

CCBE position paper on the proposed Council Regulation regarding the recognition of parenthood between Member States

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EXECUTIVE SUMMARY

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.

The purpose of this paper is to set out the position of the CCBE in regard to the European Commission proposal for a Council Regulation on the recognition of parenthood between Member States. This position paper follows some preliminary observations prepared by the CCBE in advance of the publication of the proposal. The CCBE welcomes the aims and reasons for the Regulation, in particular, that it also wishes to harmonise the applicable law on filiation and that the primary consideration should be the best interests of the child. Nevertheless, the CCBE would like to suggest some amendments to the proposal, especially in regard to the chapter on jurisdiction, such as the necessity for a cascade approach under Article 6 of the proposal, as was strongly urged in the preliminary observations, as well as the amendment of the subsidiary criterion proposed under Article 17 of the proposal.

1. General observations

Following the publication of the CCBE [preliminary observations](#) on the creation of a European instrument on parenthood on 29 July 2022, the European Commission subsequently finalised and adopted its [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 (hereinafter referred to as 'Parenthood Proposal' or 'proposed Regulation') on 7 December 2022.

The CCBE would like to firstly congratulate the European Commission for the thorough work behind its recently adopted Parenthood Proposal, as well as the impressive speed of drawing up a proposal in only two years on such a highly sensitive and complex topic.

The CCBE also welcomes that the Parenthood Proposal not only deals with mutual recognition of decisions on parenthood and the creation of a Certificate on parenthood, but also harmonises the applicable law on filiation. This will provide for much stability and legal certainty in the time to come.

The Council Regulation on parenthood has the potential to become a cornerstone of European Family Law.

Additionally, the CCBE fully supports the reasons for and objectives of the proposed Regulation as laid out in the explanatory memorandum, namely that all children should have the same rights without discrimination, irrespectively of how the child was conceived or born, the type of family of the child and their nationality.

The CCBE would like to also note that the diverging approaches of countries towards surrogacy should be respected; however, from a pragmatcal view, it is an existing reality that there are children born through surrogacy and it has been observed that there is currently a real difficulty in solving these cases as they are only done by the respective national legal systems in relation to international private law or international procedural law. To this end, with the reasons and objectives in mind, the best interests of the child should remain the primary consideration, and they should not be discriminated against due to the circumstances of their conception, as well as the freedom of movement within the EU should not be impacted.

Notwithstanding the above, through this position paper, the CCBE wishes to raise some concerns in regard to the Parenthood Proposal, in particular regarding Article 6, and provide some suggestions where possible, which we hope are useful.

2. Structure of the proposed Regulation

From a practical point of view and for the sake of consistency with other Regulations, it is proposed that the current Articles 1 and 3 as found in the Parenthood Proposal should follow each other in sequence. To this end, the CCBE proposes to change the positioning of the current Article 3 of the proposal to become Article 2, so that Article 1 elaborates on the subject matter and scope of the Regulation, whereas Article 2 should entail the definitions used in the Regulation.

Furthermore, as mentioned below under point 4.1.2. and 4.1.5., Articles 2 and 5 do not seem to be necessary from a judicial standpoint and should be moved to the recitals of the Regulation or to a less prominent position at least.

Moreover, the CCBE notes that the sub-division of the articles should be harmonised. To illustrate, the sub-divisions of Articles 4, 10, 14 or 15 (and most of the others) are divided by numbers, while those of Articles 6, 11, 18, 28, 35 and 52 are divided by letters.

3. Recitals of the proposed Regulation

3.1. Recital (2)

The Regulation is driven by the goal of ensuring that a parent in one Member State is a parent in all Member States. Against this background, the Regulation talks about the “recognition of parenthood” and “parenthood as established in another Member State”. However, one must not forget that proceedings on parenthood are also about contesting and setting aside previously established parenthood. Reference to this is only mentioned in recital (26), as well as (33) where it is stated that the Regulation should also apply to the extinction or termination of parenthood. The CCBE considers that this should be mentioned earlier in the document under recital (2), as well as made clear in the definitions (see point 4.1.4).

3.2. Recital (17)

Recital (17) states that references to the “best interests of the child” apply to “children below the age of 18 years”. The CCBE has concerns in the regard as the Regulation shall also be applied to children not yet born, as recital (24) rightfully states. In addition, it could be questioned what the best interests of the child not born yet is.

3.3. Recital (18)

Recital (18) deals with the European Court of Human Rights (ECHR) case law on surrogacy. Therefore, the CCBE would include a reference also to the ECHR case of [D. v. France](#).

3.4. Recital (21)

Recital (21) explains that the Regulation should also cover the recognition of the “parenthood of a child adopted domestically”. However, the Regulation does not apply to intercountry adoption (see Article 3(2)(e)), and recital (27) excludes intercountry adoption when it is not covered by the [Hague Adoption Convention](#). To this end, the CCBE believes that there should be a clearer definition provided of ‘adoption’, ‘domestic adoption’ and ‘intercountry adoption’, as well as what is included and excluded.

Moreover, it is important that it is also clarified which chapters of the Regulation shall apply to ‘domestically adopted’ children and who determines if it was a ‘domestic adoption’. The CCBE considers that everything but Chapter II on jurisdiction and Chapter III on applicable law should apply to adoption.

3.5. Recital (24)

The CCBE wishes to highlight that recital (24) is crucial and explains what ‘parenthood’ and a ‘parent’ is. As mentioned below under point 4.1.4. on Article 4, the definition of ‘parent’ should be included there as well, in addition to the detailed definition of ‘parenthood’.

3.6. Recital (33)

The CCBE supports the definition of ‘establishment of parenthood’ in recital (33) and that it also correctly incorporates the termination of parenthood. The CCBE considers it vital that this is included in the definition under Article 4(3).

4. Substantive provisions of the proposed Regulation

4.1. Chapter I – Subject matter, scope and definitions

4.1.1. Article 1

It should also be made clear that the Regulation entails the dispute as to parenthood, which in the proposed Regulation is only mentioned in the context of applicable law under Article 18.

4.1.2. Article 2

The CCBE considers that this would be more appropriate in the recitals as it is not necessary from a judicial standpoint and should be mentioned there instead.

4.1.3. Article 3

The CCBE suggests the following rewording of Article 3(2)(i), as substantive law is not in the competence of the EU and is excluded from the regulation (only procedural requirements as established by the applicable law fall within the scope of the Regulation):

Proposed amendment
(i) the procedural legal requirements for the recording of parenthood in a register of a Member State, and the effects of recording or failing to record parenthood in a register of a Member State.

4.1.4. Article 4

The CCBE wishes to point out that a definition of ‘parent’ is missing and should be made consistent with recital (24).

In addition, the CCBE considers that Article 4(2) could be more detailed as well, as in recital (24) (see point 3.5. above), and reiterates that the definition should also include contesting parenthood, as well as in paragraph 3. Furthermore, children not yet born, as in recital (24), should also be included.

Additionally, concerning the proposed definition of a ‘child’ under paragraph 2, the CCBE considers that issues arise from the wording “a person” and “of any age”, as well as generally the definition provided, particularly in relation to the inclusion of unborn children, and should be made consistent with recital (24) (as well as the [United Nations Convention on the Rights of the Child](#)).

Further to the above, it is also suggested to make the following amendment to paragraph 2:

Proposed amendment
2. ‘child’ means a person of any age whose parenthood is to be established or contested , recognised or proved ;

In regard to paragraph 3, similarly to paragraph 2, contesting parenthood should be included. Therefore, the CCBE proposes the following amendment:

Proposed amendment
3. ‘establishment of parenthood’ means the determination in law of the relationship between a child and each parent, including the establishment or dispute as to of parenthood following a claim contesting a parenthood established previously;

With respect to paragraph 4, the CCBE finds that the definition of court should be clearer, namely what is a court and which authorities should be included (based on a recent ECHR decision on the recognition of an Italian divorce issued by a registrar, a registrar could be a court. Is it desired or the intention to include registrars for example?). Additionally, the definition should be redrafted in order to provide clarity as Article 36 mentions recognition, whereas Article 45 mentions the acceptance of authentic instruments.

Furthermore, in regard to paragraph 6, the CCBE would like to highlight that Article 36 talks about recognition, whereas Article 45 talks about acceptance of authentic instruments (see point 4.5.1.) and this should be addressed in the definitions.

4.1.5. Article 5

As with Article 2 (see point 4.1.2.), this provision would be more appropriate in the recitals of the Regulation.

4.2. Chapter II - Jurisdiction

4.2.1. Article 6

While Article 6 offers a variety of jurisdictions, the CCBE strongly urges that the Regulation adopt the cascade approach as suggested initially in the CCBE [preliminary observations](#) on the creation of a European instrument on parenthood under Chapter II b) on general and subsidiary rules on jurisdiction (page 5 of the paper), which reads as follows:

“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.”

As mentioned in the past CCBE paper, the suggested cascade approach suggested prevents forum shopping, provides legal certainty and is clearer for all practitioners. Furthermore, the CCBE wishes to highlight that the approach of the Parenthood Proposal is also not in line with the approach of other Regulations, which adopt a cascade approach in regard to jurisdiction.

It is also vital to note that the cascade approach also protects the weaker party/best interests of the child. The current approach of the Parenthood Proposal does not protect the child from being sued in other places than their habitual residence and it should be stressed that, as stated under Article 18(a) this Regulation applies also to contesting parenthood, which means that the numerous options can be also used against the child to contest parenthood. To illustrate, difficulties may arise without a cascade in cases where, for example, the child/one parent now is in France, the habitual residence is in Sweden and the father contests in Greece.

In case the reasoning of the European Commission to not adopt the cascade approach is to facilitate the establishment of parenthood, in light of the fact that not adopting the cascade approach also facilitates contesting parenthood as stressed above, a distinction could be included according to who introduces the procedures as to limit the places of contesting if it is not the child.

Moreover, the CCBE wishes to reiterate its recommendation in its [preliminary observations](#) under Chapter II c) regarding choice of court (page 6 of the document):

“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 seised, or the jurisdiction has been expressly accepted. The problem regarding who is a ‘necessary’ party to such proceedings must be dealt with.”

4.2.2. Articles 8 and 9

The CCBE considers that it is not necessary to have both Article 8 on residual jurisdiction and Article 9 on *forum necessitatis*. Therefore, the CCBE suggests combining Articles 8 and 9, and removing the first paragraph of Article 9. The combined Article would then be as follows:

Proposed amendment
Where no court of a Member State has jurisdiction pursuant to Articles 6 or 7, jurisdiction shall be determined, in each Member State, by the laws of that Member State. The case must have a sufficient connection with the Member State of the court seised.

4.2.3. Article 10

Regarding Article 10 on incidental questions, the CCBE finds that this provision raises the question whether the court can also stay the proceedings and wishes to ask whether Article 28 limits the possibilities of staying proceedings.

4.2.4. Article 14

The CCBE is concerned that Article 14 regarding *lis pendens* does not take sufficiently into account the fact that proceedings in cases of filiation often comprise more than two parties. It is not unlikely that proceedings in country A involve the spouses, whereas proceedings in country B involve another person. This calls for a *forum conveniens* rule and the possibility of transferring the case to another country altogether.

4.2.5. Article 15

In accordance with Article 24 of the [Charter of Fundamental Rights of the European Union](#), the [United Nations Convention on the Rights of the Child](#) and the [European Parliament Resolution](#) of 5 April 2022, children have the fundamental right to express their views and be heard. The Parenthood Proposal also states under Article 31 that “recognition of a court decision in matters of parenthood may be refused if it was given without children having been given the opportunity to express their views, unless this is against the interest of the child” and Article 39(3) provides that “the recognition of an authentic instrument establishing parenthood with binding legal effect may be refused if it was formally drawn up or registered without children having been given an opportunity to express their views”. In line of the above, the CCBE propose the following amendment to paragraph 1:

Proposed amendment

1. When exercising their jurisdiction under this Regulation, the courts of the Member States **must shall**, in accordance with national law and procedure, provide children below the age of 18 years whose parenthood is to be established and who are capable of forming their own views, with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body.

Furthermore, the above proposed amendment should be made throughout the document where necessary, such as for recital (49) as well.

Additionally, the CCBE would like to stress that references to the right of the child to express their views in the recitals of the Regulation should be similar to that of the [Brussels IIter Regulation](#), albeit it should also include the recent [Resolution of the European Parliament](#) of 5 April 2022, on the protection of children's rights in civil, administrative and family law proceedings.

4.3. Chapter III – Applicable law

4.3.1. Article 17

In regard to Article 17(1), the CCBE considers that the habitual residence of the person giving birth provides clarity, which is of the utmost importance, and makes it easier in practical terms for the registrar to apply their own law and determine who is the parent. It should be noted that according to the European Court of Justice (ECJ) case [C-289/20](#) of 25 November 2021, which held that every individual has a habitual residence; therefore, no subsidiary criterion would be necessary in accordance with this. Furthermore, in the [Succession Regulation](#) there is no issue in regard to habitual residence as the sole criterion (except for exception circumstances), and having a subsidiary one would make the courts more inclined to use it. Moreover, it is underlined that a subsidiary criterion allows for more options to dispute parenthood as well.

Since, despite this ECJ ruling, it has been observed that several national courts have found no habitual residence even in recent family law cases, a subsidiary criterion could be provided. However, in regard to the subsidiary criterion “the law of the State of the birth of the child” suggested in the Parenthood Proposal, the CCBE strongly urges to replace it with “the law of the nationality of the person giving birth”. The law of the State of the birth of the child as proposed by the Parenthood Proposal is extremely risky as it allows for law shopping, is a volatile criterion and is not a strong link which is an important factor in relation to parenthood. The nationality of the person giving birth on the other hand, is the safest way to avoid law shopping, is a strong and stable connection, and takes into consideration the recognition of parenthood before the child is born, which is covered by the Regulation in accordance with recital (24).

To this end, if a subsidiary criterion is included, the CCBE strongly proposes the following amendment to paragraph 1 of Article 17:

Proposed amendment
1. 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 or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the nationality of the person giving birth to the child State of birth of the child .

In regard to Article 17(2), the CCBE commends the good intention behind the provision; however, it should be clarified that the provision can only apply for the purposes of adding another parent. Additionally, as the law is universally applicable under Article 16, this provision may lead to situations which may not be in the best interests of the child (arguably, it is not always in the best interests to have a second parent).

The CCBE wonders if paragraph 2 should be limited to applicable law to who is the parent by operation of the law. As an example, to illustrate the issues which may arise, while the child may only have one parent according to the habitual residence of the person giving birth, it may be possible due to the nationality of the potential father that they would be deemed to be the father. In some countries, once there is a divorce, the ex-husband is no longer presumed to be the father; however, in some other countries such as in Turkey, if the child is born within 300 days of the dissolution of the marriage the ex-husband is still deemed the father. In such a situation as described, based on the proposed Regulation, even if the country of habitual residence of the person giving birth only deems there to be one parent, Turkish law would be then applied and the ex-husband would be the deemed to be a parent, which is not certain if that is desired and the ex-husband may not even be aware to then set aside this paternity.

In addition, as the next Article states that the scope of applicable law also is relevant for contesting paternity, the CCBE wonders how that relates to Article 17 which is on fixing paternity.

Lastly, the CCBE is also concerned that Article 17(2) puts a limit of maximum two parents.

4.3.2. Article 18

The CCBE finds that Article 18(a) is problematic, as “procedural rules” generally follow the *lex fori*. In addition, Article 18(c) raises the question whether the “standings of persons” to be involved in the case should not be governed by national procedural rules.

Additionally, the CCBE would like to note that the use of the term ‘contestation’ in this context is incorrect from an English legal terminology perspective and ‘dispute’ or ‘challenge’ should be used instead. This remark applies to the use of this term throughout the document when used in the same context.

Moreover, the CCBE suggests that this provision would fit more appropriately at the start of the Chapter instead.

4.3.3. Article 19

The CCBE wishes to highlight the confusion caused by Article 19 as the applicable law according to Article 17 is governed by the law of the habitual residence of the person giving birth, *at the time of birth* (so once and forever). Therefore, the CCBE wonders how the applicable law could change so that a change of law must be forbidden by Article 19. To this end, it is suggested to amend this provision in order to be consistent with Article 17 and include in the recitals of the Regulation that the applicable law is determined at the time of the birth of the child.

In addition, the CCBE also suggests the following amendment to Article 19:

Proposed amendment
Where parenthood has been established in a Member State pursuant to this Regulation, a subsequent change of the facts that determine the applicable law shall not affect the parenthood already established.

4.3.4. Article 20

It should be noted that the formal validity of acts regarding parenthood is especially important with respect to consent to assisted medical reproduction. This provision offers many forms in which consent can be recorded, and should be sufficient. The CCBE wonders, however, whether it is the best option to limit the provision to “unilateral” acts, as it could be necessary to judge the validity of joint declarations.

To this end, the CCBE proposes the following rewording in Article 20(1):

Proposed amendment
A unilateral act, or joint declaration , intended to have legal effect on the establishment of parenthood shall (...)

In addition, the CCBE proposes the following minor rewording in Article 20(1)(b):

Proposed amendment
(b) the law of the State in which the person doing the act is habitually resident has the habitual residence ; or (...)

4.3.5. Article 22

The CCBE wishes to highlight a common issue in Regulations, namely that in all Regulations that refer to the breach of public policy, it is not clarified what would be applied in its place if there is found to be a breach. This is also the case under Article 22 and would provide clarity as to what would be applied instead.

4.4. Chapter IV – Recognition

4.4.1. Article 31

The CCBE noted that Article 31(1)(c), as well as various other articles of the Parenthood Proposal, uses terms such as ‘fatherhood’ and ‘motherhood’ which may not be considered gender-neutral. It is suggested to use more gender-neutral terms such as ‘parentage’ instead.

4.4.2. Article 37

This provision with respect to attestation with binding effect relates to a Member State having jurisdiction. Besides the fact that jurisdiction according to Article 6 lies with the *courts* of the Member States (not Member States per se), it is unclear at what time such jurisdiction has to be complied with, and whether this jurisdiction is hypothetical only.

To this end, the CCBE proposes to amend Article 37(2)(a) as follows:

Proposed amendment
(a) the Member State which empowered the public authority or other authority to formally draw up or register the authentic instrument establishing parenthood is one of the competent courts under Article 6 had jurisdiction under Chapter II ; and (...)

4.4.3. Article 39

As mentioned under point 4.4.1. on Article 31, Article 39(1)(b) also uses the term 'fatherhood' and 'motherhood'. The CCBE considers that more gender-neutral terms such as 'parentage' should be used instead.

4.4.4. Article 42

This provision regarding costs raises the question if it is enough to provide rules for recognition (heading of Chapter IV), or if provisions regarding *enforcement* are needed.

4.5. Chapter V – Authentic instruments with no binding legal effect

4.5.1. Article 45

Article 45(5) allows for a challenge to the Court against an authentic instrument that has been drawn up (paragraph 3) by a registrar. The CCBE is concerned that this might create problems within the national procedural laws of some Member States. In general, the benefit of this section (authentic instruments with no binding legal effect) as compared with the [Public Documents Regulation](#) is unclear.

In addition, the provision should clarify whether it is about the recognition or acceptance of the instrument and in which context this provision applies. Furthermore, an explanation of the meaning of what an authentic instrument with no binding legal effect means should also be defined under Article 4.

4.6. Chapter VI – European Certificate of Parenthood

4.6.1. Article 47

Article 47 mentions the “child” and “a legal representative” who may need the Certificate to invoke their status. However, who is a legal representative (of the child, supposedly) is determined by national law and very much limits the potential candidates for the Certificate (for example, all parents without custody or grandparents). To this end, the CCBE proposes the following amendment to this provision:

Proposed amendment
The Certificate is for use by a child or a any person demonstrating a legitimate interest legal representative who, in another Member State, needs to invoke the child’s parenthood status.

4.6.2. Article 49

The CCBE has the same concerns in regard to the right of the “child” and “a legal representative” to apply for the Certificate as mentioned above under point 4.6.1 on Article 47. It is strongly urged that the Certificate must be accessible to anyone with a legitimate interest; therefore, the CCBE proposes to this provision the following amendment as well:

Proposed amendment
1. The Certificate shall be issued upon application by the child (‘the applicant’) or, where applicable, a any person demonstrating a legitimate interest legal representative .

4.6.3. Article 54

The CCBE supports that there is no validity limit of the certified copy of the certificate. However, it proposes including the possibility for a more recent one to be requested at the discretion of each Member State. It is noted that a more recent/newer certified copy of the certificate may in turn encourage acceptance of it by Member States.

5. Concluding remarks

The CCBE is available and happy to elaborate on any aspect of the above, and wishes to congratulate the European Commission again on its efforts to address this important matter.