

# CCBE preliminary observations on the creation of a European instrument on parenthood

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## EXECUTIVE SUMMARY AND INTRODUCTION

*The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers.*

*This document contains some preliminary observations which the CCBE deems important for the European Commission to consider when drafting the proposal on this matter. Once the proposal has been published, the CCBE will further consider the matter and prepare a position paper on the substance of the proposal.*

At present, parenthood established in one EU Member State is not always recognised in another Member State.

Given the differences in Member States' substantive and conflict of law rules on parenthood established through filiation, and the fact that there are no harmonised conflict rules on parenthood nor rules on the recognition of judgments on parenthood between Member States, families face difficulties in having the parenthood of their children recognised when crossing borders within the EU.

This leads to major problems when travelling or moving to another EU country and can endanger the child's rights derived from parenthood (e.g., parental authority, maintenance, succession).

The European Commission has recently launched an initiative regarding a proposal for a Regulation, which aims to ensure that parenthood, as established in one EU country, is recognised across the EU, so that children maintain their rights in cross-border situations, in particular when their families travel or move within the EU.

None of the other instruments (Brussels IIa/b Regulation<sup>1</sup>, Maintenance Regulation<sup>2</sup>, or even the Succession Regulation<sup>3</sup>) include parenthood in their scope, even though it could be considered as a preliminary issue for the recognition of judgments given in another Member State on children's custody and visiting rights, maintenance obligations in favour of children, as well as children's inheritance rights.

The Public Documents Regulation<sup>4</sup> provides for the exemption of documents on parenthood (among others) from all forms of legalisation and similar formalities (Recital Nr 19). However, the Regulation does not apply to the recognition in one Member State of legal effects relating to the content of a public document issued in another Member State (Art. 2 Nr 4, Recital Nr 18).

The International Commission on Civil Status ('ICCS') has prepared several Conventions<sup>5</sup> in the past 50 years that provide for the facilitation and harmonisation of rules in the area of civil status. However, not all of these conventions were successful, and since the EU became active in the area of family law, Member States refrained from signing new conventions, and many even withdrew from the ICCS. Nevertheless, the ICCS has provided a valuable basis on which the Filiation Regulation can build on.

That being said, the future instrument's purpose should be to ensure legal certainty of filiation within the EU, to any child born in the EU or who has one or more parents who are EU citizens.

This legal certainty can be reached by the recognition of court decisions (and public documents, such as the civil status records).

Such recognition will be possible if common conflict rules and common procedures of recognition of judgments are adopted.

These should be driven by the best interest of the child and children's rights.

Different consultations and stakeholder discussions led to the conclusion that a legislative instrument could indicate: (i) the criteria that should determine which Member State's courts are competent to resolve a cross-border dispute on parenthood, (ii) the criteria that should determine

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<sup>1</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L338/1; Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L178/1.

<sup>2</sup> Art. 3 lit c of the EU Maintenance Regulation No 4/2009 of 18 December 2008, provides jurisdiction of "the court which, according to its own law, has jurisdiction to entertain proceedings concerning **the status of a person...**" There is also a long history of discussion under the Hague Maintenance Protocol of 2007 and its predecessor (1956) whether the applicable maintenance law shall also be applicable for the establishment of fatherhood.

<sup>3</sup> Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107.

<sup>4</sup> Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, OJ L 200/1.

<sup>5</sup> Conventions of interest in this regard: Convention (No. 5) extending the competence of authorities empowered to receive declarations acknowledging natural children; Convention (No. 6) on the establishment of maternal descent of natural children; Convention (No. 18) on the voluntary acknowledgement of children born out of wedlock.

which country's law applies to the establishment of parenthood in cross-border situations, and (iii) the recognition of judgments and official documents on parenthood issued in another Member State. The proposal could also introduce a European Certificate of Parenthood (possibly modelled on the existing European Certificate of Succession or Annex VIII of Brussels IIb (registered divorce out of court) as an optional instrument to facilitate the recognition of parenthood in another Member State.

The CCBE highly welcomes the European Commission initiative and agrees on the necessity of such an instrument. The CCBE's expert practitioners, would like to contribute with the observations below concerning a future EU Regulation on Filiation.

The CCBE also realises that the topic, as all topics in family law, is linked to the culture, history and policies of each European Member State. Nevertheless, the CCBE is also convinced of the importance for each child to have a secure and recognised status within the EU territory.

As it is not clear at this stage what the final orientations of the European Commission are, the following observations will cover a large scope of possible provisions.

## I. General Chapter

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### a) Scope

An initial chapter should clarify the scope and definitions of the intended Regulation. The CCBE suggests that the Regulation should apply to 'filiation'. It is noted that the legal terminology of filiation in other Regulations is not always consistent, for example, Brussels IIb (Art. 1 para 4 lit a) uses the term 'the establishment or the contesting of a parent-child relationship', whereas the Succession Regulation (Art. 1 Nr 2 lit a) refers to 'the status of natural persons'. At least the recitals of the proposed Regulation should clarify that these aspects are covered by the Regulation.

In addition, it should be made clear that the Regulation does not apply to:

- a) the legal capacity of parents and children;
- b) parental authority/responsibility;
- c) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- d) maintenance obligations;
- e) the name and forenames of a child;
- f) emancipation;
- g) trusts or succession.

The CCBE noted that the expert group may think that adoption falls within the scope of the Regulation. However, the recognition of adoption falls within the HCCH 1993 Adoption Convention,<sup>6</sup> and the pros and cons of incorporating adoption in the Filiation Regulation have to be discussed.

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<sup>6</sup> Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption of 29 May 1993, 32 I.L.M. 1134-46.

In addition, the CCBE further notes that the question of names is closely linked to the question of filiation. This should be taken into account to keep a consistent approach between filiation and names.

## b) Definitions

The CCBE suggests an article on the definition of terms, for example, as follows:

1. For the purposes of this Regulation, ‘decision’ should mean a decision of a court of a Member State, including a decree, order or judgment, establishing or setting aside filiation of a child.<sup>7</sup>
2. For the purposes of this Regulation, the following further definitions could apply:
  - a) ‘filiation’ [parenthood]<sup>8</sup> means the legal relationship between parent and child;
  - b) ‘child’ means the natural person, whether born or unborn, whose filiation is to be established or contested;
  - c) ‘parent’ means the person whose filiation to the child is to be established or contested;
  - d) ‘assisted reproductive technology’ (ART) means medical methods to achieve pregnancy by means other than sexual intercourse;
  - e) ‘donor’ means a person providing sperm or eggs with the intention that it be used in ‘assisted reproductive technology’;
  - f) ‘authentic instrument’ means a document which has been formally drawn up or registered as an authentic instrument in any Member State in the matters falling within the scope of this Regulation and the authenticity of which:
    - (i) relates to the signature and the content of the instrument, and
    - (ii) has been established by a public authority or other authority empowered for that purpose;  
The Member States shall communicate those authorities to the European Commission in accordance with Art. ....
  - g) ‘competent authority’ means...;
  - h) ‘court’ means any authority in any Member State with jurisdiction in the matters falling within the scope of this Regulation.

## c) Competence of Member States in matters of filiation

It should be made clear that the Regulation shall not affect the competence of the authorities of the Member States to deal with matters of filiation with respect to their national substantive laws and procedures.

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<sup>7</sup> Therefore, a purely *declarative* decision would not fall within the scope of a decision.

<sup>8</sup> Recital Nr 14 of the Public Documents Regulation states: “The concept of ‘parenthood’ should be interpreted as meaning the legal relationship between a child and the child's parents.”

## II. Chapter on Jurisdiction

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### a) Challenges

The CCBE observes that a major challenge of creating a rule on jurisdiction lies in the fact that proceedings on filiation often involve more than two parties. Furthermore, filiation is often not only fixed by a court, but also through private declaration (most commonly an acknowledgement of paternity), which is registered by a state authority. However, such an acknowledgement should be dealt with in the context of the European Certificate of Filiation, whereas the chapter on jurisdiction should only deal with court-based filiation proceedings.

### b) General and subsidiary rules on jurisdiction

The CCBE observes that it is of interest to avoid any opportunity for forum shopping in the field of parenthood. Given this, a cascade approach could be adopted.

As a general rule, in matters relating to filiation, jurisdiction should lie with the courts of the Member State whose territory the child is habitually resident.

Where there is no habitual residence of the child in a Member State – be it that the child lives outside the European Union, be it that the child is not yet born, or is deceased – there is a need for a subsidiary rule on jurisdiction which takes into account the specific situation of the case. Most likely, the jurisdiction of the Member State whose territory the party seeking to establish parentage ('applicant') or whose territory the respondent is habitually resident will be appropriate. However, the nationality of a party, especially the child, could also be an adequate link for jurisdiction.

It additionally seems logical that the court before which proceedings are pending based on the general rule should also have jurisdiction to examine a counterclaim, insofar as that counterclaim falls within the scope of the Regulation.

Where no court of a Member State has jurisdiction under the general and subsidiary rule, jurisdiction should be determined in each Member State by the law of that State.

The *forum necessitatis* principle should be considered, as well as the national residual jurisdictions. These are often very helpful in order to offer a European forum when cases would otherwise be submitted to third countries' jurisdictions.

### **c) Choice of court**

The CCBE observes that there can be a just cause for a (limited) choice of court agreement, especially if the child has a substantial connection with that Member State and if the parties have agreed freely upon the jurisdiction, at the latest at the time the court is seized, or the jurisdiction has been expressly accepted. The problem regarding who is a 'necessary' party to such proceedings must be dealt with.

### **d) Transfer of jurisdiction to a court of another Member State**

As Art. 15 of the Brussels IIa Regulation (new Art. 12 and 13 of the Brussels IIb Regulation) has proven to be of important value, the CCBE suggests a similar provision for the matter of filiation.

### **e) Incidental questions**

The CCBE is aware that incidental questions in proceedings regarding filiation may play a vital role, most likely, for example, in the validity of a marriage of the parents. It is suggested to deal with such questions by providing rules (such as new Art. 16 of the Brussels IIb Regulation), such as the following:

1. If the outcome of proceedings, in a matter not falling within the scope of this Regulation before a court of a Member State, depends on the determination of an incidental question relating to filiation, a court in that Member State may determine that question for those proceedings, even if that Member State does not have jurisdiction under this Regulation.
2. The determination of an incidental question pursuant to paragraph 1 shall produce effects only in the proceedings for which that determination was made.

## **III. Chapter on the Applicable Law**

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### **a) Universal application**

Modelled according to the Rome III Regulation<sup>9</sup> or the Property Regulations,<sup>10</sup> any law specified by the Filiation Regulation should be applied whether or not it is the law of a Member State.

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<sup>9</sup> Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343/10.

<sup>10</sup> Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183/1, 1-29; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183/30, 30-56.

## **b) General rule**

The applicable law on filiation should be closely linked to the child. The CCBE suggests that this link is the first habitual residence of the child, although the habitual residence of the person giving birth to the child might also come into consideration.

The filiation of an unborn child or of a child whose first habitual residence has not yet been established could be governed by the law of the State of the parent's nationality, in respect of this parent.

Where, by way of exception, it is clear from all the circumstances of the case that, at the time of birth, the child was manifestly more closely connected with a State other than the State whose law would be applicable under the abovementioned rules, the law applicable to filiation should be the law of that other State.

When the applicable law does not provide any filiation to the child, the law of the competent jurisdiction could be applicable in order to facilitate the filiation of the child ('pro filiatione').

## **c) Scope of the applicable law**

An article on the scope of the applicable law should ensure that the law which determines filiation should govern filiation as a whole, in particular: who, by operation of law, is a parent of the child; who is entitled to establish or contest filiation; and the periods of time for establishing or contesting filiation.

## **d) Assisted reproductive technology**

The CCBE observes that filiation of children conceived through assisted reproductive technology demands rules on the substantive and formal validity of dispositions in this regard, protecting all parties (including donors) involved.

## **e) Effects in respect of third parties**

It should be open to discussion to which extent third parties (e.g., grandparents, foster parents) may be involved in filiation cases.

## **f) Overriding mandatory provisions/public policy**

The CCBE suggests an article according to which nothing in the Regulation should restrict the application of overriding mandatory provisions of the law of the forum.

## **IV. Chapter on the Recognition of Decisions**

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To facilitate the objectives of the Regulation, a decision given in a Member State should be recognised in the other Member States without any special procedure being required. Any interested party who raises the question of recognition should have the possibility of initiating formal proceedings on recognition. Grounds for refusal of recognition should be worked out according to familiar rules.

The CCBE would like to additionally point out the problem of decisions from third countries, which are being recognised in a Member State by its internal procedural law. It needs to be discussed whether such decisions can circulate within the EU and if a Certificate of Filiation can be issued based on such a decision.

## **V. Chapter on the Creation of a European Certificate of Filiation**

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The Regulation should create a European Certificate of Filiation ('the Certificate') which should be issued for use in another Member State and should produce effects listed in a separate article. The use of the Certificate should not be mandatory. The Certificate should also not take the place of internal documents used for similar purposes in the Member States.

The Regulation should provide rules on the competence to issue the Certificate; conditions that have to be met to issue the Certificate; contents of the Certificate; effects of the Certificate; and the rectification, modification or withdrawal of the Certificate. In this regard, it is important to bear in mind the General Data Protection Regulation.<sup>11</sup>

As the Certificate should not be easily challenged, the competent authority to issue the Certificate should have international jurisdiction, and central authorities should inform the European Commission of the designated authority.

The Regulation should also clarify the correlation between the Certificate and the birth certificates issued under the national law of the Member States.

Nevertheless, it is important not to make the issuing of the Certificate too complicated as to limit the costs and inconveniences caused to European citizens.

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<sup>11</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1, 1-88.



## **VI. Final Provisions**

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A transitional provision should make sure that the Regulation shall apply to the filiation of children who are born on or after a specific date, whereas the chapters on jurisdiction, recognition and the Certificate may enter into force irrespective of the child's birthdate.

## **VII. Final Remarks**

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The CCBE is keenly following the agenda of the expert group and is very much looking forward to a proposal from the European Commission in order to work further on this very important topic for all citizens in the EU.