refused if it is irreconcilable with a later court decision given in the Member State addressed or in another Member State. These rules correspond to the provisions of Regulation Brussels IIter for decisions on parental responsibility. However, in the different context of decisions on parenthood the coherence of the legal order of the Member State addressed calls for the priority of any irreconcilable decision given in that State, and the principle of *res iudicata* requires to give priority only to an earlier decision of another Member State.

European Certificate of Parenthood

18. The main question that arises regarding the European Certificate of Parenthood (ECP) concerns the nature and function of the certificate. According to the proposal, the ECP serves as proof of the status of parenthood; it is established on the basis of a court decision, an authentic instrument with binding legal effect or an authentic instrument with no binding legal effect. The ECP thus confirms an existing status, already established and registered in a national document issued by an authority of a Member State. As such, the ECP seems different from the European Certificate of Succession, where the authority, possibly independently from any national document, establishes the status or rights of the heirs to the estate.

19. The question arises whether, if the ECP brings proof of a status already established and recorded in a national document, it adds value to the existing recognition or acceptance of national documents. The proposal foresees attestations that can accompany a national court decision or an authentic instrument (with or without binding legal effect). As the ECP does not seem to provide an independent proof, it is unclear what the ECP adds to these attestations. In particular, it is unclear what added value the ECP brings as 'proof' when it is based on a court decision or authentic instrument with binding legal effect which must already be recognised.

20. The ECP seems furthermore questionable when it brings proof, with uniform effects, of a status of parenthood recorded in an authentic instrument with no binding legal effect (typically birth certificates). As the proposal recognises, authentic instruments with no binding legal effect have varying effects in the Member States; Art. 45(1) requires Member States to grant an authentic instrument which has no binding legal effect the same evidentiary effects as it has in the Member State of origin or the most comparable effects. It would seem that the ECP would 'overrule' the diverging evidentiary effects by granting the same effect to birth certificates across Member States. This might be justified if the authority issuing the ECP would confirm, on the basis of the applicable law, the status of parenthood, independently from what is recorded in a national birth certificate. However, not all civil status registrars in the Member States, which will be issuing ECPs, are used to applying foreign law. In addition, it is not clear what would happen, if the authority concludes that, in accordance with the applicable law, the status of parenthood differs from that recorded in the birth certificate produced by the applicant.

21. A further question that arises, in the context of the issuance of an ECP, concerns the designation of the competent authority. Presumably, the authority 'of the Member State in which parenthood is established' refers to the authority of the Member State of origin of the underlying court decision or authentic instrument with or without binding legal effect. However, this terminology would not seem to fit situations where parenthood is established by operation of law because in such cases parenthood is not established in any particular place.

Conclusion

22. The Group concludes that the Proposal provides a useful starting point for discussion but is of the view that several of the proposed rules would need to be refined.