

CCBE comments on the Council Presidency redraft of Chapters II and III of the Parenthood Proposal

31/10/2024

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 CCBE would like to thank the Council for its work on this important matter and for having taken into consideration several of the points that the CCBE had raised.

In light of the recently published Council Presidency redraft of Chapters II and III of the European Commission proposal on the recognition of parenthood between Member States, the CCBE would like to raise a few concerns and reiterate some crucial issues mentioned in its previous position paper (find available [here](#)) which have not been addressed. In particular, the CCBE would like to strongly urge the Council to consider its comments with regard to Article 6 and Article 19.

1. Relevant recitals of the proposed Regulation

1.1. Recital 16

The CCBE supports the European Parliament's proposed extended reference in Recital 16 to the necessity of respect for the rights of the child in its resolution of 14 December 2023. The CCBE proposes that a **reference is made in the recitals to aspects of the United Nations Convention on the Rights of the Child that are of particular significance** for the purposes of this regulation. Identity and nationality generally flow from recognition of parenthood. Article 7 of the Convention provides that a child shall have, from birth, the right to acquire a nationality, and Article 8 requires states parties to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law. This regulation is designed to promote those rights and, therefore, it would be appropriate to make reference to them.

2. Chapter II - Jurisdiction

2.1 Article 6

2.1.1 Cascade approach

The CCBE wishes to reiterate the paramount importance of adopting a structured cascade approach for determining jurisdiction, as mentioned in its past [position paper](#) and [preliminary comments](#). **The cascade model is critical in ensuring legal stability, preventing forum shopping, and protecting the best interests of the child.**

The CCBE would like to highlight the following issues with the current approach:

- While aiming to facilitate straightforward access, the current approach could inadvertently **increase jurisdictional disputes and complicating the establishment of jurisdiction**. This in turn will actually **delay resolution**, leaving children longer without legal recognition, nationality, or a name – fundamental rights outlined in the United Nations Convention on the Rights of the Child.
- More jurisdictional choices do not always lead to legal clarity and can be **financially burdensome**, especially for the child or other vulnerable parties involved. A well-defined cascade approach, by simplifying the process, may reduce costs and clarify the route to access justice.
- Allowing for multiple jurisdictions is **inconsistent with the approach of the Brussels IIb Regulation**, such as on parental responsibility where there is only one jurisdiction. There should be a clear jurisdiction and consistency in line with the handling of parental responsibility.
- **In accordance with the Brussels IIter Regulation and the Maintenance Regulation, the protection of the weaker party is essential**, which in this case is usually the child. Including multiple jurisdictions is contrary to the principle. To this end, the CCBE would like to reiterate the importance of protecting the weaker party/child, which can be achieved with the cascade approach. The current approach 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.

Furthermore, the CCBE considers it important to **delete (f) of the birth of the child**, as the mother could then give birth wherever is desirable to her and lead to forum shopping. It is crucial to note that the mother could go to places that parenthood is more easily recognised, but also the opposite. For example, the risk arises that the sole mother could choose then to give birth somewhere where the parenthood of the father will not be recognised.

Possible cascade model as outlined in the past position paper and preliminary observations:

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."

2.1.2 If the cascade approach is not adopted

In case it is still decided not to adopt the cascade approach, 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.

2.1.3 Choice of court agreement

Moreover, the CCBE would like to once again reiterate 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. Lastly, the problem regarding who is a 'necessary' party to such proceedings must be dealt with.

2.2 Article 15

The CCBE would like to remind the Council of the right of the Child to be heard and **urges for the deletion of "where it is in the best interests of the child"** as this limitation of the right is contrary to several instruments, including the following (the CCBE also wishes to recall its suggestion to amend "shall" to "must" in order to be in line with these instruments):

- Article 21 of the Brussels IIter Regulation;
- Article 24 of the Charter of Fundamental Rights of the European Union;
- Article 12 of the United Nations Convention on the Rights of the Child;
- The 1996 HCCH Convention on the Protection of the Child
- The European Parliament Resolution of 5 April 2022.

In addition, the **interpretation of “best interests” may vary significantly** and can complicate the legal processes across different jurisdictions, as well as be risky. The CCBE also is seriously concerned that this **may lead also the decisions being not recognised due to public policy grounds** as has been the case under the 1996 HCCH Child Protection Convention (decisions can be not recognised if the views of the child are not taken into account appropriately). Lastly, the CCBE wishes to highlight that while the regulation allows for adherence to national law and procedures, it **should not limit the fundamental right of the child to be heard**.

If it is believed necessary to mention any limitation, the CCBE suggests a similar approach as in Scotland, which has the criteria for limiting a child’s right to be heard as **“unless there would be grave adverse consequences for the welfare of the child”**.

Moreover, in order to **take into account jurisdictions where there is an independent body or person, such as a Children’s Commissioner, charged with defending the interests of children**, it should be possible for that body or person to intervene in proceedings to protect the interests of the child concerned. The CCBE considers that these situations should be reflected in the regulation.

3. Chapter III – Applicable law

3.1 Article 17

The CCBE considers that it should be **clarified if this article refers only to situations where a court has to make a decision or by operation of law**.

The CCBE proposes **amending the article in line with Article 16 of the 1996 HCCH Child Protection Convention** (see also comments under 3.3 on Article 19) and recommends examining how it functions in practice, along with the experiences gathered, as the considerations are likely similar:

Article 16

(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.

(2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.

(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

(4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

3.2 Article 18

The CCBE considers the rewording to “requirements” an improvement. However, **perhaps the term “conditions” or “grounds” may be clearer** in this context.

The CCBE notes that there is a distinction between procedure between the requirements in terms of conditions, and the evidence that is required to prove it. It is presumed that the second one is what is meant in this article – the grounds rather than the evidential requirements. Additionally, the CCBE wishes to highlight that form is not always procedural law. Given this, **clarification should be provided in the recitals** of the regulation. It is important also to note that this article does not cover procedural rules, which are generally governed by the law of the forum.

3.3 Article 19

The CCBE would like to reiterate that it is crucial to **clarify in this article (and the relevant recitals) that the applicable law is determined at the time of the birth (so once and for all)**, in line with Article 17. Once the law is established at birth, it should remain fixed and not subject to change based on the child's subsequent habitual residence.

The CCBE believes that the **distinction should be clarified regarding the applicable law when there is no court intervention (so by operation of law) and when a court is seised**. The article could be **amended in line with Articles 15 and 16 of the 1996 HCCH Child Protection Convention** which makes the distinction as follows:

Article 15

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

(3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Article 16

(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.

(2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.

(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

(4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

If the distinction is not clarified similar to Article 15 and 16 of the 1996 HCCH Child Protection Convention mentioned above, it is proposed to add “by operation of law” in the paragraph:

Proposed amendment:

*Where parenthood has been established **by operation of law** in a Member State pursuant to this regulation, a subsequent change of the facts determining the applicable law shall not affect the parenthood already established.*

3.4 Article 21a

The CCBE considers that the **term "mandatory provisions" needs clarification** and the definition should be mentioned in the relevant recital as it can vary across jurisdictions. It is also especially important to the distinction between mandatory provisions and public policy is crucial.

3.5 Article 22a

The CCBE wonders whether paragraph 1a is necessary. If it is considered to be kept, the CCBE strongly recommends that it is **written in a clearer manner**, and perhaps is **formulated in a more general/broader way** as it can apply to more contexts, such as adoption. It should also be noted that this paragraph is contrary to the principle that children should not be penalised for the circumstances of their birth

4. Concluding remarks

The CCBE would be happy to elaborate on any aspect of the above or clarify any questions that you may have.