

# Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695 final

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European Law Institute





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# List of Abbreviations

1980 Hague Abduction Convention	Hague Convention on the Civil Aspects of International Child Abduction
1993 Hague Adoption Convention	Hague Convention on Intercountry Adoption
Brussels IIbis Regulation	Council Regulation No 2201/2003
Brussels IIter Regulation	Council Regulation No 2019/1111
Commission's Proposal	COM/2022/695
CJEU	Court of Justice of the European Union
CRC	United Nations Convention on the Rights of the Child
GEDIP	European Group of Private International Law
ECF	European Certificate of Filiation
ECHR	European Convention on Human Rights
ECP	European Certificate of Parenthood
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

# Fundamental Premises

## On Private International Law

- 1) A harmonised private international law is vital to ensuring freedom of movement within the European Union (EU) of EU citizens and the peaceful enjoyment of fundamental rights within and beyond the EU.
- 2) The Report suggests rules to merely coordinate, not harmonise, national family laws of Member States. To that end, the Report regards EU private international law as outcome-neutral, bearing in mind that the discipline cannot, and therefore will not, be used to circumvent the sovereignty of Member States regarding their substantive family law.
- 3) Absent a harmonisation of substantive law, the creation of a limping status for children can effectively be prevented through private international law rules, especially at the EU level, but also in the broader international sphere.
- 4) The current use of private international law to liberalise fertility markets raises human rights concerns similar to those observed in some contexts of adoption. These concerns include the emotional or economic exploitation of adults seeking to have children and the dangers of child and women trafficking.

## On Children's Rights

- 5) The Report analyses the European Commission's Proposal and suggests amendments based on the principle of the best interests of the child taken as a paramount consideration in conformity with the 1989 CRC. The distinction between filiation, which affects the identity and origins of the child, and parental responsibility, which affects the ability to understand and address the child's needs, should allow a swift coordination between the Commission's Proposal and Brussels II ter. The Report balances children's rights with the principle of non-discrimination on grounds of gender, sexual orientation, or sex, while upholding the fundamental EU devise: 'united in diversity (*in varietate concordia*)' as reflected in Article 81 TFEU.
- 6) Children's rights are overarching and foundational to all human rights. They safeguard the early phases of each and every person's course of life. Therefore, children should not be treated as a minority or group.
- 7) Respect for children's rights is the main safeguard for future generations to make better decisions regarding global peace and security.

## **On the Principle of Non-discrimination of LGBTIQ+ Parents and the Protection of Women**

- 8) To prevent LGBTIQ+ parents from being treated differently from other parents on grounds of sexual orientation or gender identity or expression, the proposed rules focus on the relationship between a child and the child's parent, regardless of the number and quality of the other persons involved in the child's upbringing.
- 9) The role of women in reproduction must not be ignored. Non-discrimination on grounds of sex requires giving relevance to the medical differences between oocyte and sperm donation, as well as to the impact of pregnancy, labour, and delivery on a woman's life course. The principle of ensuring equality by enhancing women's rights is of universal value and is essential for preventing violence against women in the context of reproduction.

## **Application Beyond the EU**

- 10) While the Report develops private international law rules to amend the Commission's Proposal, it is also designed to be adaptable beyond the EU in international contexts.

# Executive Summary

This Report examines the Commission Proposal COM/2022/695 and its critical role in advancing fundamental rights within the EU. While preserving the Commission's Proposal's core vision and framework, this analysis recommends strategic refinements that strengthen alignment with the existing EU *acquis*, foster deeper European integration, and enhance the protection of children's fundamental rights. In addition, it expands upon the Proposal's initial emphasis on the EU Strategies for children's rights and LGBTIQ+ equality by incorporating a comprehensive women's rights perspective.

The Report succeeded to reconcile the rights and protection of the three different groups by adopting three main strategies, each of which focuses on the legal needs of each group.

The first strategy consists in focusing on the universal rights of children and on the principle of non-discrimination of children based on the circumstances surrounding their birth. A new Article 5 is proposed to specifically recall these rights.

The second strategy consists in designing rules that ensure respect for the principle of non-discrimination of parents based on their sexual orientation by shifting the focus from the couple claiming joint parentage to the child's relation with each of the parents separately. This solution promotes transparency and ensures the instrument's adaptability to foreseeable developments, such as multiple parentage arrangements. It also led to focus on the child's habitual residence as the main connecting factor for jurisdiction (Articles 6 and 8) and the applicable law (Article 17), on the one hand, and to the deletion of the distinction between acts with binding legal effects and acts with non-binding legal effects (Article 44). This solution also ensures that the proposed Regulation will be able to function when the child has more than two parents.

The third strategy consists in preserving private international law's primary goal to merely coordinate

legal orders in a neutral way (ie without knowing the outcome of this coordination as famously described by the expression 'a leap into the dark' – '*Sprung ins Dunkle*'). Legal systems differ regarding critical questions of filiation, sometimes tremendously, eg in questions of surrogacy, co-parenthood, single or multiple parenthood, the position of the biological but not legal parent versus the position of the legal but not biological parent, etc. Therefore, in international matters of filiation, it is more important – today – to focus on private international law's role in coordinating rather than evaluating the legal reforms in each EU national order. This means, for instance, that a private international law instrument's main aim is to coordinate those legal orders that regulate contracts having the live birth of a child as consideration, with legal orders which consider these contracts as a serious breach of the basic values enshrined in their Constitutions. The Report could not, and does not, value one legal approach to filiation over the other. Instead, it focuses on the child, her best interests,<sup>1</sup> and the concrete child-parent relationship. Therefore, the Report considers very carefully the use of private international law to overcome public international law principles as the prohibitions of women and child trafficking. The chosen method of coordination between Member States consists in designing minimum standards which would allow the recognition of child-parent relationships existing in those Member States that attribute filiation on the basis of such contracts, also in Member States that sanction those contracts, on the basis of the best interests of the child. In all cases where the proposed EU minimum standards are not met, eg in the case of child trafficking, a recognition of the filiation status would still be possible, albeit after carefully considering the situation of the child whose rights have been impaired (as a consequence of being trafficked), which is a matter for the Member State where the child is habitually resident to verify. In practice, our assumption is that compliance of the filiation status with the best interests of a child who is not biologically related with their intended parents may only be presumed whenever the prospective

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<sup>1</sup> This report uses the generic feminine to ensure inclusiveness and readability; although exceptions are tolerated when comfort or accuracy so requires, female nouns and pronouns are extensively used in gender-neutral or gender-abstracting ways in the present Report.

parents have observed the EU minimum standards required to issue a European Certificate of Filiation (ECF). If those minimum standards are not met, the use of an ECF facilitating the circulation of the child's status would be prevented, and Member States would have to apply the rules on recognition. In this manner, the Member State in which the child habitually resides will be responsible for assessing the child's best interests *in concreto* and verify if the child needs to be protected via a public policy exception, or if the child-parent relationship is more promptly addressed through the application of national rules and procedures (Article 66.3).

In order to enhance European integration and EU fundamental rights and freedoms, ELI rules provide for the institution of a central EU register, where each Member State could retrieve information on children who have benefitted from an ECF.

The guarantees proposed via the amendments have thus been designed to address Member States' reservations regarding the Proposal's adoption, particularly their concerns about compliance with the principles of subsidiarity and proportionality. The approach establishes a two-tier system for cross-border recognition of status. In line with the Proposal, the fast-track procedure would remain optional, but available exclusively for statuses that align with EU common values and minimum standards. To this end, Article 5 is explicitly dedicated to the rights of the child. These statuses would be recorded in a centralised EU register, maintained and updated by national authorities. For all other cases, recognition would be facilitated through harmonised rules, while Member States would retain the ability to grant recognition under their national laws, including an assessment of the individual child's best interests where necessary. This balanced approach reconciles the interests of States that favour expedited recognition procedures with those expressing concerns about controversial reproductive practices, such as surrogacy.

It soon became apparent that language accuracy would have been among the easiest amendments to propose in order to improve mutual understanding and, thereby, mutual trust. This has led the Project Team to propose alternatives to concepts such as 'establishment of parenthood' or 'authentic acts with no binding legal effect'. The alternatives proposed

aim to improve the description of institutions which are known under different legal terms in Member States and, in addition, to emphasise the fundamental importance of human rights in reproductive practices.

Thus, to emphasise the child-centred focus, the English word 'parenthood' has been changed to 'filiation'. Also, the initial Proposal treats all kinds of possibilities to establish or resolve a filiation status under the wording 'establishment of parenthood' (including adoption). The Report, instead, reflects the comparative law distinctions in the different modes of ascertainment or constitution of a filiation status and, respectively, to contest and terminate it (biological facts, legal relationships, acknowledgement, intention, adoption). These distinctions allow a refined examination of the interests of involved stakeholders and of the reasons why legal systems use different methods to give legal relevance to child-parent relationships. These interests can be better analysed in the following parts.

Legal certainty as regards jurisdiction is of paramount importance, also in connection with the establishment of a unified register. The Report substitutes the six alternative jurisdiction grounds with one general jurisdiction rule, followed by two specific rules. The general rule focuses, in accordance with international instruments regarding children, on the habitual residence of the child. It is complemented by three alternative jurisdiction grounds for the ascertainment of filiation (nationality of the child, habitual residence or nationality of the putative parent) and one for the constitution of filiation in pre-birth situations (intended habitual residence of the child, subsidiarily habitual residence of one of the intended parents). The latter is a clarification for cases where the general rule fails due to the lack of a habitual residence of the child.

In line with the rule on jurisdiction, the Report redraws the rule on applicable law. Instead of focusing on the habitual residence of the person giving birth, which, eg in the case of adoption does not really reflect a close connection to the case, it again proposes the habitual residence of the child as the central connection factor. For situations where the habitual residence cannot be determined, similar to the jurisdiction rules, the Report refers to the intended habitual residence and, subsidiarily, introduces the

classical private international law fallback rule of the closest connection. Furthermore, regarding the public policy exception, it is clarified that only the concrete result of the application of the foreign law is the object of the control. Finally, in accordance with other EU instruments, a rule regarding interpersonal conflict of laws is introduced.

The rules on recognition of decisions are adjusted to the terminology of the Report and to the EU *acquis*, according to which, precedence is given to earlier decisions in matters where *res judicata* plays a role (and differently from cases of parental responsibility).

As regards authentic instruments, the Report rejects the Proposal's distinction between authentic instruments 'with' and 'without binding effect'. Instead, it focuses on the practically much more important category of authentic acts with 'evidentiary effect', which usually includes all acts. Since all authentic instruments indeed have a 'binding effect', the majority do not have a constitutive effect (the effect of creating a filiation which would stem from the act itself and not from a series of circumstances). The Report also clarifies the relationship between applicable law governing filiation, law of the forum, and law of the authority drawing up the authentic instrument relating to presumptions and effects of an authentic instrument.

Regarding the European Certificate of Filiation, the Report considers it central for the evolution of EU citizenship and fundamental rights and freedoms and proposes a facilitated recognition of a filiation status based on the ECF. To obtain such an effect, the ECF should only be drawn up if certain proceedings and rights of those involved, especially the child's right to know her origins, are maintained. It is argued that such a certificate should be traceable in a given register and associated with an encrypted database where information relevant to the child's rights would be kept. In line with the e-CODEX advancements, the Report proposes to introduce a centralised register to complement the ECF work in practice and ensure that all national authorities can retrieve a certificate from the same register. To ensure that data is correctly entered in the associated database, the rules on jurisdiction have to be clear-cut, as the Report proposes.

The Report makes clear, inspired by the 2019 Hague Judgements Convention, that Member States can decide to continue to apply their national acts or bi- or multilateral instruments if they are more favourable to the child's interests and the continuity of filiation.

# Recommendations

## 1. Specific Article on Rights of Children

The Report recommends introducing, at the beginning of the Regulation, a specific article on the rights of children in connection to filiation, which would refer to the 1989 UN Convention on the Rights of the Child (CRC) to the same extent that other EU instruments refer to fundamental rights described by other supranational instruments. Articles 7 and 8 CRC are particularly relevant in filiation matters. The former, echoing Article 24 of the 1966 ICCPR, recognises the right of every newborn child to be ‘registered immediately at the time of his or her birth’ to guarantee the infant the ‘right to a name’, the right ‘to acquire a nationality’ and ‘the right to know and be cared for by his or her parent’. Article 8 CRC requires States Parties to preserve all these elements of a child’s identity and provide assistance to the child ‘with a view to re-establishing speedily his or her identity’. In filiation matters, as in all decisions related to children, the best interests of the child are of paramount consideration, under Article 3 of the CRC. The rights of the child are non-hierarchical and include the right to non-discrimination (Article 2), the right to life and harmonious development (Article 6), and the right of the child to be heard (Article 12).

This recommendation has led us to emphasise, in an amended Article 5, the right of the child to status continuity, the right to know, and request access to, the child’s origins, and the right of the child to be heard in order to ensure that all children, regardless of how they came into existence, enjoy the same rights.

## 2. Jurisdiction

The Report recommends introducing one general jurisdiction ground focusing on the child and their habitual residence; three alternative jurisdiction grounds for the ascertainment of filiation (nationality of the child, habitual residence or nationality of the putative parent) and one for the constitution of filiation in pre-birth situations (intended habitual residence of the child, subsidiarily habitual residence of one of the intending parents). Furthermore, the *forum necessitatis* remains as a safeguard.

Granting preferential jurisdiction to the courts of the MS of the habitual residence of the child is justified on several grounds. Jurisdiction rules have been carefully designed, on the one hand, to decrease the risks of children suffering from a limping status of filiation and, on the other, to encourage MS to adopt the proposed regulation by recognising their competence to continue to regulate assisted reproductive technologies ‘at home’. In addition, limiting the grounds of jurisdiction also reduces the possibility of *lis pendens* and the risk of contradictory judgments or certificates.

Specifically, jurisdiction is based on habitual residence in Articles 6 and 8, while Article 7 complements that proposed change and Article 9 does not need to be changed.

## 3. Applicable Law

The Report recommends using the habitual residence of the child in Article 17, rather than the habitual residence of the person giving birth, as this connecting factor reflects better both the child-centred approach of the Report and the principle of the closest connection. This connecting factor may be adapted to cases where a future child-parent relationship can be pre-assessed prior to the child’s birth: in such cases, the Report recommends referring to the child’s ‘prospective’ habitual residence. This solution has the charm of one single rule for all cases. In addition, where the habitual residence cannot be determined, ELI Proposal recommends introducing the classical fallback rule of the closest connection. As a result, the structure will allow the interpreter to apply the law which is most closely connected to the child. This solution also has the advantage of ensuring conformity with the jurisdiction rules with the result that, in most cases, the competent authority will apply its own law. The Report also proposes to

clarify that the public policy exception does not aim at considering the content of the foreign law and disregard it on abstract grounds but may only be opposed if the concrete result of its application would clash with the local values and the best interests of the child.

Article 19 reflects the principle of *favor filiationis*, and ensures stability of status, so that the *conflit mobile* of the main connecting factor (which is not anchored in a given moment in time) always operates in favour of the child's filiation to guarantee continuity of status.

#### **4. Recognition of Decisions**

The Report recommends substituting 'later decision' with 'earlier decision' in line with the EU *acquis*, to prevent forum shopping to the detriment of the continuity of the child-parent status. Unlike parental responsibility, which has to be adapted to the life course of the child (eg, if the parents divorce), filiation requires the stability and continuity of status. This is better achieved by means of the traditional rule enshrined in all other EU regulations in private international law (except Brussels II ter). In the recognition procedure, the Report recommends introducing safeguards drawing from the experience of the 1993 Hague Convention on Intercountry Adoption (HCCH 1983 Adoption Convention) on the need to prevent the abduction, the sale of, or the traffic in, children. The Report also recommends removing those parts on 'authentic instruments with binding effect', since the notion is, as yet, unknown in private international law, and gives the wrong impression that an act alone may create a filiation status.

It is proposed to align Article 31 c) and d) to the drafting of the majority of EU regulations on procedural public policy and to delete Articles 34-39 on authentic acts with binding legal effects.

#### **5. Authentic Instruments**

The Report recommends focusing on the 'evidentiary effect' of authentic acts – such as various kinds of birth certificates, which necessarily stem from all kinds of authentic instruments. This effect in practice is the most important for the parties. The Report also recommends clarifying the relationship between the applicable law governing filiation, the law of the forum, and the law of the authority drawing up the authentic instrument relating to presumptions and effects of an authentic instrument.

With the proposed amendment, Chapter V would apply to all authentic instruments having evidentiary effects, including those which may be regarded as having a constitutive effect. This would make it possible for parents to rely on authentic instruments in other Member States, and Chapter V would become the 'default' regime for all authentic acts.

#### **6. European Certificate of Filiation (ECF)**

The Report recommends introducing a facilitated recognition of a filiation status based on a certification to be named the European Certificate of Filiation. The ECF would only be available to filiation statuses respectful of the rights of children and rights of those involved, especially the child's right to know her origins. The ECF would guarantee a speedier recognition of filiation status, respectful of the right of children to know their origins as part of their identity and introduce EU minimum standards based on fundamental rights. As the ECF would be optional, in cases where these EU standards were not met, eg in the case of child trafficking, a recognition of the filiation status would still be possible, albeit after having given to the EU Member State which requested recognition of the filiation with cross-border elements the possibility to consider the situation of the child victim of trafficking.

It is proposed to add four additional letters to Article 49, requiring ECF applications to include comprehensive documentation of the child's origins, which will be maintained in an encrypted database linked to a centralised register through an ECF electronic number. This framework ensures privacy protection while maintaining accessible records that enable the child, upon reaching majority, to access information regarding her origin, or that allow the child's parents, while the child is still a minor, to access such information when medical, psychological, or other essential circumstances necessitate disclosure.

## **7. Establishment of a Centralised Register**

The Report recommends introducing a centralised register to complement the ECF work in practice and allow the retrieval of a certificate by all national authorities from the same register. The amendments create a confidential but accessible system where sensitive medical records are protected by privacy provisions uploaded in an encrypted database linked to an EU centralised register via an ECF electronic number. The ECF electronic numbering system would serve as the technical backbone of this framework, requiring adoption centres, hospitals, and fertility clinics to provide complete documentation and mandating authorised registrars to verify a file's integrity before uploading it onto the system.

It is proposed to add Article 58bis governing the operation of the database for anonymised information on the child's origins. This collaborative mechanism should advance European integration while reinforcing mutual trust among Member States.

## **8. Coordination with Other Acts and Instruments on International Filiation**

The Report recommends including a clause, inspired by the 2019 Hague Judgments Convention, that Member States can decide to continue to apply their national acts or bi- or multilateral instruments if they are more favourable to the child's interests and for the continuity of filiation.

Article 66 is modified accordingly.

## **9. Terminology**

To emphasise the child-centred focus of the proposed regulation, the term *filiation* is proposed instead of that of *parenthood*. To have a more precise look at the interests which are specific to each different case of filiation allocation, the Report recommends, in line with ECtHR jurisprudence, to introduce a clear distinction between the ascertainment and contestation of a biological filiation – important in the determination of the child's identity and origins – and the constitution and termination of a non-biological filiation. The Report provides more precise language that better captures the various forms of child-parent relationships, to guarantee all children the enjoyment of identity rights on an equal footing.

# Examples of the Functioning of the Proposed Rules According to Recent Case Law

## a) Simplifying the Registration of Cross-Border Filiations

Maciej (M) is from Poland and Frida (F) is from Germany. They both live in their respective countries. They are a couple but not married. When Frida becomes pregnant, they decide to move together to South Africa where Maciej has a good working opportunity. Their child Carla (C) is born in South Africa, as demonstrated by the hospital certificate of live birth issued to Frida. After three years, Frida moves back to Germany and settles down with Carla with the intention to reside there. Maciej agrees, but fearing that he might legally not be the father, he then makes a declaration of acknowledgement at the Polish Consulate in South Africa. Later, he wants to be registered as the father in Germany, where the child now lives.

The German authorities will register Carla as Maciej's daughter on the basis of evidence from the two documents provided:

- i) **the South African certificate of live birth; and**
- ii) **the Polish declaration of paternity.**

What legal effects do these documents produce in Germany?

Which rules will the German authorities apply to evaluate these documents?

### 1. **Effects of the Polish Acknowledgement of Paternity in Germany**

Under the **Commission's Proposal**, first it has to be determined whether the document that contains M's declaration is a **decision**, an authentic instrument **'with binding legal effect'** or an authentic instrument with **'no binding legal effect'**. Clearly, the declaration cannot be characterised as a 'court decision'.<sup>2</sup> Thus, it has to be determined **whether, under the law of the country issuing the document, the latter has a 'binding legal effect'** (likely meaning 'constitutive substantive effect') or not.

According to **Article 45 of ELI Proposal**, the Polish document will be considered as having **evidentiary effect**. The effects of the declaration under Polish law – the country of origin – will be the same in Germany and other Member States of destination. This means that if, both under Polish and German law, an **acknowledgement of fatherhood is sufficient evidence for the ascertainment of filiation**, German authorities will use the declaration to record C's filiation.

German law will accept a Polish civil status registrar as a competent authority to receive the declaration of acknowledgement as a functional equivalent to the usually required German registrar (question of substitution). **On the basis of the Polish document**, the German registrar will thus be able to proceed to **the ascertainment of the child's filiation in conformity with the applicable law**.

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<sup>2</sup> See CJEU C-646/20 - Senatsverwaltung für Inneres und Sport.

## 2. Applicable Law

Article 17 (1) of the **Commission's Proposal** gives relevance to the law of the place of the **habitual residence of the person giving birth at the time of birth**. This would refer to the law of South Africa (exclusion of renvoi, Article 21). M would have to provide the content of the law of South Africa in force three years previously. Whether F actually had her habitual residence in South Africa at the moment of birth might also be difficult to determine, especially many years afterwards.

The South African law will then have to be tested against **German public policy**.

## 3. Conclusion

Under the **Commission's Proposal**, the effect of the document that contains the declaration could be highly problematic and create uncertainties as regards its possible characterisation. Furthermore, the parties could have problems in determining the content of the applicable South African law.

**ELI reform proposal of Article 17 (1)** refers primarily to the **habitual residence of the child** at the time of the request of the filiation status. The child lives in Germany and is socially integrated there. Therefore, German law applies (with exclusion of renvoi, Article 21). Furthermore, German law will be easier to determine as F is still living there.

As German law is applicable, **no question of public policy will arise in the German forum** and hinder the ascertainment of the child's parents.

**ELI Proposal** provides a swift and clear solution that is able to adapt to changes in family life and clarifies that, in most cases, the authorities will easily be able to determine the applicable law on the matter and on the evidentiary effect of the documents.

## b) Improving the Situation of Co-Mothers

Boyana (B) is a Bulgarian national married to Hadi (H) who has Hungarian nationality. They live in Spain and Boyana gives birth to the child Carla (C) there. Boyana and Hadi request the competent authorities in Spain to register Carla as their common daughter. They are her 'co-mothers' according to Spanish law. They want to know how to ensure that their child Carla is considered their daughter also in their potential countries of citizenships, namely Bulgaria and Hungary.<sup>3</sup>

In Spain, Carla will be recorded as **the child of her birth mother B**, by virtue of the certificate of live birth (which certifies that Boyana gave birth).

At the same time, Hadi can be recorded as Carla's co-mother as a result of:

- i) **the marriage with Boyana; and**
- ii) **the consent given** to the artificial insemination of her spouse Boyana with the gametes of a donor.

Since Carla is not Hadi's biological descendant, the spousal presumption operates differently from the traditional presumption of paternity in the absence of gamete donors. The main difference is that it cannot be contested on the basis of DNA testing.

The Bulgarian and Hungarian legal orders **ignore same-sex marriages**. In both countries, the procedures allowing authorities to register the filiation of children assume that each child has **only one mother and only one father**. The purpose of the proposed Regulation is not to change Bulgarian and Hungarian substantive rules, but to **ensure coordination** between the Spanish legal order, in which Carla is recorded as the child of two women, and the Bulgarian and Hungarian legal orders.

### 1. Jurisdiction

Under the **Commission's Proposal**, the Bulgarian and Hungarian authorities would be competent according to Article 6 lit e of the Proposal. The existence of multiple grounds for jurisdiction could lead to parallel proceedings and contradictory decisions issued by different national authorities. This could happen if the public prosecutor, or B (wishing to exclude H's motherhood) initiate legal proceedings. As the rules are alternative, there is no hierarchy: all authorities could decide that they are competent, and all decisions are equally valid.

In **ELI Proposal**, Spanish authorities solely competent as regards the ascertainment of filiation from B and the constitution of C's filiation from H, as Spain is the country of the habitual residence of the child at the time the court is seised. Spain would be competent as of the beginning of C's life.<sup>4</sup>

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<sup>3</sup> The case is elaborated from CJEU, 14 December 2021, V.M.A. v Stoliczna obshtina, rayon 'Pancharevo', C-490/20.

<sup>4</sup> In conformity with CJEU, 22 December 2010, Barbara Mercredi v Richard Chaffe, C-497/10 PPU, the habitual residence of recently born children is in the state where the child's parent/s have their habitual residence.

According to amendments proposed by ELI, Spanish authorities will be competent to certify C's filiation status.

Which law will they have to apply to ascertain or constitute her filiation?

## 2. Applicable law

Under the **Commission's Proposal**, the law applicable requires the identification of the 'person giving birth', in this case Boyana, and then, the determination of the latter's habitual residence at the moment of birth. If the co-mothers do not wish to disclose this circumstance, it is uncertain whether, under Article 17 (1), part 2, the law of the place of birth may apply, because that connecting factor is available only to the extent that the previous one 'cannot be determined'. In this example, the place can be determined, so the use of the connecting factor may require an investigation in order to find out who gave birth.

Under **ELI Proposal**, the law of the State of the (prospective) habitual residence of the child at the time of the request determines the applicable law – which easily leads to Spanish law.

The Bulgarian and Hungarian authorities are required to register C as B's and H's child, as this status results from the Spanish documents.

To that end they need to recognise, in their respective countries, the legal effects produced under Spanish law by the documents recorded in the Spanish civil status record.

In the Hungarian Constitution (Article L 1) it is stated that parents can only be one man and one woman. The recognition of two mothers as parents of the same child would violate that provision. This means that C's status as the daughter of two women violates Bulgarian and Hungarian public policy.<sup>5</sup>

In this case, Bulgaria and Hungary could still oppose public policy and refuse the recognition of C's filiation status as evidenced in the Spanish document, based on the rules on recognition (below).

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<sup>5</sup> The CJEU may not (successfully) overwrite the Hungarian Constitution, as it would need the collaboration of Member States. See eg the reactions to certain CJEU and ECtHR decisions by the Italian (*Frontini, Granital, Taricco*) and German Constitutional Court (PSPP judgment of the German Federal Constitutional Court of May 5, 2020; Görgülü Case October 14, 2004, reg nr 2 BvR 1481/04).

### 3. Recognition of the Spanish co-motherhood in Bulgaria and Hungary

According to the **Commission's Proposal**, the recognition of a court decision or of a document with binding effect is refused if such recognition is manifestly contrary to the **public policy of the Member State in which recognition is invoked**, taking into account the child's interests (Article 31.1 lit a/39.1 lit a). This exception has to be applied in observance of the fundamental rights and principles laid down in the EU Charter, in particular its Article 21 on the right to non-discrimination. However, since the right to non-discrimination does not include 'marriage for all' nor the right of an adult to become the parent of a certain child, it is uncertain whether it can prevent the public policy exception.

In **ELI Proposal**, each mother can seek the recognition of her status separately.

As regards B, neither the public policy considerations of Bulgaria, nor those of Hungary will affect the recognition of her as C's mother.

As regards the co-mother, ELI rules aim at encouraging the Bulgarian and Hungarian authorities to recognise her status not only **because such status has been constituted abroad in conformity with Spanish law** (as in the Commission's Proposal) but also because it respects the **uniform EU rules that the ELI Proposal suggests** to ensure **the right of C to know and access her biological ascendants (Article 5.2)**.

### 4. Conclusion

Under the Commission's Proposal, the pursuit of legal certainty contrasts with the existence of multiple connecting factors, both for jurisdiction and for the applicable law, with the result that there may be room for procedural litigation. Member States' authorities may find it difficult to subsume the foreign document in one of the three categories of public authorities' acts proposed. Refusal of recognition remains possible in the case of violation of public policy and will affect both parents. Articles 22.2 and 31.2 of the Proposal on non-discrimination will not change this outcome.

The following proposed amendments make the Spanish authorities the only authorities competent as regards the filiation with the two mothers. The applicable law will be the same for both relations that the child has with each of her mothers. The filiation to the birth mother will be recognised without obstacles in Bulgaria and Hungary – as there cannot realistically be discrimination on grounds of her sexual orientation. As regards Hadi, recognition of her motherhood in Bulgaria and Hungary is favoured by ELI rules because the filiation is constituted in Spain in conformity with Spanish law and the fact that EU law (ie the proposed Regulation) grants Carla the right to know and access her biological ascendants and this will attenuate the clash with Bulgarian and Hungarian public policy.

## c) Improving the Situation of Single Fathers in the Context of Surrogacy

Georges (G) has Belgian nationality and lives in Belgium. He concludes a surrogacy agreement with the unmarried Ukrainian woman Daryna (D), who lives in California. Daryna becomes pregnant with a child that is genetically related to Georges and an unknown egg donor. When the child Carla (C) is born, Georges is registered as her father in a birth certificate issued by the Californian authorities. He goes to Belgium with the child, where he plans to raise her, and then presents the birth certificate to the competent Belgian registrar.

The filiation of Carla has to be recorded in Belgium on the basis of:

- i)* **the Californian document**, which certifies her birth in California;
- ii)* **the parental orders** (on the basis of the surrogacy contract); and
- iii)* **her biological descent from Georges.**

### 1. Territorial and Personal Scope of the Regulation

Under the **Commission's Proposal**, it is uncertain whether this case would be governed by the Proposal as the birth certificate is obtained in California, US, a non-EU Member State. Recitals 12, 24, 25, 54 and 76 read in conjunction with Articles 3.3 and 19 assume that the rules only apply to 'filiation established in a Member State'. As regards the applicable law, however, as the conflict of laws rules of the Proposal claim universal application (Article 16), they fully substitute the Belgian rules. The registrar will have to use the EU Regulation to determine the evidentiary effects of the Californian birth certificate. The distinction between intra- and extra-EU cases is thus, in this respect, irrelevant.

As clarified by **Recital 53 of ELI Proposal**, and **Article 3**, Belgian authorities can use the Regulation's provisions for both intra- and extra-EU cases, provided they have jurisdiction.

### 2. Right of Carla to know her origins

The Commission's Proposal does not contain rules encouraging her father to ensure **Carla's right to know her origins**. Either her father, Georges, or the fertility clinic (or other facility) which arranged for her birth spontaneously, ie on their own motion guarantee this right, or she will be deprived of her fundamental right to know and have access to her ascendants.

Under ELI Proposal, the right of Carla to know her origins is clearly stated in **Article 5**.

Even if a violation of this right does not prevent the recognition of her descent from her father, Georges, he will be aware that he should arrange her birth to guarantee her right to have access to information on her genetic and biological mothers.

### 3. Conclusion

The **Commission's Proposal** creates uncertainty regarding the treatment of cases in non-EU Member States and the possibility of applying the Proposal's conflict of laws rules when assessing whether or not to recognise these situations.

**ELI Proposal** clarifies that Member States can also use the Proposal's conflict of laws rules in these cases. In addition, it also guarantees respect for the fundamental rights of children born outside the EU but living in the EU.

## d) Improving the Situation of Children in the Context of Surrogacy

Marco (M) is from France and Italy (dual nationality) and lives in Italy with Anna (A), his spouse. They conclude a surrogacy agreement with Fotini (F), a Greek citizen. Fotini becomes pregnant with a child that descends genetically from Marco and an unknown egg donor.

Without the Parenthood Regulation in force, the Greek authorities would need to establish the filiation of Carla on the basis of the surrogacy agreement subject to Greek law, validated by a court decision. This would allow civil status authorities to issue a birth certificate in which Marco and Anna are identified as being Carla's parents. The recognition of the Greek certificate in Italy would be subject to Italian rules, applied in the light of the EU *acquis* on freedom of movement and the European Convention on Human Rights (ECHR).

### 1. Prevention of Limping Status

Under the **Commission's Proposal**, first, it has to be determined whether the birth certificate is one 'with binding effect' or 'with no binding effect'. As the Greek certificate states a legal situation previously established by a court decision, it most probably falls within the category of 'no binding effects'. Hence, it can only be used as support for certain evidentiary effects, provided that it is not manifestly contrary to public policy.

Under **ELI Proposal**, the Greek authorities would not be competent to issue parental orders prior to the birth of the child, as a result of the intending parents' habitual residence in Italy. This conclusion is unsatisfactory for those wishing to promote reproductive tourism but has the advantage of ensuring the adoption of the EU Regulation by Member States which are still firmly opposed to surrogacy agreements, of ensuring legal certainty, of preventing Carla's limping status, and of favouring mutual trust. In the example contemplated, the residence of one of the intending parents is in Greece, therefore Greek authorities would be competent, and the Greek registrar would issue a birth certificate based on the surrogacy agreement. Contrary to the Commission's Proposal, the latter would easily be classified as an authentic instrument with evidentiary effect and prove the facts included in it (Article 45).

## 2. Applicable law

Under the **Commission's Proposal**, Greek law applies, as the law of the habitual residence of the person giving birth at the time of birth (Article 17. 1). This means that the law of Fotini's habitual residence applies.

However, the Italian authority may decide that Greek law cannot be applied in Italy, as the surrogacy agreement is contrary to Italian public policy.

**Under ELI Proposal**, the law of the habitual residence of the child applies and this leads to Italian law. (Greek and) Italian authorities would apply Italian law. Accordingly, the Italian registrar will record the birth of Carla in Greece and the fatherhood of Marco in the Italian registers. Anna will be recorded as the mother only upon the approval of her request of adoption in particular circumstances (Article 44 of Law 184/1983).

**Public policy would not have any relevance**, since the Italian registrar records the birth based on Italian law and the certified facts.

## 3. European Certificate

Under the **Commission's Proposal**, Greek, Belgian, and Italian authorities would have the competence to issue a European Certificate of Parenthood. This would create a situation where the child could be registered differently in different Member States.

In addition, as a result of the exemption of public policy, issuing the certificate is tantamount to creating a substantive law status. The document is thus given a 'constitutive effect' (binding legal effect), which exposes the EU to a violation of Article 81 TFEU. Member States are not inclined to accept a 'fait accompli' because it affects their competence to regulate assisted reproductive technologies in accordance with their constitutions and the results of political debates in a democratic society. This is particularly the case where the cross-border element has been intentionally created by citizens habitually resident in a Member State whose nationality they also hold.

Under **ELI Proposal**, only Italian authorities would be competent to issue the European Certificate of Filiation. The certificate itself would include less information than contemplated by the Commission's Proposal (see Article 52 below) and Italian authorities would have to issue the certificate without delay upon application by Marco and Anna. The application would contain, among other information, all relevant medical records enabling Carla to trace her origins, including the procedure to request access or contact with Fotini and her genetic mother. Provided with this information, the Italian authority would have to: 1. issue the ECF allowing the child to prove that her parents are Marco and Anna; 2. assign to the ECF an electronic number; 3. upload the information contained in the certificate in the centralised register; 4. upload in the associated encrypted database the certificate which enables: i) M and A to trace C's ascendants for medical reasons while she is still a minor; and ii) C to request information and access to Fotini and her genetic mother once she has come of age.

#### 4. Conclusions

The **Commission's Proposal** may be strengthened by more clear-cut rules regarding the authorities competent to clarify a child's filiation. Furthermore, the public policy exception remains, except for the European Certificate of Parenthood, the compliance of which with Article 81 TFEU has been put into question. For this reason, also States where same-sex couples enjoy legal recognition, such as Italy, are firmly opposed to the Proposal and will not cooperate with its adoption.

**In ELI Proposal**, the establishment of Carla's filiation despite the violation of the Italian rules on surrogacy would remain in the control of the Italian authorities, which will not deny the establishment of filiation unless they find it contrary to the best interests of the child (Carla), in the light of the situation of the family *in concreto*. Consequently, the filiation of Carla will not be tested against an abstract violation of public policy (ie, due to surrogacy) as in the Commission's Proposal, but against a serious risk of violation of her fundamental rights (eg, the right to origins, life, etc). The solution has the advantage of ensuring the adoption of the EU Regulation by those Member States which are still firmly opposed to surrogacy agreements, of ensuring legal certainty, preventing limping status, and favouring mutual trust.

## e) Improving the Situation of Co-Fathers in the Context of Adoption

Pietro (P) and Bruno (B) are two Italian same-sex partners. They celebrated their marriage in The Netherlands, where they now live. They adopt the child Carla (C) in Thailand. Pietro and Bruno are registered as the parents of Carla in the Dutch civil status record. They seek the recognition of the Dutch adoption decision in Italy.

The Dutch authorities will record Carla as the child of her two fathers via the recognition of the decision on adoption.

### 1. Scope of the Regulation

Under the **Commission's Proposal**, the case will not fall within the Proposal's scope.

Under **ELI Proposal**, the case would fall under the Regulation's scope and the rules of the HCCH 1993 Adoption Convention would be applied in addition to those of the Regulation.

### 2. Recognition of the Adoption and Certification

As this case falls outside of the **Commission's Proposal**, the HCCH 1993 Adoption Convention will apply.

Under **ELI Proposal**, the Dutch authorities may issue an ECF, which will be accepted in Italy under the common rules of the proposed Regulation.

In addition to the guarantees provided by the 1993 HCCH Adoption Convention (in particular its Article 30), Dutch authorities, will, in the same record created to guarantee children's right to know their origins, keep all relevant medical records enabling Carla to trace her ascendants. Provided with this information, the Italian authority would receive: 1. the ECF allowing the child to prove the child-parent relation with her co-fathers; and 2. the ECF electronic number enabling the child to trace her origins upon request.

### 3. Conclusions

In the **Commission's Proposal**, the recognition of the adoption depends on national rules.

In **ELI Proposal**, Carla would benefit from the simplification and guarantees provided by the ECF.

# Introduction

## Background

‘Freedom of movement’ is both an instrument and the result of the EU process of European market integration and trade liberalisation. Identifying and removing all possible obstacles to the four fundamental freedoms – and to the freedom of movement of workers in particular – is essential to achieve the ambitious goal set by the Lisbon Agenda of making Europe ‘the most competitive and dynamic *knowledge-based economy* in the world’.<sup>6</sup> As of the Amsterdam Treaty entry into force in 1999, the EU has elaborated legal instruments which attempt to coordinate family law rules of different nature and content, despite Member States’ different sensitivities in these matters. After the creation of EU citizenship by the Maastricht Treaty (1993), which superseded the purely economic notion of workers’ freedom of movement, the EU addressed indirect barriers to citizens’ mobility, such as those stemming from the personal and intimate sphere of individuals. EU citizens’ full enjoyment of the single market is challenged by the necessity of their families’ integration into a different Member State. To this end, the EU has developed a shared competence in cross-border family matters through the Area of Freedom, Security and Justice, and has used Article 81 TFEU, Article 20 TEU, Articles 326-334 TFEU, as well as Article 216 TFEU to contribute to the evolution of cross-border family law. Whilst in matrimonial matters and in matters of parental responsibility, maintenance obligations, and succession, all Member States have agreed to confer competence to the EU, in other matters – such as in the matter of the law applicable to divorce and legal separation, of matrimonial property regimes and property consequences of

registered partnerships – only a limited number of them have agreed to enhanced cooperation. Other Member States, instead, prefer to continue to use national private international law rules to regulate cross-border cases, also in order to safeguard values reflected in their national constitutions.

Regarding the non-harmonised national private international law rules, the CJEU used the EU primary law, especially the EU citizenship and free movement of EU citizens, to indirectly control certain results in the treatment of cross-border situations in family law. The first cases before the CJEU dealt with questions of name law and developed the rule that a name validly acquired in one Member State has to be accepted in all other Member States as long as the acceptance does not violate the national public policy.<sup>7</sup>

The Court was more cautious in questions of same-sex marriage<sup>8</sup> and – most important for this Report – filiation.<sup>9</sup> While it referred to the aforementioned case law regarding names, it decided that a Member State has to recognise a child-parent relationship, only to the extent necessary to guarantee that the child enjoys all the rights that the child derives from EU law, and in particular the right to move and reside freely within the territory of the Member States as guaranteed in Article 21(1) TFEU. A rejection for reasons of national public policy is excluded from the application of EU law. The ruling on the recognition of a same-sex marriage was also limited to the application of EU secondary law. The portability of a status in the context of national law, where, following

<sup>6</sup> European Council. (2000). Presidency Conclusions Lisbon European Council 23–24 March.

<sup>7</sup> See Cases C-148/02, 2 October 2003, Garcia Avello; C-353/06, 14 October 2008, Grunkin & Paul; C-208/09, 22 December 2010, Sayn-Wittgenstein; C-391/09, 12 May 2011, Runevič-Vardyn, C-438/14, 2 June 2016, Bogendorff von Wolffersdorff, C-541/15, 8 June 2017, Freitag.

<sup>8</sup> Case C-673/16, 5 June 2018, Coman et al.

<sup>9</sup> Cases C-490/20, 14 December 2021, ‘Pancharevo’ and C-2/21, 24 June 2022, Rzecznik Praw Obywatelskich.

the logic of the name law cases, a non-acceptance of the status can only be based on a limited national public policy exception, remained unclear.

The last significant development in the harmonisation of private international law rules in family law, and also incentivised by the CJEU decisions on filiation, is the European Commission's Proposal for a Regulation on Parenthood published in December 2022.

## Aim

The main challenges brought by societal and scientific evolution in filiation matters have to be addressed with a sound understanding of the fundamental rights at stake. A legislative framework grounded in fundamental human rights principles, particularly equality and non-discrimination, with a special emphasis on the rights of children and women, will enhance the acceptability of EU intervention across all Member States.

The Project Team has identified two main challenges to a common targeted policy favouring the recognition of filiation among Member States.

The first derives from the different understanding of the concept of child-parent relationship among Member States and is testified by the persistent rejection by some Member States of the 'contractualisation' of status (see below, Section 2.2). Each Member State gives relevance to the different role that a putative parent has in the birth of a child and contemplates distinct legal rules, tailored to specific scenarios such as biological filiation, adoption, and surrogacy arrangements. The Commission's Proposal's generic terminology of 'establishment of parenthood' conceals these crucial distinctions. This simplification creates unnecessary risks by failing to acknowledge the specific challenges to recognition, unique to

each scenario. This impedes the development of targeted solutions to address these distinct obstacles effectively.

To overcome the different understanding of the concept of child-parent relationship, the Project Team has prioritised language accuracy.

The concept of 'establishment of parenthood' has been disaggregated to reflect the diverse mechanisms through which national authorities verify and legally recognise parent-child relationships within their respective legal systems, in line with the *acquis* of the conspicuous line of cases of the European Court of Human Rights.<sup>10</sup> It has appeared that whilst existing biological and genetic filiation are ascertained by proving the event of birth from a woman or through DNA testing, all other child-parent relationships which are independent from biology have to be socially construed and constituted in a specific moment and in conformity with a given legal order.

The second main challenge arises from significant political and scientific resistance in some countries to accept that other countries consider it permissible to constitute a filiation bond by a contractual relationship. Such reluctance stems partly from historical traumas such as the mass violations of women's and children's rights experienced with illegal adoptions. Those findings noticeably led the Dutch Minister for Legal Protection, Sander Dekker, to suspend intercountry adoptions in 2021, following a government commission report that uncovered systematic abuses from 1967 to 1998.<sup>11</sup> On 16 April 2024, the Dutch House of Representatives adopted measures to end inter-country adoption *tout court* on the assumption that no regulatory framework would efficiently prevent the risk of abuses being perpetrated by the existing specialised agencies abroad. On 29 January 2025, Switzerland's Federal Council also decided to end international adoptions based on expert findings that a systemic overhaul

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<sup>10</sup> See eg the cases *Eski v Austria*, Application No 21949/03, 25 January 2007; *Mennesson v France*, Application No 65192/11, 26 June 2014; *Paradiso and Campanelli v Italy* Application No 25358/12, 24 January 2017 (GC); *D v France*, Application No 11288/18, 16 July 2020; *Valdis Fjölfnisdóttir and Others v Iceland* Application No 71552/17, 18 May 2021; *C.E. and others v France* Application Nos 29775/18 and 29693/19 24 March 2022; *A.L. v France* Application No 13344/20 07 April 2022; *K.K. and Others v Denmark*, Application No 25212/21, 6 December 2022; *A et B v France* Application No 12482/21, 8 June 2023.

<sup>11</sup> The 2021 Joustra Commission report had exposed serious issues like child trafficking, baby farming, document falsification, and forced separations of mothers from their children, leading to a government apology to those affected and an initial suspension of international adoptions.

cannot eliminate risks of irregular practices.<sup>12</sup> These findings demonstrate the urgent need for robust safeguards and increased cooperation in cross-border procedures affecting children's filiation status.

Risks of the commodification of children are also inherent to the 'contractualisation' of the birth of a child, and especially acute when the agreements on the birth of the child are promoted by commercial entities, such as fertility clinics or other transnational entities operating through standardised contracts and commercialising services for which they need women serving as egg donors and surrogate mothers.

To diminish risks and prevent criticism related to these risks, the Project Team introduced important safeguards that are similar to those introduced by the 1993 Hague Adoption Convention.

The Project Team agreed that, from a child rights perspective, the recognition of filiation should be favoured in all cases in which the respect of safeguards allows a presumption of compliance with the best interests of the child, and subject to a closer scrutiny by the national authority which is closer to the child, absent those safeguards. Following this goal, it is proposed to strengthen proximity in the jurisdiction rules. This would also reduce forum shopping and favour unanimity and mutual trust.

In line with the proposed Regulation, most of the already existent EU *acquis* and the case law of the CJEU, as well as the rules applicable to the recognition include public policy exceptions, as in Article 31(1) (a). The latter provides a safeguard against decisions from Member States, which do not adequately take the best interests of the child into account and do not respect the fundamental right of the child to know their origins.

To avoid limping statuses, where children have different or no parents depending on the Member State, a decentralised register is deemed both insufficient and inefficient. It is proposed that a European Certificate of Filiation could be created by

the competent legal order, uploaded to a centralised register. This would have the advantage of allowing each and every Member State to retrieve the same certificate from the same register, subject to the same conditions and safeguards.

To reconcile the needs of Member States regulating the 'contractualisation' of status with those excluding it, it is essential to provide a two-track system of recognition of filiation within the EU.

In addition, the interaction between EU private international law and Member States' rules in matters of filiation should be governed by the principle of *favor filiationis*. This would mean that, differently from other regulations, the rules in Article 66 should be changed to introduce an exception to the principle of subsidiarity in order to limit the operation of concurrent EU competence, allowing Member States to continue to apply their own rules on recognition when they are more favourable to the recognition of filiation.

This approach ensures that the recognition of filiation is governed by the overriding principle of maintaining family ties while respecting national legal traditions.

## Methodology and Structure

The following chapters contain a critical analysis of the entire text of the Commission's Proposal. The reader will find tables that contain the black letter rules proposed, followed by an explanation of the rationale for ELI proposed amendments. ELI amendments are presented by directly correcting the text of the Commission's Proposal when the changes are minimal, whereas two separate columns – one with the actual text and one with the proposed amendments – are used in the case of more significant changes, to improve readability.

The amendments and explanations follow the structure of the Commission's Proposal: the main

<sup>12</sup> See the press release at: <https://www.news.admin.ch/fr/nsb?id=103957>.

discursive criticism has been introduced in the comments to the recitals; the comments that follow the Article-by-Article analysis are shorter, yet they pedagogically redirect the reader to the previous longer and more explanatory analysis that comments on the recitals. This structure makes the Articles easier to read.

The report focuses on key provisions and does not contain comments or proposed amendments to each provision.

Despite being quoted, the Annexes to the Commission's Proposal still require a thorough review to ensure their coordination with the text of the proposed amendments.

## Colophon

The report is the result of a collective reflection of the entire Project Team, mainly held during a workshop held in Vienna in July 2024 and further developed through contributions from Observers and ELI Council Members. Ilaria Pretelli and Susanne Gössl acted as Reporters and authored the Executive Summary, the Recommendations and, with the help of the Team, the examples. Although the Report is the fruit of a collective effort, Ilaria Pretelli may be regarded as responsible for drafting the Introduction, Sections 1.1. to 1.3, 1.5, 1.6., 2.1, 2.2., 3., Chapters VI and VII, Conclusions, and Chapter I with Cristina González Beilfuss, Martina Melcher, Susanne Gössl, Sharon Shakargy and Laima Vaige; Patrick Wautelet for paras 1.4., 6 and Chapter V; Sharon Shakargy for paras 2.3. and 2.4; Cristina González Beilfuss for para 4 and Chapter II; Martina Melcher and Susanne Gössl for para 5 and Chapter III; Fabienne Jault-Seseke for para 6 and Chapter IV; Laima Vaige for Chapters VIII and IX.

The Report also benefitted from a discussion on the operability of an EU centralised register between the first Reporter and Hans van Loon, followed by a second one with Steve Heylen. The Reporters extend their gratitude to both.

Substantial input was provided by Observers and Members of our Advisory Committee and ELI's Scientific Director, Christiane Wenderhost, who contributed significantly to the development of this document and highlighted specific concerns from diverse perspectives. Written comments were provided to the first draft by: Velina Todorova on behalf of the UN Committee on the Rights of the Child; Laurence Bordier on behalf of Child Identity Protection (CHIP); Giovanna Ricciardi on behalf of the International Social Service (ISS); Anna Zobnina representing European Network of Migrant Women (ENoMW); and, before they decided to withdraw from their role of Observers, the joint comments by ILGA-Europe and the Network of European LGBTIQ\* Families Associations (NELFA). Their critical assessments led the Project Team to refine the legal design of the Report, introduce examples on the functioning of the proposed rules, and clarify the legal foundations and scientific rationale underlying the adopted recommendations.

The technical complexity of this Report demands considerable patience from readers and meticulous precision in its presentation. While accepting full responsibility for any oversights or errors, the reporters wish to acknowledge the significant improvements proposed by Bianca Scraback and Rachele Zamperini.

The reporters are also particularly grateful to Tomasz Dudek, whose dedication and expertise have been instrumental throughout the whole project.

# PART I – General Comments Through the Recitals

## 1. Title of the Regulation

<p>EUROPEAN COMMISSION</p> <p>Brussels, 7.12.2022</p> <p>COM(2022) 695 final -2022/0402 (CNS)</p> <p>Proposal for a COUNCIL REGULATION</p> <p>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</p>	<p>EUROPEAN COMMISSION</p> <p>Brussels, 7.12.2022</p> <p>COM(2022) 695 final -2022/0402 (CNS)</p> <p>Proposal for a COUNCIL REGULATION</p> <p>on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of <b>filiation</b> and on the creation of a European Certificate of <b>Filiation</b></p>
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### 1.1 Key Aspects

- The current EU legal framework creates an inconsistency where a child-parent relationship must be recognised for freedom of movement purposes, even when that same relationship is not legally acknowledged within the Member State where freedom of movement is being exercised;
- The Commission's Proposal attempts to solve this contradiction by harmonising rules of private international law;
- Ideally, if a Member State enjoys exclusive jurisdiction for the creation of a child-parent relationship by harmonised rules, the contradiction disappears, and all Member States may be required to recognise both the relationship and the exclusive competence of the identified Member State in the creation of the latter.

### 1.2. Priorities Emerging From the Text and Methods for Their Pursuit

The Commission's Proposal addresses a crucial aporia in the current framework, where EU law requires recognition of a child-parent relationship resulting from valid documentation produced in a Member State in order to ensure freedom of movement,<sup>13</sup> but this recognition does not automatically extend to substantive

<sup>13</sup> CJEU 14 December 2021, Case C-490/20 (*V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*), ECLI:EU:C:2021:1008.

rights under national law.<sup>14</sup>

The legal contradiction directly affects the rights of the child in violation of international legal instruments in force. In line with the Proposal, it is therefore essential to find ways to ensure smooth coordination of the rules governing filiation, regardless of how diverse they are at the national level.

Approaches to marriage and filiation in substantive law demonstrate significant variation not only among EU Member States but also within each of these jurisdictions over time, often following complex and sometimes contradictory developmental patterns.

In using private international law as a tool for harmonisation, a range of possible evolutions has to be taken into account to ensure that the forthcoming regulation will offer efficient and sustainable solutions.

### 1.3. The English Title of the Regulation: Filiation vs Parenthood or Parentage

The title of the French, Spanish, Italian, Portuguese and Romanian versions of the Commission's Proposal use a term derived from the Latin *Filiatio*, *filiationis*.<sup>15</sup> This term, in turn, derives from the Indo-European root of the verb 'suckling', which is the instinctive act allowing the new-born to survive.<sup>16</sup> The various declinations of the term 'filiation' immediately bring to mind the child and yet also, regardless of their age, the new generation as compared to the previous one.

The same word exists in English, although its social diffusion varies across the different English-speaking countries.<sup>17</sup> The Proposal explicitly acknowledges this term in Recital 24. In addition to being used and easily understandable, this word has the incomparable advantage of being child-centred.<sup>18</sup>

In spite of this, The Hague Conference uses the word 'parentage' for its project. A similar emphasis on the parental side of the child-parent relationship is evident in the English and German versions of the Proposal, which read 'parenthood' and '*Elternschaft*' respectively.

The following Section considers the available words to designate the relationship between a child and each of their parents from a comparative perspective.

### 1.4. Comparative Assessment: a Choice Not Set in Stone

The parent-centred approach of the English and German versions of the Proposal has led to a clarification contained in Recital 24 which is not present in other language versions (French, Italian, Spanish, etc).

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<sup>14</sup> See the Supreme Administrative Court of the Republic of Bulgaria, 1 March 2023, no 2185 following the 'Pancharevo' decision, stating that the child is not Bulgarian due to the lack of maternal ties between the child and the Bulgarian mother, and thus there is no obligation for the Bulgarian authorities to issue a birth certificate for her ([https://ujchmura-my.sharepoint.com/:w/g/personal/anna\\_wysocka\\_uj\\_edu\\_pl/ERQ5SHVfr-hlhfhHpBnwj2oBEqMaMnKR1LvT4Deb9ZMeOA?rttime=h8fTRv4v3Ug](https://ujchmura-my.sharepoint.com/:w/g/personal/anna_wysocka_uj_edu_pl/ERQ5SHVfr-hlhfhHpBnwj2oBEqMaMnKR1LvT4Deb9ZMeOA?rttime=h8fTRv4v3Ug)).

<sup>15</sup> Respectively: *filiation*, *filiación*, *filiazione*, *filição*, *filiație*.

<sup>16</sup> 'Filius' in: Etymological Dictionary of Latin Online, edited by: Michiel de Vaan (PhD 2002). Consulted online on 02/02/2024 <<https://dictionaries.brillonline.com/search#dictionary=latin&id=la0575>> First published online: October 2010.

<sup>17</sup> Some US and Canadian laws use the term: see the 'Order of Filiation' of the New York Family Court Act Section 564,-5-7; the standard legal form MS-61195 used to file a 'Complaint for Order of Filiation' in the State of Mississippi-, the Title 2 'Filiation' of Book 2 of the English version of the Civil Code of Quebec, etc.

<sup>18</sup> See, for instance, the key theme on Article 8 of the European Court of Human Rights, titled 'filiation': <https://ks.echr.coe.int/documents/d/echr-ks/filiation>. The term also appears in several decisions of the ECtHR (see, for instance, the cases of: *Fabris v France*, App no 16574/08, 7 February 2013; *X, Y and Z v the UK*, App no 21830/93, 22 April 1997; and *S.H. and others v Austria*, App no 57813/00, 3 November 2011).

The English version of Recital 24 states that ‘parenthood [is] also referred to as filiation’; and the German one that ‘*Elternschaft [ist] auch als Abstammung bezeichnet*’. The same reference to alternative wording can be found in the explanations provided by the Commission with the Proposal.<sup>19</sup> This suggests at the very least that the wording is not set in stone but is rather a matter of choice.<sup>20</sup>

This is confirmed if one looks at the EU *acquis*. The only EU Regulation which refers explicitly to the legal relationship between a child and a parent – the Brussels IIa Regulation – does not use the word ‘parenthood’: rather, Article 1(4)(a) refers to a ‘parent-child relationship’. It is striking, however, that the French (‘*filiation*’), Italian (‘*filiiazione*’) and Spanish (‘*filiación*’) versions all use the same concept as that used in the Commission’s Proposal.<sup>21</sup> It should be noted that the Brussels II bis Regulation already used the exact same words.<sup>22</sup>

The concept of ‘parenthood’ does not seem to enjoy wide recognition in the current state of the law. National codifications use various terms to designate the relationship between a child and a parent, which are closer to the concept of ‘filiation’: ‘*Abstammung*’ (§ 19 Einführungsgesetz zum Bürgerlichen Gesetzbuche, EGBGB); ‘*filiation*’ (Article 66 ff French version of the Swiss PILAct); ‘*filiiazione*’ (Article 66 ff Italian version of the Swiss PILAct); ‘*Kindesverhältnis*’ or ‘*Abstammung*’ (Article 68 German version of the Swiss PILAct); ‘*filiation*’ (Article 59 of the Draft French Code).<sup>23</sup>

The practice of The Hague Conference confirms that the term ‘parenthood’ does not (yet) belong to the commonly used concepts. The 1996 Hague Child Protection Convention uses the concept of ‘parent-child relationship’ (and of ‘*filiation*’ in the French version, ‘*Filiación*’ in the Spanish version) to exclude questions relating to the establishment or contesting of such a relationship from its scope (Article 4(a)).

The language used in the framework of the Hague Project on ‘parentage/surrogacy’ has varied. The earlier documents, such as the study carried out in 2011 (Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Agreements) used various terms, such as ‘parent-child relationships (filiation)’; ‘egal parenthood’; ‘legal parentage of children’; ‘legal parentage’; ‘legal parentage (filiation)’. A more recent document, issued in 2014, the ‘Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements’, uses the concept of ‘legal parentage’.<sup>24</sup>

This was confirmed in the Final Report issued by the Experts’ Group in 2022: in this report, the term used is that of ‘legal parentage’ and, in French, that of ‘*filiation*’.<sup>25</sup>

Finally, one can also note that the European Court of Human Rights does not exclusively use the term ‘parenthood’: rather, it seems to give preference to the terms ‘legal parent-child relationship’ and, in French,

<sup>19</sup> See the Explanatory Memorandum, p 13.

<sup>20</sup> In Dutch the word ‘*Afstamming*’ is used in the heading and basically means that someone descends from someone. It is thus rather neutral – it does not emphasise the parent or the child but starts from the one who is the descendant. In the Dutch version, Recital 24 refers to ‘*filiatie*’ as alternative, which is just a direct translation of the French and not a word that is often used. The Danish and Swedish words in the heading seem to correspond to parenthood/parentage. The Danish version contains an alternative in Recital 24 (slægtskab i lige linje, which seems to translate to something like relationship in direct line), but the Swedish does not.

<sup>21</sup> Dutch: *familierechtelijke betrekkingen* (broader than parent-child even); German: *Eltern-Kind-Verhältnisses*; Danish: *forældre-barn-forhold* (parent-child relationship); Swedish: *föräldraskap* (parenthood).

<sup>22</sup> The Maintenance Regulation uses the concept of ‘parentage’ (Article 1 of the 2009 Maintenance Regulation and Recital 25). It seems that this concept does not refer specifically to the relationship between a parent and a child. Rather, what is meant is the existence of a family relationship based on a biological link.

<sup>23</sup> *Afstamming* (Article 61, 62 and 63 Belgian PIL code); *Afstamming* (Title 5, Book 10 of the Dutch civil code) – interestingly the heading uses ‘*afstamming*’ but the provisions use ‘*familierechtelijke betrekkingen*’.

<sup>24</sup> And ‘legal maternity’; ‘legal paternity’.

<sup>25</sup> 2022 Doc N°1 (Parentage / Surrogacy Experts’ Group: Final Report ‘The feasibility of one or more private international law instruments on legal parentage’).

‘lien de filiation’,<sup>26</sup> although the terminology used may vary.<sup>27</sup>

### 1.5. Pursuing the Best Interests of the Child as of the Title of the Regulation and the Certificate

The choice of a child-centred approach, rather than a parent-centred one, goes far beyond a linguistic preference: when the focus is on the child, it becomes easier to focus on the pursuit of their best interests.

Filiation, parentage and parenthood all refer to the relationship between two persons. The same is true for ‘parent-child relationship’ or ‘child-parent relationship’.

These terms are not neutral, as names suggest concepts, and emphasising one pole of the relationship at the expense of the other can radically alter the perspective that comes to mind.

According to the historian Anne Lefebvre-Teillard,<sup>28</sup> it was precisely the social diffusion of the lexical innovation introduced by the use of the French term ‘*filiation*’ in legal documents that prepared the creation of rules that were increasingly advantageous to the child and the new generation, in the presence of conflicting interests with the old one. This paradigm shift is also reflected by the transformation of *patria potestas* in parental responsibility. Parental authority evokes a bundle of rights of parents, especially fathers, towards children. It suggests that children have duties or even obligations towards their parents, the most important of which is the ‘duty of obedience’, which has been, and continues to be, extensively codified in written statutes.<sup>29</sup> The power (*potestas*) also evokes the idea of property. On the contrary, parental responsibility is suggestive of, and understood as, a bundle of duties which parents must fulfil. When parents cannot fulfil their parental duties, their children’s universal rights may be irreparably damaged. This gradual awareness led to the adoption of the UN Convention on the Rights of the Child in 1989, which recognises that the child is a subject of rights rather than an object of rights. As observed by the Committee on the Rights of the Child on Article 5 of the Convention, ‘as children grow, develop and mature their capacities to exercise their rights also evolve. The importance of parents’ responsibility needs to continually adjust the levels of support and guidance they offer to a child. These adjustments should take account of children’s interests and wishes as well as the children’s capacities for autonomous decision-making and comprehension of their best interests.’<sup>30</sup>

Against this background, the present Report argues in favour of aligning the parent-centred versions of the Regulation to the French one, by putting the strongest emphasis on the child. This will also prevent practitioners from presenting the certificate as a ‘patent’ of parenthood for adults, instead of a means by which children may prove their own civil status and legal identity. In line with this factual approach, the Report uses the term mother, father, and parent as simple biological concepts – to the same extent as the terms egg, sperm, and

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<sup>26</sup> ECHR, Mennesson, para 96 : ‘respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the *legal parent-child relationship* ...; an essential aspect of the identity of individuals is at stake where the *legal parent-child relationship* is concerned [...]’. See also ECHR, Advisory Opinion of 10 April 2019 concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, para 13, 27 and 32: legal parent-child relationship (*lien de filiation*) » / « lien de filiation »).

<sup>27</sup> In a more recent case, the ECHR used the concept of ‘parental link’ (ECHR 3<sup>rd</sup> section, Case of *Valdís Fjölnisdóttir And Others v Iceland*, (Application no 71552/17) 18 May 2021, 71, 73

<sup>28</sup> Lefebvre-Teillard, *Filiation*, in *Dictionnaire de la culture juridique*, Paris, p 720: ‘le lien de filiation en tant que « lien de droit a longtemps été pensé et aménagé principalement en faveur des ascendants, plus que des descendants, dans l’intérêt des parents plus que dans celui de l’enfant. A cet égard le vocabulaire est très révélateur : il faut attendre la fin du XII siècle pour que le terme ‘*filiatio*’, emprunt tout comme ceux de *paternitas* et de *maternitas*, à la théologie, fasse son apparition dans le vocabulaire juridique. Il traduit une conception du lien qui part du fils pour aller vers le père, une relation désormais aménagée dans l’intérêt de l’enfant et non plus l’inverse.’

<sup>29</sup> Pretelli, *Identity and Civil Status of Children Conceived through Cross-Border Procreation Contracts*, *Yearbook of Private International Law*, Volume 25 (2023/2024), pp 248-9.

<sup>30</sup> Statement of the Committee on the Rights of the Child on Article 5 of the Convention on the Rights of the Child, at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/statements/CRC-Article-5-statement.pdf>.

gametes – although these terms do not necessarily reflect the legal concepts which are used to describe child-parent relationships in every Member State.

The use of the word ‘filiation’ in the name of the certificate envisaged by the ELI Proposal aims at suggesting, in the English version, which is the one most often referred to, that the newly coined document is an instrument which primarily addresses the needs of every person to have a legally certain identity and family ties.

### 1.6. The Right to Move and Reside Freely as Part of Parental Responsibility

The wording proposed would also clarify the difference between filiation and parental responsibility: which are, from a legal perspective, two very different kinds of relationship between a child and each of her parents. In the discourse about ‘social parents’, these two notions may lead to confusion between two very different legal concepts.

In this respect, it is important to recall that the right of a child to move and reside freely within the EU does not directly derive from the recognition of a child-parent relationship, since it is part of parental responsibility. A child will enjoy such a right only to the extent that the child’s parent also has parental responsibility.

In other words, the recognition of a child-parent relationship is neither sufficient nor necessary to enjoy freedom of movement within the EU.

## 2. Recitals (1) to (30)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(3) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) The Union has set itself the objective of creating, maintaining and developing an area of freedom, security and justice in full respect of fundamental rights in which the free movement of persons and access to justice are ensured. For the gradual establishment of such an area, the Union is to adopt measures aimed at ensuring the mutual recognition between Member States of judgments and decisions in extrajudicial cases in civil matters and the compatibility of the rules applicable in the Member States concerning conflict of laws and jurisdiction in civil matters.

(2) This Regulation concerns the recognition in a Member State of the parenthood of a child as established in another Member State. It aims to protect the fundamental rights and other rights of children in matters concerning their parenthood in cross-border situations, including their right to an identity<sup>22</sup>, to non-discrimination<sup>23</sup> and to a private and family life<sup>23</sup>, taking the best interests of the child as a primary consideration<sup>25</sup>. This Regulation also aims to provide legal certainty and predictability and to reduce litigation costs and burden for families, national courts and other competent authorities in connection with proceedings for the recognition of parenthood in another Member State. To attain these aims, this Regulation should require Member States to recognise for all purposes the parenthood of a child as established in another Member State.

(2) This Regulation concerns the recognition in a Member State of the **filiation** of a child as **ascertained or constituted** in another Member State. It aims to protect the fundamental rights and other rights of children in matters concerning their **filiation** in cross-border situations, including their right to **know their origins**<sup>31</sup>, **their right to** an identity<sup>32</sup>, to non-discrimination<sup>33</sup> and to a private and family life<sup>34</sup>, taking the best interests of the child as a primary consideration.<sup>35</sup> This Regulation also aims to **protect families from discrimination on the basis of sexual orientation or sex of family members**. To attain these aims, this Regulation **introduces rules of private international law, which should provide legal certainty and predictability, thereby reducing** litigation costs and burden for families, national courts and other competent authorities in connection with proceedings for the recognition of filiation in another Member State.

To attain these aims, this Regulation should require Member States to recognise the **filiation** of a child, as **ascertained or constituted** in another Member State, **on the basis of the procedure established by this Regulation**.

**Aware that the rights stemming from a status might vary between legal systems, this Regulation aims at reducing risks of limping statuses which affect children's identity whenever a child-parent relationship exists in a Member State but is neglected in another Member State.**

<sup>31</sup> The Committee's recommendations are available by key word in the page of the UN Commissioner for Human Rights: Universal Human rights index: <https://uhri.ohchr.org/en/search-human-rights-recommendations>.

<sup>32</sup> Article 8 of the UN Convention on the Rights of the Child.

<sup>33</sup> Article 2 of the UN Convention on the Rights of the Child, Article 21 of the Charter of Fundamental Rights of the European Union.

<sup>34</sup> Article 9 of the UN Convention on the Rights of the Child, Articles 7 and 24 of the Charter of Fundamental Rights of the European Union.

<sup>35</sup> Article 3 of the UN Convention on the Rights of the Child, Article 24 of the Charter of Fundamental Rights of the European Union.

<p>(3) Articles 21, 45, 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) confer on Union citizens the right to move and reside freely within the territory of the Member States. They comprise the right of Union citizens not to face any obstacles and the right to equal treatment with nationals in the exercise of free movement, including as regards certain social advantages, defined as any advantage which will likely facilitate mobility.<sup>36</sup> This right also applies to family members of Union citizens as defined by Directive 2004/38/EC of the European Parliament and of the Council<sup>37</sup> in matters related to scholarships, admission to education, reductions in public transportation costs for large families, reduced student fares for public transport and reduced museum entrance fees.<sup>38</sup> The protection afforded by the Treaty provisions on free movement also includes the right to have a name lawfully attributed in a Member State recognised in other Member States.<sup>39</sup></p>	
<p>(4) The Court of Justice of the European Union ('the Court of Justice') has ruled that a Member State is required to recognise a parent-child relationship for the purposes of permitting a child to exercise without impediment, with each parent, the right to move and reside freely within the territory of the Member States as guaranteed in Article 21(1) TFEU, and to exercise all the rights that the child derives from Union law.<sup>40</sup> The case-law of the Court of Justice does not, however, require Member States to recognise, for purposes other than the exercise of the rights that the child derives from Union law, the parent-child relationship between the child and the persons mentioned on the birth certificate drawn up by the authorities of another Member State as being the child's parents.</p>	
<p>(5) Under the Treaties, the competence to adopt substantive rules on family law, such as rules on the definition of family and rules on the establishment of the parenthood of a child, lies with the Member States. However, pursuant to Article 81(3) TFEU, the Union can adopt measures concerning family law with cross-border implications, in particular rules on international jurisdiction, on applicable law and on the recognition of parenthood.</p>	<p>(5) Under the Treaties, the competence to adopt substantive rules on family law, such as rules on the definition of family and rules <b>on the ascertainment and constitution of filiation</b>, lies with the Member States. However, pursuant to Article 81(3) TFEU, the Union can adopt measures concerning family law with cross-border implications, in particular rules on international jurisdiction, on applicable law and on the recognition of <b>a child-parent relationship. For the purposes of this Regulation, the filiation of a child can be defined autonomously.</b></p>

<sup>36</sup> Judgments of the Court of Justice of 31 May 1979, *Even*, C-207/78, ECLI:EU:C:1979:144 and of 8 June 1999, *Meeusen*, C-337/97, EU:ECLI:C:1999:284.

<sup>37</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004).

<sup>38</sup> For instance, judgments of the Court of Justice of 3 July 1974, *Casagrande v Landeshauptstadt München*, C-9/74, ECLI:EU:C:1974:74; of 27 September 1988, *Matteuci*, C-235/87, ECLI:EU:C:1988:460; of 30 September 1975, *Cristini v S.N.C.F.*, C-32/75, ECLI:EU:C:1975:120; and of 4 October 2012, *Commission v Austria*, C-75/11, ECLI:EU:C:2012:605

<sup>39</sup> For instance, judgments of the Court of Justice of 2 October 2003, *Carlos García Avello v État belge*, Case C-148/02, ECLI:EU:C:2003:539; of 14 October 2008, *Grunkin-Paul*, Case C353/06, ECLI:EU:C:2008:559; of 8 June 2017, *Freitag*, Case C541/15, ECLI:EU:C:2017:432.

<sup>40</sup> Judgment of the Court of Justice of 14 December 2021, *V.M.A. v Stolichna obshtina*, C 490/20, ECLI:EU:C:2021:1008.

- (6) In conformity with the Union's competence to adopt measures on family law with cross-border implications, the 2010 'European Council Stockholm programme – An open and secure Europe serving and protecting citizens'<sup>41</sup> invited the Commission to consider the problems encountered with regard to civil status documents and the access to registers of such documents and, in the light of its findings, to submit appropriate proposals and consider whether the mutual recognition of the effects of civil status documents could be appropriate, at least in certain areas. The Commission Action Plan Implementing the Stockholm Programme<sup>42</sup> envisaged a legislative proposal for dispensing with the formalities for the legalisation of documents between Member States and a legislative proposal on the mutual recognition of the effects of certain civil status documents, including as regards birth, parenthood and adoption.
- (7) In 2010 the Commission published a Green Paper entitled 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' by which it launched a broad consultation on matters relating to the free movement of public documents and the recognition of the effects of civil status records. Among others, it considered the possibility of introducing a European civil status certificate that would facilitate the cross-border recognition of civil status in the Union. The consultation aimed to gather contributions from interested parties and the general public with a view to developing Union policy in these areas and the relevant legislative proposals. In 2016, the Union legislator adopted Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union<sup>43</sup>, including documents on birth, parenthood and adoption.
- (8) While the Union has competence to adopt measures on family law with cross-border implications such as rules on international jurisdiction, applicable law and the recognition of **parenthood filiation** between Member States, to date the Union has not adopted provisions in those areas as regards **parenthood filiation**. The Member States' provisions currently applicable in these areas differ.
- (9) At Union level, a number of Union instruments deal with certain rights of children in cross-border situations, in particular Council Regulation (EC) No 4/2009<sup>44</sup>, Regulation (EU) No 650/2012 of the European Parliament and of the Council<sup>45</sup> and Council Regulation (EU) 2019/1111.<sup>46</sup> However, these Regulations do not include provisions on the **establishment ascertainment, constitution** or the recognition of **parenthood filiation**. For its part, Regulation (EU) 2016/1191 of the European Parliament and of the Council<sup>47</sup> includes public documents on birth, **parenthood filiation** and adoption in its scope, but this Regulation deals with the authenticity and the language of such documents and not with the recognition of their contents or effects in another Member State.

<sup>41</sup> OJ C 115 of 4.5.2010, p 1.

<sup>42</sup> COM(2010) 171 final.

<sup>43</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, 26.7.2016, p 1).

<sup>44</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10.1.2009, p 1).

<sup>45</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, 27.7.2012, p 107).

<sup>46</sup> 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 L 178, 2.7.2019, p 1).

<sup>47</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, 26.7.2016, p 1).

<p>(10) As a result of the absence of Union provisions on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood between Member States, families may encounter difficulties in having the parenthood of their children recognised for all purposes within the Union, including when they move to another Member State or return to their Member State of origin.</p>	<p>(10) As a result of the absence of Union provisions on international jurisdiction and applicable law for the <b>ascertainment or constitution of filiation</b> in cross-border situations and on the recognition of filiation between Member States, <b>children</b> may encounter difficulties in having <b>their filiation</b> recognised for all purposes within the Union <b>with the risk of impairing their right to enjoy family life, in particular</b> when they move to another Member State or return to their Member State of origin.</p>
<p>(11) Children derive a number of rights from parenthood, including the right to an identity, a name, nationality (where governed by <i>ius sanguinis</i>), custody and access rights by their parents, maintenance rights, succession rights and the right to be legally represented by their parents. The non-recognition in a Member State of the parenthood established in another Member State can have serious adverse consequences on children's fundamental rights and on the rights that they derive from national law. This may prompt families to start litigation to have the parenthood of their child recognised in another Member State, although those proceedings have uncertain results and involve significant time and costs for both families and the Member States' judicial systems. Ultimately, families may be deterred from exercising their right to free movement for fear that the parenthood of their child will not be recognised in another Member State for the purposes of rights derived from national law.</p>	<p>(11) Children derive a number of rights from <b>their filiation status</b>, including the right to an identity, a name, nationality (where governed by <i>ius sanguinis</i>), custody and access rights by their parents, maintenance rights, succession rights and the right to be legally represented by their parents. The non-recognition in a Member State of the <b>filiation ascertained or constituted by</b> another Member State can have serious adverse consequences on children's fundamental rights and on the rights that they derive from national law. <b>Child-parent relationships registered in one Member State are not always recognised, and therefore recorded, in another Member State. At present, the recognition of filiation statuses varies considerably depending on the proximity between the substantive laws of the respective Member States. The most acute differences which exist and which create obstacles to the recognition of status concern cases where the child-parent relationship is the consequence of a contractual agreement involving a fertility clinic, cases of co-motherhood or co-fatherhood and where the child has more than two parents. While most of these differences can be reconciled within the framework established by the Council of Europe's Convention on Fundamental Rights, the remaining disparities must be resolved through private international law. Harmonising private international law will prevent both families and Member States' judicial systems from incurring significant time and cost burdens and guarantee families' right to free movement, ensuring that the filiation of a child will be recognised in another Member State for the purposes of rights derived from national law.</b></p>

<p>(12) In 2020 the Commission announced measures<sup>48</sup> to ensure that the parenthood established in a Member State would be recognised in all other Member States. This initiative was included in the 2020 EU LGBTIQ Equality Strategy<sup>49</sup> and the 2021 EU Strategy on the rights of the child<sup>50</sup> as a key action to support equality and the rights of children. The European Parliament welcomed the Commission's initiative in its 2021 Resolution on LGBTIQ rights in the EU<sup>51</sup> and in its 2022 Resolution on the protection of the rights of the child in civil, administrative and family law proceedings.<sup>52</sup></p>	
<p>(13) This Regulation should not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, including Directive 2004/38/EC. For instance, Member States must already today recognise a parent-child relationship for the purposes of permitting children to exercise, with <del>each of their two parents</del>, the right to move and reside freely within the territory of the Member States without impediment, and to exercise all the rights that the child derives from Union law. This Regulation does not provide for any additional conditions or requirements for the exercise of such rights.</p>	<p>(13) This Regulation <b>does</b> not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, including Directive 2004/38/EC. For instance, Member States must already today recognise a <b>child-parent</b> relationship for the purposes of permitting children to exercise, with a <b>parent exercising parental responsibility</b>, the right to move and reside freely within the territory of the Member States without impediment, and to exercise all the rights that the child derives from Union law. This Regulation does not provide for any additional conditions or requirements for the exercise of such rights.</p>

<sup>48</sup> State of the Union Address by Commission President von der Leyen at the European Parliament Plenary, 20 September 2020.

<sup>49</sup> Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM(2020) 698 final.

<sup>50</sup> EU Strategy on the rights of the child, COM(2021) 142 final.

<sup>51</sup> [European Parliament resolution of 14 September 2021 on LGBTIQ rights in the EU \(2021/2679\(RSP\)\)](#).

<sup>52</sup> European Parliament resolution of 5 April 2022 on the protection of the rights of the child in civil, administrative and family law proceedings (2021/2060(INI)).

(14) Under Article 21 TFEU and secondary legislation relating thereto as interpreted by the Court of Justice, the respect of a Member State's national identity under Article 4(2) TEU and a Member State's public policy cannot serve as justification to refuse to recognise a parent-child relationship between children and their ~~same-sex~~ parents for the purposes of exercising the rights that a child derives from Union law. In addition, for the purposes of exercising such rights, proof of parenthood can be presented by any means<sup>53</sup>. ~~Therefore, a Member State is not entitled to require that a person presents either the attestations provided for in this Regulation accompanying a court decision or an authentic instrument on parenthood, or the European Certificate of Parenthood created by this Regulation, where the person invokes, in the context of the exercise of the right to free movement, rights that a child derives from Union law. This should not, however, prevent a person from choosing to present in such cases also the relevant attestation or the European Certificate of Parenthood provided for in this Regulation.~~ To ensure that Union citizens and their family members are informed that the rights that a child derives from Union law are not affected by this Regulation, the forms of the attestations and of the European Certificate of Parenthood annexed to this Regulation should include a statement specifying that the relevant attestation or the European Certificate of Parenthood do not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, and that, for the exercise of such rights, proof of the parent-child relationship can be presented by any means.

(14) Under Article 21 TFEU and secondary legislation relating thereto as interpreted by the Court of Justice, the respect of a Member State's national identity under Article 4(2) TEU and a Member State's public policy cannot serve as justification to refuse to recognise a **child-parent** relationship between children and their **parents** for the purposes of exercising the rights that a child derives from Union law. In addition, for the purposes of exercising such rights, proof of **filiation** can be presented by any means.

To ensure that Union citizens and their family members are informed that the rights that a child derives from Union law are not affected by this Regulation, the forms of the attestations and of the European Certificate of **Filiation** annexed to this Regulation should include a statement specifying that the relevant attestation or the European Certificate of **Filiation** do not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, and that, for the exercise of such rights, proof of the child-**parent** relationship can be presented by any means.

<sup>53</sup> Judgments of the Court of Justice of 25 July 2002, C-459/99, *MRAX*, ECLI:EU:C:2002:461, paragraphs 61 and 62, and of 17 February 2005, C-215/03, *Oulane*, ECLI:EU:C:2005:95, paragraphs 23 to 26.

<p>(15) Article 2 of the United Nations Convention on the Rights of the Child of 20 November 1989 ('UN Convention on the Rights of the Child') requires States Parties to respect and ensure the rights of children without discrimination of any kind, and to take all appropriate measures to ensure that the child is protected against all forms of discrimination <del>or punishment</del> on the basis of the circumstances of the child's parents. Under Article 3 of the said Convention, in all actions by, amongst others, courts and administrative authorities, the best interests of the child must be a primary consideration.</p>	<p>(15) Article 2 of the United Nations Convention on the Rights of the Child of 20 November 1989 ('UN Convention on the Rights of the Child') requires States Parties to respect and ensure the rights of children without discrimination of any kind, and to take all appropriate measures to ensure that the child is protected against all forms of discrimination on the basis <b>of the race, gender or sexual orientation</b> of the child's parents. Under Article 3 of the said Convention, in all actions by, amongst others, courts and administrative authorities, the best interests of the child must be a primary consideration.</p>
<p>(16) Article 2 of the United Nations Convention on the Rights of the Child of 20 November 1989 ('UN Convention on the Rights of the Child') requires States Parties to respect and ensure the rights of children without discrimination of any kind, and to take all appropriate measures to ensure that the child is protected against all forms of discrimination <del>or punishment</del> on the basis of <b>the any</b> circumstances <del>of the child's parents</del>. Under Article 3 of the said Convention, in all actions by, amongst others, courts and administrative authorities, the best interests of the child must be a primary consideration</p>	
<p>(17) Any reference to the 'best interests of the child' in this Regulation should apply to children within the meaning of Article 1 of the United Nations Convention on the Rights of the Child of 20 November 1989 ('UN Convention on the Rights of the Child'), that is, children below the age of 18 years unless under the law applicable to the child, majority is attained earlier. Any reference to the 'best interests of the child' in this Regulation should also be interpreted in the light of Article 24 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Articles 3 and 12 of the UN Convention on the Rights of the Child as implemented by national law. Any reference to the 'child's interests' in this Regulation should be understood as referring to the best interests of the child and to the interests of children whichever their age.</p>	

(18) Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('European Convention of Human Rights') lays down the right to respect for private and family life, while Article 1 of Protocol No. 12 to the said Convention provides that the enjoyment of any right set forth by law must be secured without discrimination on any ground, including birth. The European Court of Human Rights has interpreted Article 8 of the Convention as requiring all States within its jurisdiction to recognise the ~~legal parent-child relationship~~ **of filiation established ascertained** abroad between a ~~children born out of surrogacy to surrogate mothers~~ and their biological ~~and~~ intended parents. **States party to the Convention are required** and to provide for a mechanism for the recognition in law of the ~~parent-child relationship~~ **of filiation constituted abroad between children born with the intervention of third persons, such as gamete providers or surrogate mothers and their** with the non-biological intended parents **also when the latter are not biologically related to the child** (for example through the adoption of the child)<sup>54</sup>, **especially when they are socially related to the child (for example because they are married or in a registered partnership with the biological parent).**

(19) The Court of Justice has confirmed that the essential characteristics of Union law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the Union and its Member States, and its Member States with each other. This legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised.

(20) Pursuant to Article 2 of the Treaty on European Union ('TEU'), equality and non-discrimination are amongst the values on which the Union is founded and which are common to the Member States. Article 21 of the Charter prohibits discrimination on grounds of, amongst others, birth. Article 3 TEU and Article 24 of the Charter provide for the protection of the rights of the child, and Article 7 of the Charter provides for everyone's right to respect for their private and family life.

(21) In conformity with the provisions of international conventions and Union law, this Regulation should ensure that children enjoy their rights and maintain their legal status in cross-border situations without discrimination. To that effect, and in the light of the case law of the Court of Justice, including on mutual trust between Member States, and of the European Court on Human Rights, this Regulation should cover the recognition in a Member State of the ~~parenthood established~~ **filiation ascertained or constituted** in another Member State irrespective of how the child was conceived or born and irrespective of the child's type of family, and including domestic adoption. ~~Therefore, subject to the application of the rules on applicable law of this Regulation, this Regulation should cover the recognition in a Member State of the parenthood established in another Member State of a child with same-sex parents. This Regulation should also cover the recognition in a Member State of the parenthood of a child adopted domestically in another Member State under the rules governing domestic adoption in that Member State.~~

<sup>54</sup> For example, *Mennesson v France* (Application no 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014) and Advisory Opinion P16-2018-001 (Request no P16-2018-001, Council of Europe: European Court of Human Rights, 10 April 2019).

- (22) To achieve its aims, it is necessary and appropriate for this Regulation to bring together common rules on jurisdiction, applicable law, recognition or, as the case may be, acceptance of court decisions and authentic instruments on **parenthood-filiation** as well as rules on the creation of a European Certificate of **Parenthood-Filiation** in a Union legal instrument which is binding and directly applicable.
- (23) This Regulation covers ‘civil matters’, which includes civil court proceedings and the resulting decisions on **parenthood-filiation**, and authentic instruments on **parenthood-filiation**. The term ‘civil matters’ should be interpreted autonomously, in accordance with the established case law of the Court of Justice. It should be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of this Regulation and, second, to the general principles that stem from the corpus of the national legal systems. The term ‘civil matters’ should therefore be interpreted as capable of extending also to measures that, from the point of view of the legal system of a Member State, might fall under public law.
- (24) For the purposes of this Regulation, **parenthood-filiation**, also referred to as **filiation parenthood or parentage**, may be biologic, genetic, by adoption or by operation of law. Also for the purposes of this Regulation, **parenthood-filiation** should mean the **parent-child child-parent** relationship established **constituted** in law, and should cover the legal status of being the child of a particular parent or parents. This Regulation should cover the **parenthood-established filiation constituted** in a Member State of both minors and adults, including a deceased child and a child not yet born, **whether to a single parent, a de facto couple, a married couple or a couple in a relationship which, under the law applicable to such relationship, has comparable effects, such as a registered partnership regardless of the family situation and with reference to each of the parents, if more than one**. This Regulation should apply regardless of the nationality of the child whose filiation has been **parenthood-is-to-be established ascertained or constituted**, and regardless of the nationality of the parents of the child. The term ‘parent’ in this Regulation should be understood, as applicable, as referring to the legal parent, the intended parent, the person who claims to be a parent or the **putative parent** person in respect of whom the child claims parenthood.
- (25) This Regulation should not apply to the **establishment of parenthood-recognition of a filiation** in a Member State in a domestic situation with no cross-border elements. This Regulation should not therefore include provisions on jurisdiction or applicable law for the establishment of parenthood in domestic cases, such as the parenthood of a child further to a domestic adoption in a Member State. However, in order to safeguard children’s rights without discrimination in cross-border situations as laid down in the Charter, in application of the principle of mutual trust between Member States as confirmed by the Court of Justice, the provisions of this Regulation on the recognition or, as the case may be, acceptance of court decisions and authentic instruments on parenthood should also apply to the recognition of parenthood established in a Member State in domestic situations, such as the parenthood established in a Member State further to a domestic adoption in that Member State. The provisions of this Regulation concerning the relevant attestation and the European Certificate of **Parenthood Filiation** should therefore also apply as regards the **parenthood-established filiation ascertained or recognised** in a Member State in domestic situations, such as further to a domestic adoption in a Member State.

(26) For the purposes of this Regulation, a domestic adoption in a Member State is that in which the child and the adoptive parent or parents have their habitual residence in the same Member State and where the adoption creates a permanent ~~parent-child~~ **child-parent** relationship. In order to take account of the different legal traditions of the Member States, this Regulation should cover domestic adoption in a Member State where the adoption results in the termination of the legal relationship between the child and the family of origin (~~full adoption~~) as well as domestic adoption in a Member State which does not result in the termination of the legal relationship between the child and the family of origin (~~simple adoption~~).

(27) Inter-country adoption, where the child and the adoptive parent or parents have their habitual residence in different States, is governed by the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, to which all Member States are party. This Regulation should ~~not~~ apply to inter-country adoption **only to the extent that its provisions may integrate those of** ~~irrespective of whether it involves two Member States or a Member State and a third State, and irrespective of whether or not an inter-country adoption is covered by the Hague Convention.~~

(28) While the ~~establishment and the recognition of parenthood~~ **ascertainment, constitution and recognition of filiation** in conformity with this Regulation is relevant for other areas of civil law, the scope of this Regulation should be limited to jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments concerning ~~parenthood~~ **filiation**. For reasons of clarity, other areas of civil law which could be seen as having a link with ~~parenthood~~ **filiation** should be explicitly excluded from the scope of this Regulation.

(29) In particular, the rules on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments set out in this Regulation should not apply to maintenance rights, governed by Council Regulation (EC) No 4/2009<sup>55</sup>; succession rights, governed by Regulation (EU) No 650/2012 of the European Parliament and of the Council<sup>56</sup>; or parental responsibility matters, governed by Council Regulation (EU) 2019/1111<sup>57</sup>. However, as the question of the ~~parenthood~~ **filiation** of a child must be resolved as a preliminary question before resolving matters of parental responsibility, maintenance or succession as regards the child, this Regulation should facilitate the application of the above-mentioned Union instruments on family law and succession.

(30) This Regulation should not apply to preliminary questions such as the existence, validity or recognition of a marriage or a relationship deemed by the law applicable to it as having comparable effects, which should continue to be governed by the national law of the Member States, including their rules of private international law and, where relevant, by the case law of the Court of Justice on free movement.

<sup>55</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10.1.2009, p 1).

<sup>56</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, 27.7.2012, p 107).

<sup>57</sup> 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 L 178, 2.7.2019, p 1).

## 2.1. Key Aspects

- Descriptive accuracy of legal concepts enhances progressive harmonisation also in substantive law.
- Comparative law methods should be used to harmonise the differences in terminology between legal filiations.

## 2.2. Priorities Emerging From the Text and Methods for Their Pursuit

The different understandings of the concept of child-parent relationship among Member States derives from the circumstance that Member States give different relevance to the role that a putative parent has had in the birth of a child. This is reflected by the existence of distinct legal rules for the ascertainment or constitution of filiation.

These different sets of rules are tailored to the specific scenarios to which they refer, such as biological filiation, adoption, and contracts with surrogate mothers.

The Commission's Proposal's generic terminology of 'establishment of parenthood' conceals these crucial distinctions in an attempt not to discriminate between biological parents and legal parents. However, provided that a risk of discrimination exists in what appears to be a merely descriptive distinction, this simplification creates unnecessary risks by failing to acknowledge the specific recognition challenges unique to each method.

This impedes the development of targeted solutions to effectively address present obstacles to the recognition of foreign filiation.

To overcome the issues related to the different understandings of the concept of child-parent relationship, it is essential to adopt functional definitions and aim for language accuracy.

The ambiguous concept of 'establishment of parenthood' has thus been disaggregated to reflect the diverse mechanisms through which national authorities verify and legally recognise child-parent relationships within their respective legal systems.

## 2.3. The Concept of 'Status of Filiation'

Legal status is a tool used to define and differentiate groups of people who have unique, significant legal features. Austin defined it as such:

There are certain rights and duties with certain capacities and incapacities to take rights and incur duties, by which persons, as subjects of the law, are variously determined to certain classes. The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a condition or status which the person occupies, or with which the person is invested. One and the same person may belong to many of the classes, or may occupy, or be invested with, many conditions or statuses.<sup>58</sup>

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<sup>58</sup> J Austin, *Lectures on Jurisprudence* (R Campbell ed, 5th edn, 1911) 684.

Allen added:

Status [...] is a condition. Status is, if the tautology may be pardoned, essentially static. There is no question of exercising a status. It is a thing which is, and which continues until it is ended or changed. Capacity is a thing that can.<sup>59</sup>

And Dicey noted:

Every person has a certain civil status consisting of his capacity or incapacity under the laws of his country for the acquisition and exercise of legal rights and for the performance of legal acts.<sup>60</sup>

While the exact definition of status has been much debated by scholars, it can be surmised that status creates groups of people who have unique sets of rights and duties, capacities and incapacities which are imposed by law and not the person's free choice and extend beyond the specific relationship it is attached to and have a permanent, or at least very stable, nature.<sup>61</sup> Due to their importance, such matters are commonly subjected to personal law.<sup>62</sup> According to this definition, filiation is clearly a matter of status. Parents have unique duties and capacities that are superimposed on them by the law and which they cannot be freed from on their own accord. While some of these duties and capacities are matters of parental responsibility, some are derived from the filiation itself (eg, the inheritance reserve, in systems where such a rule exists). The aggregation of these rights and duties is unique to parenthood. Further, the status of parenthood or filiation extends to rights and duties towards third parties (notably the State, eg immigration, benefits).

Importantly, the concept of status creates stability. In English private international law, 'status' was defined as *res* and changes made to status as *in rem*.<sup>63</sup> Hence, status is connected to a specific legal system to which it is subject (traditionally only one system), and the effects of changes to status extend beyond the parties to have global consequences, which in turn ensures the stability and certainty of the status. This stable and robust meaning of status is part of its importance and appeal: it allows the law in general, and each specific jurisdiction in particular, to mark, highlight, and protect important legal structures. The prevalent norm (at least throughout the Western world) of classifying filiation as a matter of status affords filiation cross-border stability, certainty and legal attention and protection, regardless of the details of the protection (eg extent of maintenance, scope of parental responsibility) granted under each individual law.

## 2.4. Limping Status

Filiation has consequences even regardless of parental responsibility (to which the Commission's Proposal does not apply), such as familial affiliation (eg for marriage), inheritance, citizenship and other such rights. The Commission's Proposal avoids the substantive filiation discussion and acknowledges that a Member State might deem a person to be a child/parent in one context (eg inheritance) but not in another (eg parental responsibility). The Commission's Proposal seeks to provide for the best possible private international law tools to prevent limping statuses.

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<sup>59</sup> CK Allen, 'Status and Capacity' (1930) 46 *Law Quarterly Review* 277, 292.

<sup>60</sup> KA Berriedale, A.V. Dicey's Digest of the Law of England With Reference to the Conflict of Laws (5th edition, 1932) 531.

<sup>61</sup> RH Graveson, *Status in the Common Law* (Athlone, 1953) 117; CK Allen, 'Status and Capacity' (1930) 46 *Law Quarterly Review* 277, 299.

<sup>62</sup> E Rabel, *The Conflict of Laws: A Comparative Study* (1945), 102; Sharon Shakargy 'Marriage by the State or Married to the State' (2013) 9 *Journal of Private International Law* 499, 503.

<sup>63</sup> GC Cheshire, *Private International Law* (2<sup>nd</sup> edn, 1938), 107-108.

### 3. Recitals (31)-(35)

(31) The requirements for the recording of parenthood in a register should be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept that should determine under what legal conditions and how the recording must be carried out, and which authorities are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information. In order to avoid duplication of documents, the national registration authorities should accept the documents drawn up in another Member State by the competent authorities whose circulation is provided for by this Regulation. In particular, the European Certificate of Parenthood issued under this Regulation should constitute a valid document for the recording of parenthood in a register of a Member State. As the procedure for the issuance of the European Certificate of Parenthood and its contents and effects should be uniform in all Member States as set out in this Regulation, and the European Certificate of Parenthood should be issued in conformity with the rules on jurisdiction and applicable law laid down in this Regulation, the authorities involved in the registration should not require that the European Certificate of Parenthood be first transposed into a national document on parenthood. This should not preclude the authorities involved in the registration from confirming the conditions necessary to establish the authenticity of the European Certificate of Parenthood or from asking the person applying for registration to provide such additional information as required under the law of the Member State in which the register is kept, provided that information is not already included in the European Certificate of

(31) The requirements for the recording of **filiation** in a **national** register should be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept that should determine under what legal conditions and how the recording must be carried out, and which authorities are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information. In order to avoid duplication of documents, the national registration authorities should accept the documents drawn up in another Member State by the competent authorities whose circulation is provided for by this Regulation. In **addition**, the European Certificate of **Filiation** issued under this Regulation should constitute a valid document for the recording of **filiation** in a register of a Member State **as well as in a centralised IT register**. As the procedure for the issuance of the European Certificate of **Filiation** and its contents and effects should be uniform in all Member States as set out in this Regulation, and the European Certificate of **Filiation** should be issued in conformity with the rules on jurisdiction and applicable law laid down in this Regulation, the authorities involved in the registration should not require that the European Certificate of **Filiation** be first transposed into a national document on **filiation**. This should not preclude the authorities involved in the registration from confirming the conditions necessary to establish the authenticity of the European Certificate of **Filiation** or from asking the person applying for registration to provide such additional information as required under the law of the Member State in which the register is kept, provided that information is not already included in the European Certificate of

Parenthood. The competent authority may indicate to the person applying for registration how the missing information can be provided. The effects of recording the parenthood in a register (for example, depending on the national law, whether registration establishes parenthood or only provides evidence of the parenthood already established) should also be excluded from the scope of this Regulation and be determined by the law of the Member State in which the register is kept.

**Filiation.** The competent authority may indicate to the person applying for registration how the missing information can be provided. The effects of recording the **filiation** in a **national** register (for example, depending on the national law, whether registration **constitutes filiation** or only provides evidence of the **filiation** already **ascertained**) should also be excluded from the scope of this Regulation and be determined by the law of the Member State in which the register is kept.

(32) This Regulation ~~should not cover~~ the recognition of court decisions on ~~parenthood~~ given in a third State ~~or the recognition or, as the case may be, acceptance of authentic instruments on parenthood~~ drawn up or registered in a third State. The recognition or acceptance of such documents ~~should remain~~ subject to the national law of each Member State.

(32) This Regulation **covers** the recognition of court decisions on **filiation** given in a third State **and** the recognition or, as the case may be, acceptance of authentic instruments on **filiation** drawn up or registered in a third State. The recognition or acceptance of such documents **may also be** subject to the national law of each Member State.

**The European Certificate of Filiation constitutes an additional and more expeditious method of circulation of status as compared to its circulation subject to the recognition of decisions or acceptance of public documents under the rules of the present Regulation. Whenever the conditions for its issuance are not met, Member States recognise child-parent relationships under their national rules, including private international rules applicable to the recognition of decisions or acceptance of documents drawn up in States in which the present Regulation does not apply.**

<p>(33) <del>The establishment of parenthood should mean the legal determination of the legal relationship between a child and each parent, and should be understood to include the establishment of parenthood following a claim contesting a parenthood established previously. Where relevant, this Regulation should also apply to the extinction or termination of parenthood.</del></p>	<p>(33) <b>The ascertainment of filiation</b> should mean the determination of the legal relationship between a child and a parent, <b>and should be understood to include: a) the ascertainment of a biological filiation on the basis of facts, such as the fact of birth from a woman, or descent attested on the basis of DNA testing or presumed by legally relevant elements of evidence; b) the constitution of legal relationships between a child and an adult on the sole basis of another legal relationship, such as a marriage or civil partnership between such adult and the parent of the child; c) the constitution of a legal relationship between a child and an adult on the basis of an act of acknowledgement of filiation by a non-registered partner of the parent of the child; d) the contestation of an ascertained filiation on the basis of the child's or adult's intention to acknowledge the inexistence of a presumed biological relation between them; e) the termination of filiation.</b></p>
<p>(34) Notwithstanding the differences in national laws, parenthood <b>filiation</b> is typically established <b>ascertained by the person assisting to birth, such as midwives, or constituted</b> by operation of law or by an act of a competent authority. Examples of the establishment of parenthood <b>constitution of filiation</b> by operation of law include parenthood by birth as regards the person giving birth, and parenthood by <b>the legal presumption</b> as regards the spouse or the registered partner of the person giving birth <b>birth mother, (whether recorded as female or male or 'diverse', etc in the State's civil status records)</b>. Examples of the establishment of parenthood <b>filiation constituted</b> by an act of a competent authority include a <b>establishment of parenthood by a court decision (such as in of adoption, or the decision in proceedings where parenthood filiation is contested, or in proceedings where parenthood is claimed, for example by proving a possession of state), by a notarial deed (for example, in adoption or where the child is not yet born in rare examples), by an administrative decision (for example, after an acknowledgment of paternity) or by registration. Parenthood Filiation</b> is typically registered in the civil, personal or population register. Evidence of <b>parenthood filiation</b> can be provided by the <b>aforementioned documents establishing the parenthood (such as the court decision, the notarial deed or the administrative decision establishing parenthood)</b>. However, evidence of <b>parenthood filiation</b> is most often provided by the registration of the parenthood in the register itself, by an extract from the relevant register or by a certificate containing the information registered in the relevant register (such as a birth certificate or an <b>equivalent parenthood certificate</b>).</p>	
<p>(35) The smooth and correct functioning of a Union area of justice with respect for the Member States' different legal systems and traditions is fundamental for the Union. In that regard, mutual trust in one another's justice systems should be further enhanced.</p>	

### 3.1. Key Aspects

- 'Establishment of parenthood' is a new expression which the Commission's Proposal adopts to include heterogenous situations. A greater accuracy prevents the uncertainty and confusion inevitably associated with generic expressions;

- In line with the French project of a code of private international law, a distinction allows the addressing of the specific rights stemming from methods of attributions of the filiation relation to intended parents, namely in cases of gamete and embryo transfer, surrogacy and adoption;
- Such distinctions ensure that the specific needs of children of multiple ancestry are addressed and enhance the protection of the rights of the child also in the interests of future generations.

### 3.2. Priorities Emerging from the Text and Methods for Their Pursuit

The Commission's Proposal attempts to overcome the differences in the substantive law of Member States by adopting a 'billiard ball' approach to the recognition of foreign filiations, which consists in using birth certificates or equivalent documents as constitutive of a civil status created abroad. This approach fails to grasp the evidentiary nature of certificates, the function of which consists in declaring that something has happened in a certain moment as a result of the behaviour of certain persons.

The amendments proposed distinguish legal filiations corresponding to biological filiations – which can be ascertained – from legal filiations which need to be socially and legally constituted and are often the result of a lengthy and costly process – as when they derive from contractual agreements with fertility clinics, gamete providers or surrogate mothers; or from institutional procedures such as those leading to adoptions.

Far from being discriminatory, this distinction ensures that children are protected according to their specific needs. In the first case, the legal filiation is ascertainable as a fact that two persons share part of a unique genetic heritage. It can be proven by means of presumptions, witnessing the event of birth, or DNA testing. In this sense, filiation contributes to the identity of the child's self.

The child-parent relationship which does not reflect a biological filiation necessarily depends on a statement provided by a given legal order at a specific moment in time. It can depend on the existence of another legal relationship between the child and the partner of the putative parent (such as a marriage or civil partnership); or on an act of acknowledgement of filiation by a non-registered partner of the parent of the child.

The distinction between the two different scenarios is reflected in the modes of severing the child-parent relationship which are specific to each case: the contestation of an ascertained filiation is grounded on the child's or adult's intention to acknowledge the non-existence of the formerly presumed biological relationship between them. Instead, the termination of a filiation constituted by intent is evaluated under different circumstances. The principle of the best interests of the child plays a different role in the two kinds of filiation.

When referring to childbirth, terms like 'person giving birth' may unintentionally reduce women to their biological functions, despite aiming for inclusivity. While this language seeks to acknowledge transgender persons, it is also based on the assumption that a person has an immaterial and gendered self, and this reduces her body to an unimportant and disposable attribute. It may even be reminiscent of the religious idea of bodies as inferior and imperfect and souls as superior and pure.

To overcome the linguistic gordian knot, the ELI Proposal adopts scientific language developed in biological studies, which distinguish a female and a male role in procreation and uses mother with reference to the person carrying out a pregnancy and giving birth. It is believed that this approach, while acknowledging the importance of the child-birth mother relationship, includes those exceptional cases of transgender men who choose to give birth and breastfeed through their female sexual organs (referred to as seahorse dads).

## 4. Recitals (36)-(49): Jurisdiction

<p>(36) In order to facilitate the recognition of court decisions and authentic instruments on <b>parenthood filiation</b> matters, this Regulation should lay down uniform jurisdiction rules for the <b>establishment ascertainment or constitution of parenthood filiation</b> with a cross-border element. This Regulation should also clarify the rights of children <del>below the age of 18 years</del> to be provided with an opportunity <b>to know their origins, especially as regards the proceedings which led to the constitution of their filiation,</b> and <b>to be provided with an opportunity</b> to express their views in proceedings to which they are subject.</p>	
<p>(37) This Regulation should not affect the question of which authorities within each Member State are competent to deal with <b>parenthood filiation</b> matters (for example, courts, administrative authorities, notaries, registrars or other authorities).</p>	
<p>(38) This Regulation should respect the different systems for dealing with <b>parenthood filiation</b> matters in the Member States. As regards ‘authentic instruments’, Member States often empower authorities, such as notaries, administrative authorities or registrars to draw up authentic instruments <b>establishing ascertaining or constituting parenthood filiation</b> in the Member State in which they have been drawn up or registered (‘authentic instruments with binding legal effect’), <del>or to draw up authentic instruments which have no binding legal effect in the Member State in which they have been drawn up or registered but which have evidentiary effects in that Member State (‘authentic instruments with no binding legal effect’).</del> The term ‘empowerment’ in this Regulation is to be interpreted autonomously in accordance with the definition of ‘authentic instrument’ used horizontally in Union instruments and in the light of the objectives of this Regulation.</p>	<p>(39) To safeguard the child’s interests, jurisdiction should be determined according to the criterion of proximity. Consequently, where possible jurisdiction should lie with the Member State of the habitual residence of the child. However, in order to facilitate the child’s access to justice in a Member State, alternative jurisdiction should also be granted to the Member State of the nationality of the child, <del>to the Member State of the habitual residence of the respondent (for example, the person in respect of whom the child claims parenthood); to the Member State of the habitual residence of any of the parents, to the Member State of the nationality of any of the parents or to the Member State of the child’s birth.</del></p>
	<p>(39) To safeguard the child’s interests, jurisdiction should be determined according to the criterion of proximity. Consequently, jurisdiction should lie with the Member State of the habitual residence of the child. However, in order to facilitate the child’s access to justice in a Member State, alternative jurisdiction should also be granted to the Member State of the nationality of the child <b>and of the habitual residence or nationality of the putative parent in cases concerning the ascertainment of filiation initiated by the child.</b></p>

(40) In accordance with the case law of the Court of Justice, the child's place of habitual residence must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in the territory of a Member State, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that it reflects some degree of integration of the child into a social and family environment, which is the place which, in practice, is the centre of that child's life. Such factors include the duration, regularity, conditions and reasons for the child's stay on the territory of the Member State concerned and the child's nationality, with the relevant factors varying according to the age of the child concerned. They also include the place and conditions of the child's attendance at school, and the family and social relationships of the child in the Member State. The intention of the parents to settle with the child in a given Member State may also be taken into account where that intention is manifested by tangible steps, such as the purchase or lease of a residence in the Member State concerned. By contrast, the nationality of the person giving birth or the previous residence of this person in the Member State of the court seised is not relevant, whereas the fact that the child was born in that Member State and holds the nationality of that Member State is insufficient.

**As a general rule, the environment of a young child is essentially a family environment, determined by the reference person/s with whom the child lives, by whom the child is in fact looked after and taken care of.**

(41) Where this Regulation refers to nationality as a connecting factor for the purposes of jurisdiction or applicable law, the question of how to consider a child or a parent having multiple nationalities is a preliminary question which falls outside the scope of this Regulation and should be left to national law, including, where applicable, international conventions, in full observance of the general principles of the Union. For the purposes of this Regulation, a child or a parent possessing multiple nationalities may choose the court or the law of any of the Member States whose nationality he or she possesses at the time of seising the court or at the time the parenthood is established.

~~(42) Where jurisdiction cannot be established based on the general alternative jurisdiction grounds, the courts of the Member State where the child is present should have jurisdiction. This presence rule should, in particular, allow the courts of a Member State to exercise jurisdiction in respect of third-country national children, including applicants for or beneficiaries of international protection such as refugee children and children internationally displaced because of disturbances occurring in their State of habitual residence.~~

(43) Where no court of a Member State has jurisdiction pursuant to this Regulation, jurisdiction should be determined, in each Member State, by the laws of that Member State, including the international instruments in force in that Member State.

(44) In order to remedy situations of denial of justice, this Regulation should provide a *forum necessitatis* allowing a court of a Member State, on an exceptional basis, to rule on a parenthood matter which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when the child or another interested party cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on *forum necessitatis* should, however, be exercised only if the case has a sufficient connection with the Member State of the court seised.

(45) In the interests of procedural economy and procedural efficiency, if the outcome of proceedings before a court of a Member State not having jurisdiction under this Regulation depends on the determination of an incidental question falling within the scope of this Regulation, the courts of that Member State should not be prevented by this Regulation from determining that question. Therefore, if the object of the proceedings is, for instance, a succession dispute in which the parent-child relationship between the deceased and the child must be established for the purposes of those proceedings, the Member State having jurisdiction for the succession dispute should be allowed to determine that question for the pending proceedings, regardless of whether it has jurisdiction for parenthood matters under this Regulation. Any such determination should be made in accordance with the applicable law designated by this Regulation and should only produce effects in the proceedings for which it was made.

(46) In the interests of the harmonious functioning of justice, the giving of irreconcilable court decisions in different Member States should be avoided. To that end, this Regulation should provide for general procedural rules similar to those of other Union instruments in the area of judicial cooperation in civil matters.

(47) One such procedural rule is the *lis pendens* rule, which should come into play if the same case on **filiation** is brought before different courts in different Member States. That rule should determine which court should proceed to deal with the case on **filiation**.

(48) This Regulation should define at what time a court is deemed to be seised for the purposes of this Regulation. In the light of the two different systems existing in the Member States, which either require the document instituting the proceedings to be served upon the respondent first, or to be lodged with the court first, it should be sufficient for the first step under national law to have been taken, provided that the applicant has not subsequently failed to take any steps that he or she was required to take under national law in order to have the second step effected.

<p>(49) Proceedings on the establishment of parenthood under this Regulation should, as a basic principle, provide children below the age of 18 years who are subject to those proceedings and who are capable of forming their own views, in accordance with the case law of the Court of Justice, with a genuine and effective opportunity to express their views and, when assessing the best interests of the child, due weight should be given to those views. This Regulation should, however, leave the question of who will hear the child and how the child will be heard to be determined by the national law and procedure of the Member States. In addition, while remaining a right of the child, hearing the child should not constitute an absolute obligation although it should be assessed taking into account the best interests of the child.</p>	<p>(49) Proceedings on the <b>ascertainment or constitution of filiation</b> under this Regulation should, as a basic principle, provide children below the age of 18, who are subject to those proceedings and who are capable of forming their own views, in accordance with the case law of the Court of Justice, with a genuine and effective opportunity to express their views and, when assessing the best interests of the child, due weight should be given to those views. <b>Proceedings on the ascertainment or constitution of filiation under this Regulation should, as a basic principle, provide children of at least 18 years old with the right to obtain information on their identity and origins, either directly or through a representative or an appropriate body.</b> This Regulation should, however, leave the questions of who will hear the <b>minor</b>, how the <b>minor</b> will be heard, <b>and how children of age may obtain access to information on their identity and origins</b> to be determined by the national law and procedure of the Member States. In addition, while remaining a right of the child, hearing the child <b>and granting the child access to information on the child's identity and origins</b> should not constitute absolute obligations although <b>both</b> should be assessed taking into account the best interests of the child.</p>
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#### 4.1. Key Aspects

- The ELI Proposal opts for providing general jurisdiction rules applying to all civil matters related to filiation.
- Article 6 of the Proposal provides for six grounds of jurisdiction of alternative character allowing the plaintiff to select the court that seems more adequate in view of their interests. The Proposal also includes a ground of subsidiary jurisdiction, granting jurisdiction to the courts of the Member States where the child is present, a reference to national residual jurisdiction and a *forum necessitatis* as well as a special rule on incidental questions.
- The rules on the application of jurisdiction rules (seising of the court, examination as to jurisdiction, examination as to admissibility, *lis pendens* and hearing of the child) are closely inspired by rules that can be found in Regulation 2019/1111.

#### 4.2. Priorities Emerging from the Text and Methods for Their Pursuit

The focus is on providing a very broad basis of jurisdiction in order to allow for the intervention of EU courts in almost all cases. The six alternative fora cover almost any imaginable case connected to the EU. This is justified in terms of *favor filiationis*, as a means to facilitate the establishment of filiation.

The intention of providing for a court in a Member State in all cases is further confirmed by the inclusion of a provision of subsidiary jurisdiction granting jurisdiction to the Member State where the child is present in order to benefit, in particular, applicants or beneficiaries of international protection such as refugees or internationally displaced children and by the inclusion of a *forum necessitatis* and reference to national rules of jurisdiction applying as residual rules when no court in a Member State is available.

#### 4.3. Risks or Missed Opportunities

The Commission's Proposal misses the opportunity of considering the subject matter in its full complexity. It would be preferable to distinguish, as proposed, between different situations and develop special rules for the ascertainment, the constitution and the contestation and termination of filiation, as explained above.

At first sight, the Proposal seems to work in favour of rainbow families insofar as it allows same-sex parents to select the courts more favourable to same-sex parenthood. This may, however, backfire, first, because the decisions rendered by such courts might not be recognised either on grounds of public policy or because of lack of proximity (in connection to Third States). The proposed rules might moreover be interpreted to imply that the desire to become parents ranks above any other consideration, particularly in connection to restrictions based on bioethics.

The proposed jurisdiction rules provide for ample ground for forum shopping, which is dangerous as regards human trafficking, child-trafficking and violence against women. The fact that the courts in the State of birth are granted jurisdiction is particularly problematic since it would encourage strategic behaviours and the movement and trafficking of children and surrogate mothers.

From the perspective of children's rights, the proposed jurisdiction rules might seem favourable at first sight, but they are based on a very limited understanding that equates the interests of children with the interests of intending parents and focusses on the *fait accompli* situation. Cases where the interests of children and adults are in conflict or where there are several adults in conflict about filiation have not been considered sufficiently.

The interplay between the proposed rules and the Maintenance Regulation has not been considered either: any court with jurisdiction on filiation also has jurisdiction as regards maintenance, which might ultimately result in a court that is not in proximity to the child's centre of life deciding on the amounts of child support.

The special needs of children placed in institutions or under public care would also require that jurisdiction is granted to a more limited number of courts.

The prominence given to the child's right to be heard seems disproportionate as regards the ascertainment of filiation, which is not decided on the basis of any evaluation of the needs and wishes of children and adults but based on findings of fact.

#### 4.4. Proposed Changes: Balance Between the Interests at Stake

The jurisdiction rules of the Commission's Proposal do not consider that the interests at stake may not be the same in different scenarios and that there might be conflicts between adults who wish, or do not wish, to assume the position of being a parent.

As regards the ascertainment of filiation, ie when filiation is a question of fact and in particular the child seeks to uncover their biological truth, it seems adequate to provide for alternative fora. The main concern in these cases is access to justice. However, since the competent authority has to investigate the facts, jurisdiction rules should not be overreaching, and proximity be guaranteed. EU courts should also be available where the child is an EU citizen residing in a non-EU Third State, bearing in mind that the investigation of paternity may not

be available in the State of habitual residence (under Islamic law, for example) and the right of the child to an identity may be compromised.

As regards the constitution of filiation, ie when filiation is created by an act of authority on the basis of an adult's intention, jurisdiction rules should not grant 'parents' the possibility of selecting the court of their preference. Restraint in connection to jurisdiction in such a scenario is justified on several grounds. Jurisdiction rules should not be framed to favour reproductive tourism that risks creating a limping status of filiation that is not recognised in the State of habitual residence of the intending parents because such a limping relationship is detrimental to the child. As Recital 11 of the proposed Regulation rightly says: 'The non-recognition in a Member State of the parenthood established in another Member State can have serious adverse consequences on children's fundamental rights and on the rights that they derive from national law.' From a more general perspective, it should be acknowledged that forcing Member States to accept a 'fait accompli' affects Member States in their competence to regulate assisted reproductive technologies in accordance with the results of political debates in a democratic society. This is particularly the case where the cross-border element has been intentionally created by citizens habitually resident in a Member State whose nationality they also hold. In the absence of a European consensus as regards the constitution of filiation, in particular from a bioethical perspective, EU jurisdiction rules should be based on proximity and not encourage forum shopping and the circumvention of restrictions in relation to the use of assisted reproduction technology prevailing in the State of habitual residence of those concerned. Restraint is also appropriate bearing in mind that adults do not have the right to have children. Where filiation matters are connected to child protection, such as is the case of regular adoptions, it is also appropriate to confer jurisdiction only to the Member States of the habitual residence of the child.

In the case of claims regarding the contestation and termination of filiation, forum shopping may work to the child's detriment. Legal systems strike different balances as regards the weight to be given to the biological truth in opposition to the stability of the child's status. Given the lack of consensus at the European level, it seems advisable to privilege the courts in the Member State of habitual residence.

The above reflections would indicate that the courts in the Member State of the habitual residence of the child at the time the court is seised should be the courts with general jurisdiction as regards filiation matters. This might pose difficulties in the case of newly born infants, but the CJEU already provided guidance in the *Mercredi* case.<sup>64</sup> The Court found that, as a general rule, the environment of a young child is essentially a family environment, determined by the reference person/s with whom the child lives, by whom the child is in fact looked after and taken care of.

In addition to the general rule, two special rules would be needed. As regards the ascertainment of filiation, the child should be given broader possibilities because their right to an identity is compromised, and they have a legitimate interest in finding out the biological truth. It therefore appears appropriate to provide for additional fora allowing lawsuits in the Member State of the nationality of the child or the nationality or habitual residence of the putative parent, ie, the person whose legal parenthood is the object of the proceedings. Such a rule would also allow children who may be EU citizens residing in a Third State to access courts in the EU, which is essential in cases where the investigation of paternity and DNA testing is not available in the State of habitual residence.

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<sup>64</sup> *Supra*, note 3.

A special jurisdiction rule would be required for proceedings taking place before the birth of the child, which are more frequent as regards the constitution of filiation (pre-birth decisions in connection to surrogacy or for the validation of agreements between adults). In such cases, it would seem appropriate to grant jurisdiction to the courts in the Member State of the intended habitual residence of the child. In the rare cases where such a habitual residence cannot be determined, the case could be brought to the Member State of the habitual residence of either intending parent.

The jurisdiction rules of the Proposal may be extended to Third States. As mentioned, the rules of the Proposal could be considered exorbitant by the third State of the habitual residence of the child with the ensuing risk of non-recognition of the judgment rendered in the EU. It is also questionable that a forum based on the child's presence is required as a subsidiary ground of jurisdiction. Even in the case of displaced children or refugees, 'filiation matters', which are distinct from 'parental responsibility matters' and which do not include rights and responsibilities related to the child's care and upbringing, do not seem to require an urgent intervention that cannot wait until habitual residence is established. The subsidiary rule of jurisdiction should, therefore, be abolished.

From a technical perspective, it would seem that the inclusion of a *forum necessitatis* is incompatible with national rules of jurisdiction applying as subsidiary rules. *Forum necessitatis* presupposes a complete system of jurisdiction rules that leaves no room for national jurisdiction rules. This should be the preferred option in particular in view of the fact that the recognition system established in the Proposal does not review jurisdiction. The proposed provision on residual jurisdiction rules should thus be eliminated and the proposed *forum necessitatis* rule maintained.

The rights of the child should play a prominent role throughout the proposed rules. The reference to the right of the child to be heard might be relevant in certain kinds of proceedings such as, for example, adoption. Filiation proceedings might, however, be concerned exclusively with the ascertainment of the biological truth, which is independent from the views, desires and wishes of any of those concerned. It therefore seems adequate to require that the child be heard in accordance with national law, ie when national law deems that the hearing of the child is relevant. The right of the child to know their origins should be given more relevance and be included in the first Chapter.

## 5. Recitals (50)-(57): Applicable Law

(50) This Regulation should provide legal certainty and predictability by providing common rules on the law applicable to the establishment of parenthood **filiation** in cross-border situations. Such common rules aim to avoid conflicting decisions depending on which Member States' courts or other competent authorities establish parenthood decide on **filiation** and to facilitate, in particular, the acceptance of authentic instruments which have no binding legal effect in the Member State of origin but which have evidentiary effects in that Member State

(51) As a rule, the law applicable to the establishment of parenthood in cross-border situations should be the law of the State of the habitual residence of the person giving birth at the time of birth. This connecting factor should ensure that the applicable law can be determined in the vast majority of cases, including as regards a new-born, whose habitual residence may be difficult to establish. The time of birth should be interpreted strictly, referring to the most frequent situation in which parenthood is established upon birth by operation of law and registered in the relevant register within a few days following birth. That law should apply both to situations in which the person giving birth has the habitual residence in the State of birth (as would be the typical situation) and also to situations in which the person giving birth has the habitual residence in a State other than the State of birth (for example, when birth occurs while travelling). The law of the State of the habitual residence of the person giving birth at the time of birth should apply, by analogy, where the parenthood of the child needs to be established before the child is born. To ensure that the applicable law can be determined in all circumstances, the law of the State of birth of the child should apply in the rare cases where the habitual residence of the person giving birth at the time of birth cannot be established (for example, in the case of a refugee or an internationally displaced mother):

(51) As a rule, the law applicable to the **ascertainment or constitution of filiation** in cross-border situations should be the law of the State of the habitual residence of **the child. To determine habitual residence, in accordance with the case law of the Court of Justice, special regard is to be given to factors such as the physical presence of the child, the habitual residence of either prospective parent and their intention of living with the child at this place. In cases where the child is not yet born, the concept refers to the place of the prospective habitual residence immediately after birth.**

52) By way of exception, where the law applicable as a rule results in the establishment of parenthood as regards only one parent (for example, only the genetic parent in a same-sex couple), either of two subsidiary laws, namely the law of the State of nationality of either parent or the law of the State of birth of the child, may be applied to establish parenthood as regards the second parent (for example, the non-genetic parent in a same-sex couple). Given that, in those cases, both the parenthood as regards one parent and the parenthood as regards the other parent would be established in accordance with one of the laws designated as applicable by this Regulation, the parenthood as regards each parent, including where established by the authorities of different Member States, should be recognised in all other Member States under the rules of this Regulation where the parenthood as regards each parent has been established by the authorities of a Member State whose courts have jurisdiction under this Regulation.

(53) Any of the laws designated as applicable by this Regulation should apply even if it is not the law of a Member State. **This Regulation does not prevent a Member State from introducing, or continuing to apply, national mechanisms to recognise a filiation ascertained or constituted by operation of a non-EU Member State law, for instance using the Regulation's rules on applicable law to recognise a filiation by means of private international law.**

(54) To ensure legal certainty and the continuity of parenthood **filiation**, where parenthood **filiation** has been established **ascertained or constituted** in a Member State in accordance with one of the laws designated as applicable by this Regulation, the change of connecting factor, especially a change of the child's habitual residence, as a result of a change of the habitual residence of the person who gave birth or of the nationality of either parent should not affect the parenthood **filiation** already established. **ascertained or constituted.**

(55) An interested party may do a unilateral act intended to have legal effect on a parenthood established or to be established, for example, an acknowledgment of paternity or the giving of consent by a spouse to the use of assisted reproductive technology. Such an act should be formally valid if it satisfies the formal requirements of the law designated as applicable by this Regulation, or the law of the State in which the person doing the act has the habitual residence, or the law of the State in which the act was done.

(56) Considerations of public interest should allow courts and other competent authorities ~~establishing parenthood~~ in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State when doing so would be contrary to the Charter and, in particular, Article 21 thereof, which prohibits discrimination.

(56) Considerations of public interest should allow courts and other competent authorities in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, **the result of applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. Regard must be given to the fact that it is not the foreign rule in abstracto which may be rejected but rather the result of its application in the case at hand. For example, if a Member State allows a same-sex couple to adopt a child but does not accept the same-sex spouse of the birth mother as a co-mother, its authorities may not refuse the application of a foreign law solely because it would contain such a provision. The result of the application of such a provision is the only object of the public policy exception.**

The courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another State when doing so would be contrary to the Charter and, in particular, Article 21, **which prohibits discrimination, and Article 24 thereof, which protects the best interests of the child, encompassing their right to an identity (see Recital 11) and to know one's origin.**<sup>65</sup> For example, if a child may be adopted by two persons of the same sex in a State, that State should not be allowed to refuse, on public policy grounds, to apply another foreign law which allows two persons of the same sex to become parents through different provisions – eg by an act of acknowledgement rather than adoption – unless particular aspects of the best interests of the child require it to do so.

<sup>65</sup> See thereto Besson, Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights, *International Journal of Law, Policy and the Family* 2007, 137, 138##.

(57) Since there are States in which two or more systems of law or sets of rules concerning the matters governed by this Regulation may coexist, a provision should govern the extent to which this Regulation applies in the different territorial units of those States.

### 5.1. Key Aspects

- In selecting the most suitable connecting factor, the child's best interests have to be a primary consideration;
- Possible connecting factors can be compared and analysed in terms of legal certainty and practicability, and the principle of closest connection can be implemented;
- The difficulties in tracing a clear-cut border between intra-EU and extra-EU situations suggest seizing this opportunity to include all filiations (irrespective of their form), thereby providing certainty also for Third State situations;
- The proposed single rule-focus reduces complexity, avoids characterisation difficulties and neutralises *fraude à la loi*;
- The solutions proposed need to be tested with a view to assessing their suitability also regarding the specific situation of children born to surrogate mothers, and children born within same-sex couples, as these children should not be exposed to limping statuses as a result of the existing differences in the substantive legal frameworks.

### 5.2. Priorities Emerging from the Text and Methods for Their Pursuit

Rules on the applicable law are required to determine the law governing the 'initial' ascertainment or constitution of filiation. The unification of rules on the applicable law within the EU guarantees that a child-parent relationship (filiation) will be assessed by reference to the same substantive law throughout the EU.

Less clear is the treatment of a filiation status ascertained or constituted in a Third State. The CJEU decided in *Sahyouni I*<sup>66</sup> and *Sahyouni II*<sup>67</sup> that the Rome III Regulation does not apply to the acceptance of a divorce that was pronounced in a non-EU (Third) State. The Report proposes a clarification in Recital 53 that Member States are allowed to apply the Proposal's rules to accept a filiation status created in another State that does not fall under the recognition regime of the Regulation.

Typically, the rules on the applicable law are shaped with three (general) objectives in mind: first, they need to be as simple, clear and precise as possible. This is even more important if they are to be applied not only by judges or lawyers but – as is the case regarding filiation – by civil officers. Second, private international law rules shall generally be based on the closest connection between the situation and the applicable law. Third, particular material interests may have to be accommodated. In this regard, it might be deemed preferable for the applicable law to uphold a pre-existing relationship; the *favor filiationis* principle expresses this thought.

As regards filiation, these objectives face two major challenges:

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<sup>66</sup> CJEU 12.5.2016, -, C281/15, ECLI:EU:C:2016:343.

<sup>67</sup> CJEU 20.12.2017 – C372/16, ECLI:EU:C:2017:988.

First, unlike a marriage or a registered partnership, filiation as a status or legal link is not always ‘established’ by an act. In substantive law, the civil status of filiation may be based on the relevance given by a legal order to:

- 1) the biological filiation (eg the fact of giving birth: *mater semper certa est*-rule; or the genetic filiation from either parent who are the child’s biological ascendants); or
- 2) a social reality (eg, *possession d’état*; legal relationship between the prospective co-parents: legal presumption in favour of the spouse of the child’s mother).

In both cases, the civil status of filiation may be acquired by the child by operation of law. In other cases, the civil status of filiation requires either a judgment (ie constitutive judicial or administrative decision) or an act (eg acknowledgement of paternity, surrogacy agreement).

All three possibilities – operation of law, decision, or act – should be covered by a rule on the applicable law.

Second, filiation creates a bond between the child and another person. Traditionally, a child has two parents, a mother and a father. Nowadays, children continue to have two parents in the overwhelming majority of cases, although not necessarily of different sex. Furthermore, in some cases, more than two adults may qualify as parents of the same child (eg genetic mother of a child who has a different birth mother, genetic father, adoptive parents who do not substitute the original parents, etc). Ascertained or constituted filiation regarding one person may sometimes, yet not always, exclude filiation from another.

Regardless of how the filiation comes into being and regardless of the sex and number of putative parents, the aforementioned objectives need to be respected with regard to each legal relationship that the child enjoys with each (putative) parent. These objectives (simplicity, closest connection, *favor filiationis*) should form a grid for assessing possible rules on the applicable law.

### 5.3. Single Rule Approach to Foster Simplicity and Legal Certainty

On the one hand, the application of different laws may better respect the objective of closest connection for each relationship. In any case, each child-parent relationship must be assessed individually.

On the other hand, certainty and coordination are fostered if all filiation links are governed by the same substantive law. Limping relationships can be avoided as the existence or absence of a filiation is always determined by the same law.

Article 17 of the Commission’s Proposal already embraces the single rule approach for the sake of simplicity. By using the habitual residence of the child as the connecting factor (as proposed here, see below at 5.4), the single rule approach works even better. A single – appropriate – rule can cover all sorts of filiation, including adoption. It is also well-suited to not only apply to the ascertainment and constitution of filiation but also to its contestation and termination. It may cover all aspects of filiation including the formal and material validity of an act (eg acknowledgement of parenthood).

### 5.4. Closest Connection: The Habitual Residence of the Child as the Most Appropriate Connecting Factor

Recital 51 and Article 17 (1) of the Commission’s Proposal refer to the law at the habitual residence of the birth mother. This reference will often coincide with that of the habitual residence of the child, of the habitual residence of the putative parents, and even with that of the nationality of the child and parents and of the State of birth. In these cases of coincidence, the connecting factor used in the Commission’s Proposal ensures a strong proximity to the case.

This connecting factor might also enhance the protection of children which find themselves in a vulnerable situation as a result of the existing differences in substantive laws: children born to surrogate mothers and children born within a same-sex couple. The primary connecting factor refers to the application of the law of the State that (most likely) governed the surrogacy process and ensures filiation from the intended parents (rather than the surrogate mother). As regards same-sex parents, a broad fall-back rule ensures as best as possible the application of a law that allows for the simultaneous filiation of the child with both spouses, regardless of each spouse's sex or biological relation with the child.

However, the Commission's approach of (primarily) applying the law of the birth mother's habitual residence does not focus on the person who should be at the centre of the rule: the child. To refer to another person rather than the person who is at the centre of the applicable substantive law is also atypical in private international law. Furthermore, a reference to the birth mother seems ill-suited to determine the filiation link between the child and other adults (eg putative mother, father, putative co-parent). The proposed connecting factor and its determination at birth seem even less appropriate in cases where filiation is ascertained, constituted, contested or terminated at a later point in the life of the child, eg. in case of adoption (as far as included) or in cases of determination of filiation by acknowledgement or after contestation of a previous filiation. In these cases, a reference to the habitual residence of the birth mother does not necessarily reflect a close connection to the case and might also not be in the best interests of the child or the person who wants to see their child-parent relationship ascertained or constituted (eg genetic father or mother, adoptive mother). In sum, Article 17 (1) is an appropriate option to deal with exceptional situations, eg surrogacy and co-parenthood at the time of birth, but it does not seem adequate for other (less-exceptional) situations. Furthermore, the connecting factor may divert attention to interests other than the prominent ones. The rule should focus on the child as a separate person and the person at the centre of attention rather than treat the child as a mere 'annex' to the birth mother.

As an alternative, the Final Report of the Hague Experts' Group on Parentage proposed to look at the 'place of birth' as the primary connecting factor, with (only) a subsidiary reference to the 'habitual residence of the person giving birth' and the 'habitual residence of the child' as an exception rule.<sup>68</sup> *Prima facie*, the 'place of birth' would have the advantage that the law applicable can be determined by a fact. Despite its simplicity and enhancement of legal certainty, this connecting factor might not reflect the closest connection if filiation is not ascertained or constituted close to birth, but at a later time. Furthermore, even at birth, it does not always ensure a close connection, for example if a child is born during a short-term holiday. Hence the need for the subsidiary and exception rules in the Final Report of the Hague Experts' Group on Parentage. Finally, due to the subsidiary and exception rules, the habitual residence of the person giving birth and the habitual residence of the child would still need to be determined in order to establish whether the general or subsidiary rules apply.

A reference to the habitual residence of the child as the main connecting factor, as suggested in this paper, would result in the application of the same law as Article 17 (1) of the Commission's Proposal in most cases regarding filiation at birth (or directly after), but would also be more appropriate in other situations.<sup>69</sup> It is a commonly used connecting factor in international family law and would also coincide with the main connecting factor to determine jurisdiction – also the habitual residence of the child – and thus enhance consistency within the Proposal. Furthermore, the habitual residence of the child as a connecting factor certainly strengthens the child-centred approach. Given that filiation is 'primarily a

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<sup>68</sup> Final Report of the Hague Experts' Group on Parentage, 20.

<sup>69</sup> See also, among others, Budzikiewicz, *Auf dem Weg zu einer europäischen Abstammungsverordnung? – Licht und Schatten im Vorschlag der Europäischen Kommission*, ZEuP 2024, 253 (257).

matter of the status of the child<sup>70</sup>, there should be a preference for a connecting factor referring to the child. Moreover, it is a neutral criterion that does not favour one (putative) parent over the other(s) as it puts the child rather than one (putative) parent at its centre.

Additionally, in contrast to Article 17 (1) of the Commission's Proposal, which is not suited for adoptions and would have required a special rule for adoptions<sup>71</sup>, ELI Proposal addresses this issue. Such a rule can also be applied to filiation constituted by adoption as far as international instruments do not prevail. Especially in the case of intercountry adoptions, independent of whether such an adoption would fall within the scope of the HCCH 1993 Child Adoption Convention, the reference to the habitual residence of the child would create consistency with the Convention's rules: if the adoption procedure is still pending, the law of the habitual residence of the child would be applied – in conformity with Article 4 of the Convention – whereas, if the child has already been adopted, and litigation arises in the following years as regards the adoption, the law of the new habitual residence of the child will be applicable. In line with this approach, the prerequisites for adoption will remain governed by the legal order in which the prospective parents initiate the proceedings for adoption in conformity with Article 5 of the Convention. Also, referring to the habitual residence of the child in the case of adoption, which can happen years after birth, reflects a closer connection between the child and the applicable law than the reference to the birth person's habitual residence that may or may not be known.

In view of these aspects, the use of the habitual residence of the child as the connecting factor seems preferable to either the habitual residence of the person giving birth or the State of birth. In addition, the challenges regarding the determination of the habitual residence of the child at birth, shortly after the birth and in pre-birth situations can be overcome. In these situations, the Report proposes to refer to the already established case law of the CJEU (on the Brussels IIbis [not IIter] Regulation) and to carefully extend it to pre-birth situations by using presumptions on where the habitual residence will be after birth.

The CJEU determined in a line of cases<sup>72</sup> that the habitual residence of a child will be determined by their physical presence at a certain place and the level of integration there. This integration has to be determined taking into account several circumstances, and, in the case of very young children, special attention is given to the habitual residence of the primary care-giver and the intention of the care-giver to stay with the child in that State. In order to simplify the task of civil status officers or authorities in charge of determining the place of the habitual residence of the child, the criteria referred to by the CJEU in the interpretation of the Brussels II bis regulation have been adapted and reference has been made to the habitual residence of either prospective parent.

To look at the prospective habitual residence for pre-birth situations requires a certain amount of reasoning of the courts, but not much more than that necessary to determine every habitual residence (also of the person giving birth). To also look at the prospective habitual residence using the factors developed by the CJEU regarding babies is a cautious further development of the already existing concept of the habitual residence as known from the Brussels II bis (not IIter) Regulation.

Given that the habitual residence of the child might still not be determinable in certain cases, a subsidiary rule is required. Instead of being limited to the law of the State of birth, the Report proposes a more open wording and refers to the closest connection.

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<sup>70</sup> See *Batiffol/Lagarde*, *Droit international privé* (1976) 91 (footnote 10).

<sup>71</sup> For details see Marburg Group Comments, 42 et seq.

<sup>72</sup> starting with 22.12.2010 -C-497/10 PPU, [ECLI:EU:C:2010:829](#) - Mecredi/Chaffe; see eg CJEU 28.6.2018 – C-12/17 [ECLI:EU:C:2018:513](#), 'HR/KO'.

### 5.5. No Special Rules for Adoption Required

The proposed connecting factor, based on a child-centred approach, is suitable for assessing the law applicable to adoption. The application of the rules on jurisdiction and those on the applicable law will ultimately lead to the *lex auctoritatis*, which is the traditional connecting factor for adoption.

### 5.6. Favor Filiationis and Assisted Reproduction Techniques (ART) Involving Donors and Surrogacy

The proposed connecting factor is also appropriate to regulate consent to ART and filiation of the child born as a consequence of ART (ie not mere medical consent but involving a third donor).

The law of the State where the medically assisted procedure takes place necessarily applies, since clinics need to respect legislation of the State where they are based (eg regarding consent, age or relationship requirements).<sup>73</sup> However, the law applicable to filiation should be the law of the prospective habitual residence of the child. ART cases should not be treated differently to avoid exposure of the circumstances of conception, discrimination and forum shopping. Thus, clinics should also advise prospective parents of the requirements of the law of the prospective habitual residence of the child. For example, if the law at the child's prospective habitual residence requires certain presumptions of paternity issued only by a clinic recognised by the State that conducted the procedure, the law of the State where the clinic is located has to be taken into consideration to assess whether these substantive requirements are fulfilled.

### 5.7. Public Policy

In accordance with the traditional understanding of public policy exceptions, the result of the application of a foreign substantive law rule – rather than the rule as such – should be the measure of incompatibility. Article 22.2 gives the impression that the Proposal has a different public policy control in mind. To avoid that impression (without losing the content of para 2), it should be moved to a recital and illustrated by an example, as suggested under Recital 56.

In addition to the references to the Charter and its Article 21, particular reference should also be made to the right to identity and to know one's origins. This would lift some of the extraordinary weight given to the non-discrimination rule, which might otherwise be used to severely limit the scope of the public policy exception without individual analysis – especially against the background of the CJEU case law on freedom of movement.

In this regard, a reference to the existing case law of the CJEU could be included in Recital 56 and situations that must not be dealt with by public policy could be clarified in the Recital. In this regard, one has to bear in mind that CJEU case law is more restrictive than the Proposal as it limits the obligation to recognise a foreign status to free movement situations and does not extend to substantive law. With a view to the Commission's Proposal, the filiation status of a person may, however, no longer be ignored by substantive private law (inheritance law, etc), thereby touching upon questions regarding the national identity of the Member States. Similarly, in view of the case law of the ECtHR, Article 7 CFR and Article 8 ECHR do not require the recognition of filiation in accordance with a foreign substantive law if other adequate options exist (eg adoption).

The best interests of the child should always be at the forefront and centre of a public policy assessment. In this regard, the right of children to know their identity in particular should be considered. Moreover, apart

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<sup>73</sup> Cf *Twardoch*, Regulating International Filiation Law at the EU Level, *European Review of Private Law* 2024, 259 (281). For another approach, see Article 62 French PIL Code Project.

from the respect for social paternity, the determination of the biological/genetic origins of the child might be considered in the context of weighing various aspects in the (overall) best interests of the child (see Article 24.2 of the Charter).

The application of the public policy rule may be particularly challenging in the context of co-motherhood and co-fatherhood, of multiple parentage and filiation based on surrogacy agreements (in some Member States, commercial surrogacy is regarded as a violation of public policy; in others, altruistic surrogacy is also prohibited and subject to criminal sanctions which also cover cross-border cases).<sup>74</sup> It may enhance legal certainty to expand the assessment criteria regarding these cases.

## 6. Recitals (58)–(64): Recognition

(58) This Regulation should provide for the recognition of court decisions and authentic instruments ~~establishing parenthood with binding legal effect~~ **ascertaining or constituting filiation** issued in another Member State.

(59) Depending on the national law, an authentic instrument ~~establishing parenthood with binding legal effect~~ **ascertaining or constituting filiation** in the Member State of origin can be, for example, a notarial deed of adoption or an administrative decision ~~establishing parenthood following~~ **based on** an acknowledgment of paternity. This Regulation should also provide for the acceptance of authentic instruments which have no binding legal effect in the Member State of origin but which have evidentiary effects in that Member State. Depending on the national law, such an authentic instrument can be, for example, a birth certificate or a ~~parenthood~~ certificate providing evidence of the ~~parenthood~~ **filiation** established **issued** in the Member State of origin, **regardless of the legal basis on which filiation is ascertained or constituted**, (whether the parenthood has been established **be it** by operation of law or by an act of a competent authority, such as a court decision, a notarial deed, an administrative decision or registration).

(60) Mutual trust in the administration of justice in the Union justifies the principle that court decisions ~~establishing parenthood~~ **ascertaining or constituting filiation** in a Member State should be recognised in all Member States without the need for any recognition procedure. In particular, when presented with a court decision given in another Member State, ~~establishing parenthood that can no longer be challenged~~ **ascertaining or constituting filiation** in the Member State of origin, the competent authorities of the requested Member State should recognise the court decision by operation of law without any special procedure being required and update the records on ~~parenthood~~ **filiation** in the relevant register accordingly.

<sup>74</sup> See, for example, Spanish Tribunal Supremo, 31 March 2022, STS 1153/2022, ECLI:ES:TS:2022:1153 and on 6 February 2014, STS 247/2014, ECLI:ES:TS:2014:247 and Art- 12.6 of the Italian Law 40/2004.

<p>(61) It should be left to national law whether the grounds for refusal may be raised by a party or <i>ex officio</i>. This should not preclude any interested party who wishes to raise the recognition of a court decision on <b>parenthood filiation</b> given in another Member State as the principal issue in a dispute from applying to a court for a court decision stating that there are no grounds for a refusal of the recognition of that court decision. It should be for the national law of the Member State where such application is made to determine who can be considered as an interested party entitled to make such application.</p>	
<p>(62) The recognition in a Member State of court decisions on <b>parenthood filiation</b> matters given in another Member State should be based on the principle of mutual trust. Therefore, the grounds for non-recognition should be kept to the minimum in the light of the underlying aim of this Regulation, which is to facilitate the recognition of <b>parenthood filiation</b> and to protect effectively children's rights and the best interests of the child in cross-border situations.</p>	

## 6.1. Key Aspects

- The Commission's Proposal adopts language used in other Regulations, which may not be suited to the cross-border portability of child-parent relationships.
- Most of the EU *acquis* for court decisions and authentic instruments is implemented in the Proposal; most of the provisions are satisfactory but some copy-pastes are not. As regards the grounds for refusal of recognition (Article 31), the Proposal simply 'copies and pastes' provisions that have been introduced in the Brussels II ter Regulation (Article 39). This is not appropriate. For parental responsibility, the decision may change over time: it needs to adapt as the child grows up and their environment changes. For filiation, on the contrary, stability is a key factor.
- The public order exception raises some objections.

## 6.2. Priorities Emerging From the Text and Methods for Their Pursuit

The provisions on recognition of decisions (Articles 24 to 34) correspond to the EU *acquis*.

Some provisions are based on the idea that questions of ascertaining or constituting filiation should be treated in the same way as questions of parental responsibility.

These provisions are open to criticism and have to be amended.

Differently from the EU *acquis* on the irreconcilability of decisions, the Brussels II ter Regulation gives priority to the later decision instead of the earlier one. This encourages forum shopping. However, since decisions regarding parental responsibility are by nature temporary, the change is understandable in that context. These decisions must be able to be modified to adapt to the child's needs. This is not the case regarding decisions on filiation, which should not be able to be changed too easily, as the stability of civil status is at stake. Therefore, the *res iudicata* rule must apply in the case of filiation and priority must be given to the first decision. Thus, a later court decision cannot be recognised if it is incompatible with an earlier one. The Proposal, which suggests the opposite, has to be amended.

In addition, a specific ground of non-recognition should be introduced in order to protect the child and guarantee concrete safeguards of the child's best interests. Instead of referring to the principle in the abstract, the Proposal introduces a specific reference to the rights listed in Article 5.

## 7. Recitals (65)-(67): Authentic Instruments with Binding Legal Effects

~~65) Authentic instruments with binding legal effect in the Member State of origin should be treated as equivalent to 'court decisions' for the purposes of the rules on recognition of this Regulation~~

~~(66) Although the obligation to provide children below the age of 18 years with the opportunity to express their views under this Regulation should not apply to authentic instruments with binding legal effect, the~~ **The** rights of children to express their views should however be taken into consideration pursuant to Article 24 of the Charter and in the light of Articles **7, 8 and 12** of the UN Convention on the Rights of the Child as implemented by national law and procedure. ~~The fact that children were not given the opportunity to express their views should not automatically be a ground for refusal of recognition of authentic instruments with binding legal effect.~~

~~(67) The recognition in a Member State under this Regulation of a court decision establishing parenthood given~~ **ascertaining or constituting filiation** in another Member State, or of an authentic instrument establishing parenthood with binding legal effect drawn up or registered in another Member State **and ascertaining or constituting filiation**, should not imply the recognition of the possible marriage or registered partnership of the parents of the child whose parenthood **filiation** has been or is to be established **determined**.

### 7.1. Key Aspects

- The Commission's Proposal:
  - adopts language used in other Regulations, which may not be suited to the cross-border portability of child-parent relationships.
  - neglects the fact that authentic acts having constitutive effects may also have evidentiary effects.
  - ignores the fact that, while formal evidentiary effects of an authentic instrument may be governed

exclusively by the law of the Member State in which the instrument was issued, substantial evidentiary effects are governed by the law applicable to filiation.

- does not foresee a workable solution to ensure that the authorities of the Member State addressed can easily ascertain what the precise evidentiary effects of an authentic instrument issued in another Member State are.
- creates uncertainty by allowing the authorities of the Member State addressed to choose between giving an authentic instrument in filiation matters the same evidentiary effects it has in the Member State of origin or the most comparable effects.

## 7.2. Priorities Emerging from the Text

The Commission's Proposal should be revised to:

- ensure that all authentic instruments in filiation matters may benefit from their evidentiary effects in other Member States.
- require the authorities of the Member State addressed to give an authentic instrument the same evidentiary effects it has in the Member State of origin or under the law applicable to filiation.

## 7.3. The Existence of Two Categories of Authentic Acts

The Commission's Proposal distinguishes between two categories of authentic acts. On the one hand, authentic acts 'with binding legal effects' (Articles 35 to 39) and, on the other hand, authentic instruments without such binding legal effects (Articles 44-45). The former are subject to a recognition regime, while the latter benefit from the acceptance mechanism.

The distinction between these two categories has given rise to much discussion. Some commentators have argued that this distinction may be difficult to apply and give rise to uncertainties, in particular given that the future Regulation would include four different regimes dealing with the cross-border effects of documents dealing with filiation. Other commentators have even questioned the existence of authentic instruments in filiation matters with constitutive effects, arguing that such instruments do not exist in the law of Member States.

While the Proposal may not be entirely forthcoming, the intention of the Commission is clear. The dividing line the Commission intended touches on the effects of authentic instruments in filiation matters. Under the Proposal, authentic instruments with evidentiary effects are deemed to be 'with no binding legal effects', while authentic instruments with binding legal effects are those which go beyond evidentiary effects: they create a filiation. In other words, the latter have constitutive effects.

This is clarified in Recital 38 of the Proposal, where reference is made to the situation in some Member States where administrative authorities and notaries are empowered to 'draw up authentic instruments establishing parenthood with binding legal effect in the Member State in which they have been drawn up or registered ("authentic instruments with binding legal effect")'. The same Recital explains that authentic instruments which have no binding legal effect in the Member State in which they have been drawn up 'have evidentiary effects in that Member State ("authentic instruments with no binding legal effect")'.

The terminology used by the Proposal raises important questions.

It has been questioned whether authentic instruments in filiation matters could, as such, have constitutive

effects. This is a question of substantive law. However, comparative research has shown that in a limited number of situations, authentic instruments may indeed have constitutive effects in filiation matters. The best example is probably that of the birth certificate under French law. According to Article 311-25 of the French Civil Code, motherhood is established when the name of the mother is duly recorded on the birth certificate. In other words, the fact of giving birth to a child is not as such sufficient to create motherhood. However, it is contested that motherhood is constituted when the birth certificate is drawn up, because the certificate contains a declaration which may be true or false.

It is important to note that an authentic act may have a constitutive effect, even though the act may be challenged. In other words, having constitutive effects does not mean having a final, definitive nature. To continue on the example of the birth certificate under French law, it is possible, although it will be rare in practice, to challenge the motherhood of the person whose name is recorded as the mother on the birth certificate.<sup>75</sup> In this respect there is a difference with the constitution of filiation by a court: when a court issues a decision constituting filiation, such decision is final.

It must be stressed that, pending further research, it appears that authentic acts seldom have constitutive effects, in contrast to what Recital 38 of the Proposal suggests: 'Member States often empower authorities, such as notaries, administrative authorities or registrars to draw up authentic instruments establishing parenthood with binding legal effect in the Member State in which they have been drawn up or registered ("authentic instruments with binding legal effect")'.

Finally, it must be noted that an authentic instrument may have constitutive effects and at the same time evidentiary effects. These effects are not mutually exclusive. It is perfectly possible that the same instrument creates a filiation and at the same time, serves as evidence of the filiation thereby constituted.

#### **7.4. The Limited Need and Usefulness of Section 3 ('Authentic Instruments With Binding Legal Effect')**

The Commission's Proposal includes a whole section and several provisions (Articles 35 to 39) dealing with authentic instruments with binding legal effects. This section extends the mechanism of recognition as of right, which is firstly aimed at court decisions, to authentic instruments with binding legal effects.

The Proposal does not make it convincingly clear why such an extension is needed. There are two main reasons to entertain doubts about the actual usefulness of such extension.

The first reason relates to the fact that, as already underlined, authentic acts with binding legal effects, as understood in the Proposal, remain the exception. It seems that most acts in filiation matters have evidentiary effects. Only in a limited number of cases does an act also have constitutive effects.

The expectation is therefore that Section 3 will not often be put to work. It is submitted that there will be little use in practice for the mechanism of recognition of authentic acts in filiation matters having binding legal effects.

More importantly, and this is the second reason, it may be doubted whether a parent has any interest in practice to rely, in a Member State, on the constitutive effect of an authentic act issued in another Member State. Parents using authentic acts in filiation matters do so mainly, if not exclusively, to demonstrate their

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<sup>75</sup> See F Terré & D Fenouillet, *Droit civil. La famille* (2011, 8th ed, Dalloz), pp 395-396, n° 436.

identity as a parent and the existence of a child-parent relationship. This is necessary to 1) ensure that the filiation is duly recorded in the (civil status) registers of the Member State in which the act is used; and 2) obtain, in that Member State, documents, such as a birth certificate, an identity card or a passport, for the child. Once the local registers reflect the existence of the filiation, the child will be able to benefit from the consequences attached to being the child of their parents – such as acquire the nationality of a parent, to have their name modified accordingly, or to benefit from the social security status of the parent.

It is submitted that it is not necessary to rely on the constitutive effect of a birth certificate to have civil status registers updated. Rather, the parent may rely on the evidentiary effects of the certificate. As will be explained hereunder, these effects make it possible for a parent to assert that they possess that quality. It is irrelevant in this respect that the filiation was established directly in the birth certificate or by other means. This is confirmed in two Recitals, in which the Commission refers to authentic acts which provide ‘evidence of the parenthood’ (Recital 59) or authentic instruments which ‘can have evidentiary effects as regards parenthood already established or as regards other facts’ (Recital 68).

As the Commission explained, ‘citizens most often request the recognition of parenthood in another Member State on the basis of an authentic instrument which does not establish parenthood with binding legal effect, but which has evidentiary effects of the parenthood previously established in that Member State by other means (by operation of law or by an act of a competent authority)’.<sup>76</sup> What matters in practice for a parent is the possibility to rely on the existence of filiation, ie to be able to assert that they are indeed the parent. The authorities in the Member State addressed are not concerned about how filiation was established. They are looking for robust evidence of the existence of filiation.<sup>77</sup>

The only context in which a parent would need to rely on the constitutive effect of an authentic act is when the filiation is challenged in court proceedings. The dispute indeed turns on whether filiation exists, ie whether it was duly ascertained or constituted. In such cases, it may be questioned whether authentic acts should be put on the same foot as court decisions. As already underlined, authentic acts do not possess the same finality as court decisions. The filiation established in such an act may be challenged, based on the provisions of the law applicable to filiation.

## 7.5. The Hidden Dimension: Evidentiary Effects of Authentic Acts with Binding Legal Effects

The Commission’s Proposal distinguishes between two categories of authentic acts. Authentic acts with binding legal effects are governed by a specific section: they are assimilated to court decisions and therefore benefit from the ‘recognition’. Authentic acts without such legal binding effects are subject to a different treatment: they are subject to the regime of ‘acceptance’.

As has been underlined, authentic acts with binding legal effects seem to be rather the exception than the norm. These acts may have very specific consequences. As a rule, they will also have evidentiary effects. The same act could indeed both have constitutive effects and produce evidentiary effects. To come back to the example of the birth certificate under French law, it both establishes motherhood and also constitutes evidence of the existence of motherhood.<sup>78</sup>

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<sup>76</sup> Proposal, p 11.

<sup>77</sup> Incidentally, Article 37 § 4 of the Proposal, dealing with the attestation issued in the Member State of origin for an authentic instrument establishing parenthood with binding legal effect, confirms that the evidentiary effects are key. According to this provision, ‘The attestation shall contain a statement informing Union citizens and their family members that the attestation does not affect the rights that a child derives from Union law and that, for the exercise of such rights, proof of the parent-child relationship can be presented by any means.’ (emphasis added).

<sup>78</sup> P Courbe & A Gouttenoire, *Droit de la famille* (6th ed, 2013, Sirey), p 336, n° 900.

It is not clear whether, under the Proposal, authentic acts with binding legal effects may be relied upon for their evidentiary effects. The binary system proposed by the Commission suggests that the two categories of authentic acts are mutually exclusive. An authentic act with binding legal effects would, in other words, necessarily fall under Section 3 (Articles 35 to 39). Recitals 68 and 69, dealing with the acceptance of authentic instruments, specifically aim at those authentic instruments which have no binding legal effect in the Member State of origin.

If this is how the Proposal should be understood, it would not be to the benefit of the parents or children concerned. Such a rigid system would make it impossible for these parents and children to rely on the evidentiary effects of authentic instruments having binding legal effects, while it is manifest that such evidentiary effects are the most useful ones in practice.

Another possible reading of the Proposal is that the recognition it contemplates for authentic acts with binding legal effects is not limited to the constitutive effect. Under this broader reading, an authentic act with binding legal effects, once recognised, would, in other Member States, benefit of all effects it enjoys in the Member State of origin. Hence, authentic acts with binding legal effects could, once recognised, also be relied upon to provide evidence of the existence of filiation.

If the Commission intended the Proposal to be read this way, clarification is required to avoid any ambiguity. The Proposal should, in particular, avoid creating the impression that it is based on a rigid distinction between two categories of authentic acts, thereby denying those involved the possibility to rely on the evidentiary effects of an authentic instrument having binding legal effects.

In addition, if one should understand that, under the Proposal, the recognition of authentic instruments with binding legal effects covers not only the constitutive but also the evidentiary effects of such instruments, it remains that the Proposal is ill-suited to ensure a smooth and fluid cross-border circulation of such evidentiary effects. Under Article 36, the principle may be that: '[a]uthentic instruments establishing parenthood with binding legal effect in the Member State of origin shall be recognised in other Member States without any special procedure being required'. Article 37.5 subjects, however, the recognition of such instruments to the production of an attestation. This attestation is a document issued by the competent authority of the Member State of origin. Without such attestation, recognition is denied under the Proposal.

If, under the Proposal, a parent may only rely on the evidentiary effect of an authentic instrument having binding legal effects upon the production of an attestation, this would significantly impair the cross-border circulation of such cross-border effects. It would indeed represent a step backward for parents: in most cases today, birth certificates may be produced as such in other Member States, without any need for additional evidence or documents. Requiring parents to obtain such an attestation before being authorised to rely on the evidentiary effects of a birth certificate would amount to creating an additional obstacle to the cross-border circulation of filiation.

## **7.6. Conclusion**

The emphasis of the Commission's Proposal on authentic acts with binding legal effects is misplaced, as such acts appear to be the exception, and their constitutive effects are not what parents seek to rely on.

The Proposal seems to restrict the cross-border effects of authentic acts with binding legal effects to the constitutive effects. In practice, the evidentiary effects of such acts are more important. The Proposal should clarify that authentic acts with binding legal effects may also be relied upon insofar as they produce evidentiary effects.

The Proposal subjects the recognition of authentic acts with binding legal effects to the production of an attestation. This is a formal obstacle which unduly restricts the possibility for parents to rely on such evidentiary effects.

## 8. Recitals (68)-(75): Authentic Instruments with No Binding Legal Effects

<p>(68) In order to take into account the different systems of dealing with <del>parenthood</del> <b>filiation</b> in the Member States, this Regulation should guarantee the acceptance in all Member States of authentic instruments <del>which have no binding legal effect in the Member State of origin but which have evidentiary effects in that Member State. Such authentic instruments can have evidentiary effects as regards parenthood already established or as regards other facts.</del> Depending on the national law, authentic instruments providing evidence of <del>parenthood</del> <b>filiation</b> <del>already established</del> <b>determined</b> can be, for example, a birth certificate, a <del>parenthood</del> <b>filiation</b> certificate or an extract from the civil register on birth. Authentic</p>	
	<p>instruments providing evidence of other facts can be, for example, a notarial or administrative document recording an acknowledgment of paternity, a notarial or administrative document recording the consent of a mother or of a child to the <del>establishment of parenthood</del> <b>ascertainment or constitution of filiation</b>, a notarial or administrative document recording the consent of a spouse to the use of assisted reproductive technology, or a notarial or administrative document recording a possession of status.</p>
<p>(69) Authentic instruments which have <del>no binding legal effect in the Member State of origin but which have evidentiary effects in that Member State</del> should have the same evidentiary effects in another Member State as they have in the Member State of origin, or the most comparable effects. When determining the evidentiary effects of such an authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin. The evidentiary effects which such an authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin.</p>	<p>(69) Authentic instruments which have <b>evidentiary effects</b> in the Member State of origin <b>or under the law of a Member State applicable to filiation</b> should have the same evidentiary effects in another Member State as they have in the Member State of <b>origin or under the law applicable to filiation</b>, or the most comparable effects. When determining the evidentiary effects of such an authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin <b>or under the law governing filiation</b>. The evidentiary effects which such an authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin <b>or the law governing filiation</b>.</p> <p><b>Authentic instruments in filiation matters produce various evidentiary effects. While the general evidentiary effects are governed by the law of the Member State of origin, the extended evidentiary effects depend on the law governing the filiation.</b></p>

(70) The ‘authenticity’ of an authentic instrument ~~which has no binding legal effect in the Member State of origin but which has evidentiary effects in that Member State~~ should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument. A party wishing to challenge the authenticity of such an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State.

(71) The term ‘legal act’ (for example, an acknowledgment of paternity or the giving of consent) or ‘legal relationship’ (for example, the ~~parenthood~~ **filiation** of a child) recorded in an authentic instrument ~~which has no binding legal effect in the Member State of origin but which has evidentiary effects in that Member State~~ should be interpreted as referring to the contents as to substance recorded in the authentic instrument. A party wishing to challenge a legal act or a legal relationship recorded in the authentic instrument should do so before the courts having jurisdiction under this Regulation, which should decide on the challenge in accordance with the law applicable to the ~~establishment of parenthood~~ **ascertainment or constitution of filiation** designated by this Regulation.

(72) If a question relating to the legal act or legal relationship recorded in an authentic instrument ~~which has no binding legal effect in the Member State of origin but which has evidentiary effects in that Member State~~ is raised as an incidental question in proceedings before a court of a Member State, that court should have jurisdiction over that question.

73) Where an authentic instrument ~~which has no binding legal effect in the Member State of origin but which has evidentiary effects in that Member State~~ is being challenged, it should not produce any evidentiary effects in a Member State other than the Member State of origin as long as the challenge is pending. If the challenge concerns only a specific matter relating to the legal act or legal relationships recorded in the authentic instrument, the authentic instrument in question should not produce any evidentiary effects in a Member State other than the Member State of origin with regard to the matter being challenged as long as the challenge is pending. An authentic instrument which has been declared invalid as a result of a challenge should cease to produce any evidentiary effects.

74) Should an authority, in application of this Regulation, be presented with two incompatible authentic instruments which ~~do not establish parenthood with binding legal effect but which have evidentiary effects in their respective Member State of origin~~, it should assess the question of which authentic instrument, if any, should be given priority taking into account the circumstances of the particular case. Where it is not clear from those circumstances which of such authentic instruments, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings.

75) Considerations of public interest should allow Member State courts or other competent authorities to refuse, in exceptional circumstances, to recognise or, as the case may be, accept a court decision or authentic instrument on the ~~parenthood established in another Member State~~ **filiation** where, in a given case, such recognition or acceptance would be manifestly incompatible with the public policy (ordre public) of the Member State concerned. However, the courts or other competent authorities should not be able to refuse to recognise or, as the case may be, accept a court decision or an authentic instrument issued in another Member State when doing so would be contrary to the Charter and, in particular, Article 21 thereof, which prohibits discrimination.

## 8.1. Key Aspects

- Evidentiary effects are binding.
- The future Regulation should better reflect the difference between the two categories of authentic acts and its impact on the applicable law.
- The following changes should be considered in this respect:
  - Article 18(b) should be modified in order to clarify that the evidentiary effects it refers to are the extended evidentiary effects. This may be achieved by referring to the ‘substantive evidentiary effects’ (as opposed to ‘formal’ evidentiary effects), which is another way of describing the extended evidentiary effects.
  - It is also suggested to delete the reference in Article 18(b) to ‘the binding legal effect’ of authentic instruments: this reference is unnecessary, as the binding legal effects are nothing more than a method to establish parenthood. Article 18(a) already makes clear that the procedures to establish or contest parenthood are governed by the law designated by the Regulation. Article 18(b) therefore only refers to the evidentiary effects.
  - Recital 69 of the Proposal should also be adapted: it indicates that reference should be made to the nature and scope of the evidentiary effects of the authentic instruments in the Member State of origin. This only applies to the general evidentiary effects, not to extended evidentiary effects.
  - It would be helpful to include an additional recital to clarify that the applicable law differs depending on the subject matter of the evidentiary effect: this recital, which has been included in the proposed Recital 69 above, indicates that authentic instruments in filiation matters produce various evidentiary effects and that while the general evidentiary effects are governed by the law of the Member State of origin, the extended evidentiary effects depend on the law governing the filiation.

## 8.2. Priorities Emerging From the Text and Methods for Their Pursuit

The Commission's Proposal builds on existing Regulations which have introduced provisions aiming specifically at the evidentiary effects of authentic acts. Article 45 is directly inspired by the Succession Regulation and the Matrimonial Property Regulation (see Article 59 Succession Regulation; Article 58 of the Matrimonial Property Regulation and Article 58 of the Partnership Regulation). The text has been adopted without substantial change. As in these Regulations, the Proposal limits the scope of the mechanism of acceptance to the evidentiary effects of authentic acts. The recognition of the legal acts or legal relationships (ie the ‘content’ of the act) recorded in an authentic act is subject to a different regime. Article 45 (6) of the Proposal indeed indicates that the recognition of such ‘legal acts or legal relationships recorded in such an authentic instrument’ is subject to the law declared applicable by the Proposal.

The evidentiary effects of authentic acts may touch on different elements. It is necessary to distinguish with precision the various evidentiary effects which authentic acts may produce before assessing the Proposal.<sup>79</sup>

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<sup>79</sup> In addition to the generic and specific evidentiary effects which birth certificates could entail, authentic acts in parenthood matters could also serve as evidence of other elements which, although not directly covering parenthood, are linked to parenthood. Recital 68 refers in this respect to the existence of the consent of a mother or of a child to the establishment of parenthood.

### 8.3. Preliminary Observations: The Nature and Extent of the Evidentiary Effects of Authentic Acts in Parenthood Matters

Authentic acts in filiation matters may produce different evidentiary effects. Some of these evidentiary effects are quite limited and will not help parents in cross-border situations. Other evidentiary effects touch more directly on filiation and may, therefore, play a central role in the cross-border circulation of filiation.

In the first place, authentic acts may enjoy general evidentiary effects (also referred to as the ‘formal evidentiary effects’).<sup>80</sup> In those Member States where authentic acts exist, ie the Romano-Germanic legal systems, specific legal provisions exist which describe these evidentiary effects enjoyed by all authentic acts (see Table 1). Most of these provisions are general and apply to all authentic acts, without distinguishing between acts issued by notaries and acts issued by civil status registrars.

Table 1

Germany	§ 415 Code of Civil Procedure (ZPO)
France	Article 1371 Civil Code
Belgium	Article 8.17 Civil Code
The Netherlands	Article 157 Code of Civil Procedure (WBRv)
Italy	Article 2700 Civil Code (Codice civile)
Luxembourg	Article 1319 Civil Code
Romania	Article 269 Code of Civil Procedure
Spain	Article 1218 Civil Code (Codigo civil)
Poland	Article 244 Code of Civil Procedure (Kodeks postępowania cywilnego)

Two relevant features of these evidentiary effects stand out:

- First, their scope is quite limited. They only extend to elements ascertained directly by the authority issuing the act, ie the notary or the civil status registrar.<sup>81</sup> This usually covers the identities of the parties, the date and place of issuance of the act and the fact that the parties made certain declarations in the presence of a notary or a civil status registrar. Article 269 of the Romanian Code of Civil Procedure provides that the authenticity relates to the ‘identity of the parties, the fact that they consented to the content of the act, their signature and the date of the act’.

<sup>80</sup> In the German version of the Proposal, reference is made to the concept of ‘formelle Beweiskraft’; see Article 45 and Recitals 68 and 69. Under the Succession Regulation, Article 59 also refers to the ‘formelle Beweiskraft’; see H-P Mansel, Article 59, in Calvo-Caravaca, Davi and Mansel, *The EU Succession Regulation. A Commentary* (CUP 2016) p 641, n° 20

<sup>81</sup> See in detail, J Fitchen, *The Private International Law of Authentic Instruments*, Hart, 2020, pp 28-30. Under the Succession Regulation, this is further expressed by Recital 62, which refers in this respect to ‘the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated’

In relation to birth certificates, the elements covered by this evidentiary effect do not seem useful for parents who wish to rely on their filiation in other Member States. The limited evidentiary effects of a birth certificate indeed concern the date on which the birth was declared; the identity of the person who made the declaration and the fact that that person made a declaration. In legal systems which strictly adhere to the *ex propriis sensibus* principle<sup>82</sup>, the birth itself as a fact or the name of the doctor are not covered by the evidentiary effect, as the civil registrar does not witness the birth itself. In some legal systems, special provisions have been adopted, which provide that the evidentiary status extends to those elements.<sup>83</sup> The existence of filiation cannot be covered by this restricted version of the evidentiary effect, as filiation itself is never witnessed by a registrar.

- Second, these evidentiary effects are well protected: they enjoy a higher evidential standard than that applicable to facts and actions or declarations recorded in a private document. In many Member States, a person who wishes to challenge the fact that the elements recorded by a civil status registrar or a notary are correct, may only do so by using a special procedure.<sup>84</sup> This procedure involves demonstrating that the authority which issued the authentic act erred in recording the content of the act. As this is a notoriously difficult procedure to conduct, authentic acts are not routinely challenged.

In other Member States, such as Germany, the evidentiary effects of authentic acts may be challenged in normal proceedings before any court, without having recourse to a special set of proceedings. However, the presumption of accuracy remains strong.<sup>85</sup>

As a consequence, the elements covered by the higher probative force are presumed to be correct and true. This presumption is strong: it cannot be overturned lightly. In addition, the evidentiary effects of an authentic instrument may usually also be relied upon by third parties.

Next to these limited evidentiary effects, authentic acts may also benefit from more extensive evidentiary effects. These effects are not limited to facts which have been ascertained directly by the authority issuing the act. They extend to other elements which concern the actual content of the act, content which may be the result of a legal reasoning.

In succession matters, national certificates<sup>86</sup> may produce such extended evidentiary effects. This will be the case when such a certificate creates a presumption that a person designated as heir does in fact possess that quality.<sup>87</sup>

In filiation matters, birth certificates may also produce extended evidentiary effects. This is the case if the birth certificate may serve to demonstrate the existence of filiation. Such evidence cannot be covered by the more limited evidentiary effects attached to all authentic acts. Filiation is indeed not a factual element recorded by the authority issuing the authentic act.

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<sup>82</sup> Which seems to be the case of a majority, if not all, Romano-Germanic legal systems. For Spain, see P Beaumont, J Fitchen and J Holliday, *The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions*, European Parliament Study PE 556.935, 2016, p 219.

<sup>83</sup> See eg Article 22 § 1 Dutch Civil Code, which makes a distinction between what the registrar witnesses - 'ambtvenaarsverklaring' - and the declaration made by the party - 'partijverklaring'.

<sup>84</sup> Under French law : Article 303 to 316 Code of Civil Procedure; Greek law : Article 460 Code of Civil Procedure; Portuguese law : Article 3(3) Code of the Civil Register; Romanian law : Article 304 Code of civil procedure; Spanish law : Article 320 Code of Civil Procedure; Poland : Article 189 Code of Civil Procedure.

<sup>85</sup> See in detail, J Fitchen, *The Private International Law of Authentic Instruments*, Hart, 2020, pp 78-79.

<sup>86</sup> Which may be authentic acts according to the CJEU (*EE, Kauno miesto 4-ojo notaro biuro notare, K-DE, case C-80/19, § 75; WB, Przemysława Bac (intervener), case C-658/17, § 72*).

<sup>87</sup> See eg Article 4.59 Civil Code (Belgium).

This explains why special provisions exist in many Member States which make it possible to use a birth certificate to demonstrate that a person is the parent (father or mother) of another person (see Table 2).

Table 2

France	Article 310-3 Civil Code : parenthood ‘se prouve par l’acte de naissance de l’enfant [...]’
Belgium	Article 23 Civil Code : « Seuls les actes de l’état civil font preuve de l’état de la personne, à moins que la loi n’en dispose autrement »
Spain	Article 17 of Act 20/2011 of 21 July 2011 relating to the Registro Civil : ‘Eficacia probatoria de la inscripción. 1. La inscripción en el Registro Civil constituye prueba plena de los hechos inscritos’
Germany	§ 54 of the Personenstandsgesetz, entitled ‘Beweiskraft der Personenstandsregister und -urkunden’: ‘Die Beurkundungen in den Personenstandsregistern beweisen Eheschließung, Begründung der Lebenspartnerschaft, Geburt und Tod und die darüber gemachten näheren Angaben sowie die sonstigen Angaben über den Personenstand der Personen, auf die sich der Eintrag bezieht. Hinweise haben diese Beweiskraft nicht.’
Luxembourg	Article 319 Civil Code : ‘La filiation des enfants légitimes se prouve par les actes de naissance inscrits sur les registres de l’état civil.’
Portugal	Article 3(1) Code of Civil Registry: ‘A prova resultante do registo civil quanto aos factos que a ele estão obrigatoriamente sujeitos e ao estado civil correspondente não pode ser ilidida por qualquer outra, a não ser nas acções de estado e nas acções de registo » / « The proof resulting from civil registration is a legal one and it may not be rebutted except in the context of an action to dispute civil status or an action of registry’.
Austria	§ 40 of the Civil Status Act : ‘Die Eintragung zu den allgemeinen und besonderen Personenstandsdaten begründet vollen Beweis im Sinne des § 292 Abs. 1 ZPO, soweit es sich nicht um die Staatsangehörigkeit handelt.’ / ‘The entry on the general and special personal status data constitutes full proof within the meaning of section 292 (1) of the Code of Civil Procedure, insofar as it does not concern nationality’
Italy	Article 236 Codice civile : ‘Atto di nascita e possesso di stato’ – ‘La filiazione si prova con l’atto di nascita nei registri dello stato civile#
Romania	Article 409 Civil Code: ‘Filiația se dovedește prin actul de naștere întocmit în registrul de stare civilă, precum și cu certificatul de naștere eliberat pe baza acestuia.’ / ‘Filiation shall be proved by the birth certificate in the birth register and the birth certificate issued on that basis.’
Greece	Law 344/1976 on the Registrar [to be completed]

Bulgaria	Article 34(2) Civil Registration Act of 1990 – ‘(2) The civil status acts issued under the rules established in this Act shall have the power of evidence for the data contained therein pending proof of their untruthfulness.’ <sup>88</sup> / ‘(2) Актовете за гражданско състояние, съставени по установен в този закон ред, имат доказателствена сила за отразените в тях данни до доказване на тяхната неистинност.’)
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Although further research is needed on this question, it seems that the effect of these provisions is to create a presumption that filiation exists. In other words, the person whose name is indicated in the birth certificate as mother or father of the child may validly claim to have that status. This presumption is an evidentiary mechanism: it does not create or establish filiation but may be used to easily assert that this status exists. In that sense, the mechanism should not be confused with the *negotium*, ie the actual legal content of the authentic act. Rather, it comes very close to the presumption created by Article 53.2 of the proposed amendments for the elements mentioned in the European Certificate of Filiation: the person mentioned in the birth certificate is presumed to have the status mentioned in the birth certificate. One could say that, with this extended evidentiary effect, birth certificates provide strong evidence of its actual content, without having any influence on the existence or content of the status.

The presumption created by the national legal provisions may be rebutted. Where the generic evidentiary effects must, in many Member States, be challenged using specially designed procedures, no special evidentiary mechanism exists to challenge the presumption of filiation. Challenging the presumption linked to the extended evidentiary effects must be done by using the general mechanisms existing under the law of filiation. In other words, the presumption of filiation can only be rebutted by demonstrating that there is no filiation. And this must be done using the various means made available by the law governing filiation.

#### 8.4. The Law Applicable to the Evidentiary Effects of Authentic Acts in Filiation Matters

Authentic acts in filiation matters produce various evidentiary effects, ie general evidentiary effects and extended evidentiary effects. The law governing these evidentiary effects may differ depending on the subject matter of the evidentiary effects.

In other Regulations which include a provision on acceptance of authentic acts, it is made clear that the evidentiary effects of authentic acts are governed by the law of the Member State of origin (see Recital 61 of the Succession Regulation, Recital 58 of the Matrimonial Property Regulation and Recital 57 of the Partnership Regulation, which provide in identical terms that: ‘When determining the evidentiary effects of a given authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin. The evidentiary effects which a given authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin.’)

This position is reflected in Article 44 of the Proposal, which refers to authentic acts ‘which have no binding legal effect in the Member State of origin, but which have evidentiary effects in that Member State’.

<sup>88</sup> However, when assessing the substantive evidentiary value of the civil status record as an official document, it must be taken into account that it (substantive evidentiary value) refers only to what took place before the civil registrar and was personally perceived by them : Ruling of the Supreme Court of Cassation No 232 of 11.04.2013 case № 2401/2013 IV civil division.

Article 37.2 lit b of the Proposal, which relates to authentic acts having binding legal effect, also confirms the role of the law of the Member State of origin, but this time in relation to authentic instruments having legal binding effect. Under this provision, an attestation may only be issued if the authentic instrument ‘has binding legal effect’ in the Member State of origin.

At the same time, Article 18 lit b of the Proposal indicates that the law designated by the future Regulation governs ‘the binding legal effect and/or the evidentiary effects of authentic instrument’.

The Proposal creates some confusion on the matter of the applicable law. It is unclear whether, under the Proposal, the evidentiary effects of authentic instruments should be governed by the law of the Member State of origin or by the law governing filiation.

It is submitted that this confusion is linked to the fact that the Proposal insufficiently distinguishes between the various evidentiary effects which may be linked to authentic acts in filiation matters.

The general evidentiary effects of authentic instruments should exclusively be governed by the law of the Member State of origin. The exclusive application of this law can be understood because these effects are intimately linked to the role and the competences of the authority drawing up the authentic act. These general evidentiary effects are closely tied with the legal system of the Member State from which the authentic act originates, as they exist because the Member State has entrusted the authority issuing the act with the power to record certain factual elements and has provided that such recordings enjoy a higher evidentiary status. At the same time, the application of local law may also be explained by the need to ensure the application of the special procedure existing on local level to overturn the presumption of authenticity. This dictates the application of the law of the Member State of origin to this type of effect.

On the other hand, the extended evidentiary effects are closely linked to the law applicable to filiation as such. As explained, these effects create a presumption that the status recorded in a birth certificate exists. The nature and effects of this presumption are intimately linked to the rules governing filiation. The rebuttal of this presumption is also linked to the law governing filiation: the presumption may only be rebutted by using the various procedures available under the law applicable to filiation. It therefore seems natural to apply that law to define the nature and extent of the substantial evidentiary effects.

This is reflected in Article 53.2 of the Proposal in relation to the ECF: under this provision, the ECP is presumed ‘to demonstrate accurately elements which have been established under the law applicable to the establishment of parenthood’. This confirms that the extended evidentiary effects should be governed by the law applicable to filiation.

## 9. Recitals (76)-(83): European Certificate of Parenthood

<p>(76) In order for the recognition of the parenthood <del>established</del> in a Member State to be settled speedily, smoothly and efficiently, children or their parent(s) should be able to demonstrate easily the children's status in another Member State. To enable them to do so, this Regulation should provide for the creation of a uniform certificate, the <del>European Certificate of Parenthood</del>, to be issued for use in another Member State. In order to respect the principle of subsidiarity, the European Certificate of Parenthood <del>should not take the place of internal documents which may exist for similar purposes in the Member States.</del></p>	<p>(76) In order for the recognition of the filiation <b>ascertained or constituted</b> in a Member State to be settled speedily, smoothly and efficiently, children or their parent(s) should be able to demonstrate easily the children's status in another Member State. To enable them to do so, this Regulation should provide for the creation of a uniform certificate, the <b>European Certificate of Filiation</b>, to be issued for use in another Member State. In order to respect the principles of subsidiarity <b>and proportionality</b>, <b>this Regulation does not create a European civil status of filiation in addition to national ones and followed by a European set of rights, duties, capacities, or incapacities but it provides an instrument – the European Certificate of Filiation – which enhances the legal certainty of national civil status, as attested by documents which</b> exist for similar purposes in the Member States. The Certificate <b>ensures a more expeditious circulation of child-parent relationships, which reflects practices respectful of the best interests of the child. It also encompasses an ethical dimension, considering future generations.</b></p>
<p>(77) The authority that issues the European Certificate of <del>Parenthood</del> should have regard to the formalities <del>required for the registration of parenthood in the Member State in which the register is kept. For that purpose, this Regulation should provide for an exchange of information on such formalities between the Member States.</del></p>	<p>(77) The authority that issues the European Certificate of <b>Filiation</b> should have regard to the formalities <b>specified in this Regulation.</b></p>

<p>(78) The use of the European Certificate of Parenthood <del>should not be mandatory</del>. This means that persons entitled to apply for a European Certificate of Parenthood, namely the child or a legal representative, should be under no obligation to do so and should be free to present the other instruments available under this Regulation (a court decision or an authentic instrument) when requesting recognition in another Member State. However, no authority or person presented with a European Certificate of Parenthood issued in another Member State should be entitled to request that a court decision or an authentic instrument be presented instead of the European Certificate of Parenthood.</p>	<p>(78) The use of the European Certificate of <b>Filiation</b> is optional.</p>
<p>(79) The European Certificate of Parenthood should be issued in the Member State in which <del>parenthood was established</del> and whose courts have jurisdiction under this Regulation. It should be for each Member State to determine in its internal legislation which authorities are to have competence to issue the European Certificate of Parenthood, whether they be courts or other authorities with competence in matters of <del>parenthood</del>, such as, for example, administrative authorities, notaries or registrars. The Member States should communicate to the Commission the relevant information concerning the authorities empowered under national law to issue the European Certificate of Parenthood in order for that information to be made publicly available.</p>	<p>(79) The European Certificate of <b>Filiation</b> should be issued in the Member State whose courts have jurisdiction under this Regulation. It should be for each Member State to determine in its internal legislation which authorities are to have competence to issue the European Certificate of <b>Filiation</b>, whether they be courts or other authorities with competence in matters of <b>filiation</b>, such as, for example, administrative authorities, notaries or registrars. The Member States should communicate to the Commission the relevant information concerning the authorities empowered under national law to issue the European Certificate of <b>Filiation</b> in order for that information to be made publicly available.</p>

<p>(80) Whilst the contents and the effects of national authentic instrument providing evidence of <del>parenthood</del> (such as a birth certificate or a parenthood certificate) vary depending on the Member State of origin, the European Certificate of <del>Parenthood</del> should have the same contents and produce the same effects in all Member States. It should have evidentiary effects and should be presumed to demonstrate accurately elements which have been established under the law applicable to the <del>establishment of parenthood</del> designated by this Regulation. The evidentiary effects of the European Certificate of <del>Parenthood</del> should not extend to elements which are not governed by this Regulation, such as the civil status of the parents of the child whose parenthood is concerned. Whilst the language of a national authentic instrument providing evidence of parenthood is issued in the language of the Member State of origin, the European Certificate of <del>Parenthood</del> form annexed to this Regulation is available in all Union languages.</p>	<p>(80) Whilst the contents and the effects of national authentic instrument providing evidence of <b>filiation</b> (such as a birth certificate or a parenthood certificate) vary depending on the Member State of origin, the European Certificate of <b>Filiation</b> should have the same contents and produce the same effects in all Member States. It should have evidentiary effects and should be presumed to demonstrate accurately elements which have been established under the law applicable to the <b>ascertainment or constitution of filiation</b> designated by this Regulation. The evidentiary effects of the European Certificate of <b>Filiation</b> should not extend to elements which are not governed by this Regulation, such as the civil status of the parents of the child whose <b>filiation</b> is concerned. Whilst the language of a national authentic instrument providing evidence of <b>filiation</b> is issued in the language of the Member State of origin, the European Certificate of <b>Filiation</b> form annexed to this Regulation is available in all Union languages.</p>
<p>(81) The court or other competent authority should issue the European Certificate of <del>Parenthood</del> upon request. <del>The original of the European Certificate of Parenthood should remain with the issuing authority, which should issue one or more certified copies of the European Certificate of Parenthood to the applicant or a legal representative. Given the stability of parenthood status in the vast majority of cases, the validity of the copies of the European Certificate of Parenthood should not be limited in time, without prejudice to the possibility to rectify, modify, suspend or withdraw the European Certificate of Parenthood as necessary. This Regulation should provide for redress against decisions of the issuing authority, including decisions to refuse to issue a European Certificate of Parenthood. Where the European Certificate of Parenthood is rectified, modified, suspended or withdrawn, the issuing authority should inform the persons to whom certified copies have been issued so as to avoid a wrongful use of such copies.</del></p>	<p>(81) The court or other competent authority should issue the European Certificate of <b>Filiation</b> upon request. <b>The data relied upon to issue the European Certificate of Filiation should be stored in a dedicated centralised register, accessible by the competent registrars as designated by Member States and created by the Commission. Given the possibility to retrieve the data kept in the centralised IT register at all times and by all Member States,</b> the validity of the copies of the European Certificate of <b>Filiation</b> may be limited in time. <b>The recording of data in the centralised register is</b> without prejudice to the possibility to rectify, modify, suspend or withdraw <b>the data present in the register for a subsequent</b> European Certificate of Filiation as necessary. <b>The rectified data should be added to the file on the date of the digital intervention by the competent Member State, whilst track of the previous data should be kept and remain accessible in all cases. The authorities of a Member State rectifying the data in the register on the basis of subsequent facts, documents, or</b></p>

	<p><b>acts should immediately inform the persons to whom certified copies have been issued so as to avoid a wrongful use of such copies as well as, when applicable, the previous issuing authority, ie if it is the authority of another Member State.</b> This Regulation should provide for redress against decisions of <b>each</b> issuing authority, including decisions to refuse to issue a European Certificate of <b>Filiation</b>. Where the European Certificate of <b>Filiation</b> is rectified, modified, suspended or withdrawn, by the authorities of a Member State which has access to the centralized register the issuing authority should inform the persons to whom certified copies have been issued.</p>
<p>(82) This Regulation should provide for a modern means of access to justice making it possible for natural persons or their legal representatives and Member State courts or other competent authorities to <del>communicate electronically through the European electronic access point established on the European e-Justice Portal by Regulation (EU) .../...[the Digitalisation Regulation]. Consistency with [the Digitalisation Regulation] should be ensured. It is therefore appropriate for this Regulation to refer to [the Digitalisation Regulation] as necessary, including as regards the definitions of ‘decentralised IT system’ and ‘European electronic access point’.</del> The European electronic access point is <del>be</del> part of a decentralised IT system. The decentralised IT system should be comprised of the back-end systems of Member States and interoperable access points, including the European electronic access point, through which they should be interconnected. The access points of the decentralised IT system should be based on the e-CODEX system established by Regulation (EU) 2022/850. The European Interoperability Framework provides the reference concept for interoperable policy implementation.</p>	
<p>(83) The European <del>electronic access point</del> should allow natural persons or their legal representatives to launch a request for a European Certificate of Parenthood and to receive and send that Certificate electronically. It should also allow them to communicate electronically with Member State courts or other competent authorities in proceedings for a decision that there are no grounds for the refusal of recognition of a court decision or an authentic instrument on <del>parenthood</del>, or proceedings for the refusal of recognition of a court decision or an authentic instrument on <del>parenthood</del>. <del>Member State courts or other competent authorities should communicate with citizens through the European electronic access point only where the citizen has given prior express consent to the use of this means of communication.</del></p>	<p>(83) The European <b>centralised register</b> should allow <b>all national authorities to retrieve</b> a European Certificate of <b>Filiation</b>, <b>as soon as the national authority of a Member State issues the first certification.</b> It should also allow them to communicate electronically with Member State courts or other competent authorities in proceedings for a decision that there are no grounds for the refusal of recognition of a court decision or an authentic instrument on <b>filiation</b>, or proceedings for the refusal of recognition of a court decision or an authentic instrument on <b>filiation</b>.</p>

### 9.1. Key Aspects

- The word ‘status’ has, in filiation matters, a different meaning than that employed in the corresponding article of the EU Successions Regulation 650/2012. The ‘status of heir’ is not a civil status, whereas the status of filiation is.
- The terms ‘certificate/certification’ and of ‘establishment of filiation’ need to be understood in the framework of a comprehensive legal system. For the purposes of European integration, a semantic evolution of status in a bureaucratic sense, where the written document is given priority over human rights, needs to be prevented, whilst a EU notion of status should be anchored in the fundamental rights of the child.
- The possibility of multiple ECF with conflicting content should be prevented, whereas it cannot be excluded in the original text.

### 9.2. Priorities Emerging From the Text

There are two priorities of equal importance:

- to ensure that a filiation status recognised in one Member State is recognised in all Member States; and
- to ensure that, if the child and the child’s biological mother are victims of trafficking, and in all cases of access to the EU market by child trafficking, illegal adoption, and women trafficking networks, the child’s filiation status is considered in the light of the child’s specific situation, needs, and best interests.

### 9.3. Articles 46-49: The Semantic Evolution of Personal Status Certification and Its Meaning

Historically, the authorities of every established power, whether religious or political, document the essential facts of life – births, marriages, deaths, etc – in specially created registers. Crystallising the identity of people in a register serves the governing authority to know the quantity and certain qualities of the people who form the social body over which it exercises its power. As a result, people’s contribution to the society in which they live and their participation in the exercise of power turn out to be conditioned by the presence of the data identifying them in these records. It is only through the certification of identity – identifying data certified as true in a register – that people are put in a position to exercise a whole series of rights and powers of various kinds: political, social, economic, etc. Among the first registers of such kind in Europe are those kept by the Catholic church. In order to marry according to the Catholic rite, the bride and groom must apply to the authorities of the Catholic Church for certification of their religious identity, which has been built up over the course of a lifetime by passing a number of ‘stages of religious growth’ the sacraments – baptism, communion, confirmation – which are regulated in Part One of Book IV of the Code of Canon Law.<sup>89</sup> In the absence of the prescribed documents, the participation of religious persons in the religious life of the community may be limited or compromised. Until recently, in most Catholic communities, divorced or homosexual persons were denied the sacrament of communion. Until today, both categories cannot ‘consecrate’ their partnership: divorced persons need to annihilate *ex tunc* their previous marriage for some original cause of nullity to remarry; homosexual persons are also still prevented from marrying their same-sex partner. The same applies with public registries in each nation: party autonomy – in the case of, for example, the will to marry – remains

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<sup>89</sup> The Code of Canon Law was promulgated by Pope John Paul II on January 25, 1983 and came into effect on 27 November of that year and is available online in many language versions (eg, [Belarusian](#), [Traditional Chinese](#), [French](#), [English](#), [Italian](#), [Latin](#), [Portuguese](#), [Russian](#), [Spanish](#), [German](#)).

conditioned by the regularity of the entries appearing in the registry. Most States require the transcription of a divorce before giving to a previously married person a *nihil obstat* to a second marriage. Without registration, personal identity cannot be certified by the registrar, with the result that the person will be limited in his or her autonomy. Without the certificate attesting to her identity or personal qualities, a person cannot exercise the rights and powers that are recognised by the institutions that manage the registry with the consequence that her social status depends on the entry. For these reasons, being '*sans papiers*' is synonymous with social exclusion, invisibility, and therefore vulnerability.

Conversely, the mere existence of a regular, even if false, entry in a registry may prove sufficient to attribute rights and powers to persons whose identity is taken for true.

A proper understanding and implementation of the marital status certification system is then instrumental to ensuring consistent social growth that respects individual rights and especially the right of citizenship that enables citizens to actively participate in the political life of their communities.

In order to secure the right of citizenship for every person, Article 7 CRC enshrines the right of every newborn child to be 'registered immediately at the time of his or her birth.' This registration, again under the same provision, is explicitly seen as serving to guarantee the infant both the 'right to a name' and the right 'to acquire a nationality'. In most cases, the identity attested by registration includes, 'to the extent possible', the identity of the parents and the right 'to be raised by them'.

The two extreme cases of unregistered person and persons certified alive without being so allow us to understand the meaning of status certification and avert the risks of its semantic evolution in a bureaucratic sense. The meaning of the certification of a status by the authority expressed by the social body lies instead in the *certum facere* that represents its etymological root and requires that the recorded fact reflect an empirically verified reality and thus be true.

#### 9.4. Status Stability Between Biology and Law

Even the etymology of the word 'status' reflects its inherent static, or stable, character, tending to capture a permanent quality of the person and not an extemporaneous or easily changed datum of her identity.

Status arises to describe irreversible events: being born in a certain place, on a certain day and at a certain time, having contracted marriage in a certain place and on a certain day and at a certain time, having given birth to a daughter on a certain day and at a certain time. This anchorage to the truth of a circumstance that happened and is therefore irreversible and documentable with certainty is the basis of the principle of the non-negotiability of personal statuses explicitly recognised by most countries of continental law.<sup>90</sup>

There is, however, a fundamental difference between the facts that can be documented and selected to attribute permanent qualities to a person such as to affect their identity: some are biological events – such as birth, death, scientifically verifiable physical or psychic qualities, etc – others are social, ritual events, to which each legal system attaches a specific meaning, although often comparable to that attributed by other legal systems. These include marriage, adoption, etc. Here the reality which is being certified is that of the happening of a rite or procedure which is considered by the authority which has overseen it, as attributive of status.

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<sup>90</sup> See: E Gallant, Autonomie conflictuelle et substantielle dans les pactes familiaux internationaux. In : Le droit à l'épreuve des siècles et des frontières : Mélanges en l'honneur du Professeur Bertrand Ancel LGDJ - Iprolex, 2018, pp 709-733.

This second category of certification of status, those attributed by the legal system, may either remain confined to the community governed by such legal system – if a comparable foreign status does not exist – or may be exportable.<sup>91</sup>

Its exportability necessarily requires cooperation among States and such cooperation may be driven or controlled by the EU. Cooperation can take place in different frameworks and can use different methods, but what is essential is that cooperation provides the ground for a discussion on the underlying fundamental principles and the function of certification instead of taking place at a bureaucratic level with the mere introduction of multilingual forms.

## **9.5. The Relationship Between Fundamental Rights and Certification**

In filiation matters, what is at stake is the right of the child to an identity, which encompasses her right to know her origins.

The norms of coordination between systems must guarantee these human rights. Already in selecting vital records, each system selects the relevant facts that have to be recorded and for which purpose and to what extent: it is a question of national law whether the intention to raise a child is sufficient to grant a status or whether the law simply obliges (contractually) the person to express her intention to provide for the child.<sup>92</sup>

The work of the registrar remains subject to the control of the authority responsible for overseeing compliance with the rules applicable to entries in a register.

## **9.6. Risks or Missed Opportunities**

The Commission's Proposal uses the word 'certificate' following the Succession Regulation. It does not anchor the word to the existence of an EU-wide register from which the data 'certified' as true in such 'European certificate' may be extracted.

Rather, it attempts to work with a 'decentralised IT system', a 'European electronic access point' and 'national IT portals', without considering the possibility of a centralised IT system from which the certificates could be extracted at the same time in each Member State. This Report argues that the installation of a centralised system would be a major advancement for European integration at a minor cost – as compared to the decentralised system etc.

The system could operate under the following conditions:

- The data which each Member State would enter in the centralised system under EU control should reflect either the certifiable biological reality of a filiation or the constitution of a filiation respecting minimum standards common to EU Member States;

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<sup>91</sup> An example is the case of the Swiss status of 'origin', pursuant to Article 2 of the Swiss Federal Citizenship Act of June 20, 2014, R.S. 141.0 FF 2011 2567, which, in Switzerland, indicates the place of origin of the family and is attributed to every Swiss citizen, along with citizenship. Many Swiss citizens find themselves with origin in a place they have never even visited but which represents the original village of the family whose surname they bear. Origin is therefore not certifiable in registers kept by non-Swiss authorities.

<sup>92</sup> The widening margins of private autonomy, the mobility of people and their ability to create the conditions for the application of foreign laws undermines the stability of personal status and qualities that do not reflect a biological truth but vary according to the law applicable to their constitution. The increased availability of the latter type of statuses makes their stability precarious. There has been talk in this regard of an evolution of marriage from a 'status issue' to a 'contractual affair'. See S Shakargy, Family, Contracts, Autonomy, and Choice: A Comment on Dagan and Heller's *The Choice Theory of Contracts*, *Jerusalem Review of Legal Studies*, 2019, 90-103.

- Under the principle of *favor filiationis*, each Member State would remain free to recognise a filiation even when it does not respect the minimum standards common to EU Member States under its own private international law rules.

Against this background, the European Certificate of Filiation would be an optional and more expeditious alternative to the recognition of decisions or the acceptance of authentic instruments ascertaining or constituting a filiation on the basis of national laws.

It is argued that, among the minimum standards for the constitution of a child-parent relationship between a child and an adult claiming such constitution, are the rights stemming from the CRC and in particular the right of the child to an identity, encompassing the right of the child to know their origins. These rights are fundamental rights of children and their protection constitutes an obstacle to child trafficking. The expression of consent to raise a non-biological child in the framework of a child-parent relationship responds to the same legal needs: stability for the relationship with the child and prevention of the risks which exist when the child-parent relationship depends on the relationship between the non-biological intentional parent and the biological parent of the child.

#### **A) LGBTIQ+ Perspective**

The problem of the recognition of the child-parent relationship between the same-sex spouse of a biological parent and her child would be solved by the introduction, in the register, of data permitting the child and public authorities to trace the origin of the child and to verify the modes of assessment of the intention to raise a common child. This prevents the child-parent relationship with the non-biological parent from being disrupted by the possible end of her relationship with the biological parent. It should also prevent discrimination based on sexual orientation as, differently from the certification of co-fatherhood or co-motherhood, it is not based on the existence of a formal marriage or partnership between the intending parents.

The European Certificate should state clearly that a person is the mother or father of the child and/or that another person, whether of the same sex or not, also has a child-parent relationship with the child following the constitution of a legal motherhood or fatherhood at a certain date and by a certain Member State. Such a certification would be more acceptable for States which are reluctant to 'certify' a child-parent relationship if this certificate does not reflect the actual circumstances of the child's birth and, therefore, does not contain information necessary for the child to know her origins. Thus, an implementation of a certificate drawn up in the described way would be more acceptable to Member States that are concerned with this essential right of the child.

#### **B) Risks of Human Trafficking, Child Trafficking and Violence Against Women**

It is argued that traceability of the circumstances of birth prevents human trafficking, child trafficking and violence against women.

#### **C) For Children's Rights**

The rights stemming from the CRC and, in particular, the right of the child to an identity, encompassing the right of the child to know their origins, are further protected.

On the other hand, the fact that the ECF gives account of the modes of ascertainment and constitution of filiation is merely descriptive of a reality which does not expose the child to the risk of discrimination for its mere existence.

As regards the frequent and misleading fear that children born with gamete donors may be discriminated against to the same extent as the traditional distinction between ‘legitimate’ and ‘illegitimate children’, suffice to say that it was not the circumstance of their birth out of wedlock which was at the origin of the ancient discrimination, but the consequences that the law provided for them as a category. Today, children continue to be born within wedlock or out of wedlock and the marriage continues to be relevant for the ascertainment or constitution of their filiation, however, the discriminatory rules have been removed.

## 10. Recitals (84)-(99): Coordination with Other Instruments

(84) This Regulation should not affect the application of Conventions No 16, No 33 and No 34 of the International Commission on Civil Status (‘ICCS’) in respect of the plurilingual extracts and certificates of birth as between Member States or between a Member State and a third State.
(85) In order to ensure uniform conditions for the implementation of this Regulation as regards the establishment of the <del>decentralized</del> IT system for the purposes of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council.
(86) In order to ensure that the attestations provided for in Chapters IV and V and the European Certificate of <del>Parenthood</del> <b>Filiation</b> provided for in Chapter VI of this Regulation are kept up to date, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission to amend Annexes I to V to this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making. In particular, to ensure equal participation in the preparation of delegated acts, the Council receives all documents at the same time as Member States’ experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
(87) Respect for international commitments entered into by the Member States means that this Regulation should not affect the application of international conventions to which one or more Member States are party at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the European e-Justice Portal on the basis of the information supplied by the Member States. Consistency with the general objectives of this Regulation requires, however, that this Regulation take precedence, as between Member States, over conventions concluded exclusively between two or more Member States in so far as such conventions concern matters governed by this Regulation.
(88) For agreements with one or more third States concluded by a Member State before the date of its accession to the Union, Article 351 TFEU applies.
(89) The Commission should make publicly available through the European e-Justice Portal and update the information communicated by the Member States.
(90) This Regulation respects the fundamental rights and observes the principles recognised in the Charter. In particular, this Regulation seeks to promote the application of Article 7 on everyone’s right to respect for their private and family life, Article 21 prohibiting discrimination, and Article 24 on the protection of the rights of the child.

(91) This Regulation should be applied in compliance with Union data protection law and respecting the protection of privacy as enshrined in the Charter. Any processing of personal data under this Regulation should be undertaken in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council (the General Data Protection Regulation, 'GDPR'), Regulation (EU) 2018/1725 of the European Parliament and of the Council (the EU Data Protection Regulation, 'EUDPR') and Directive 2002/58/EC of the European Parliament and of the Council.

(92) In applying this Regulation, Member State courts or other competent authorities may need to process personal data for the purposes of the establishment of parenthood **ascertainment or constitution of filiation** in cross-border situations and of their recognition of parenthood between Member States. This entails the processing of personal data **in relation to a child and adults related to the child on biological or legal grounds** for the establishment of parenthood in a cross-border situation, **including: documentation of the child's origin**, the issuance of the attestations accompanying court decisions or authentic instruments, the issuance of a European Certificate of Parenthood **Filiation**, the presentation of documents for their recognition of parenthood, the obtaining of a decision that there are no grounds for refusal of **their** recognition of parenthood, or the application for refusal of recognition of filiation. Personal data processed by Member State courts or other competent authorities pursuant to this Regulation are contained in the documents handled by Member State courts or other competent authorities for the above purposes. Personal data processed will in particular concern children, their parents and their legal representatives. The personal data handled by Member State courts or other competent authorities should be processed in accordance with applicable data protection legislation, in particular the GDPR. In addition, in applying this Regulation, the Commission may need to process personal data in connection with the electronic communication between natural persons or their legal representatives and Member State courts or other competent authorities to request, receive and send a European Certificate of Parenthood, or in proceedings concerning the recognition or the refusal of recognition of **parenthood filiation**, through the European electronic access point in the context of the decentralised IT system. The personal data handled by the Commission should be processed in accordance with the EUDPR.

(93) This Regulation should provide the legal basis for the processing of personal data by Member State courts or other competent authorities in accordance with Article 6(1) and (3) of the GDPR and by the Commission in accordance with Article 5(1) and (2) of the EUDPR. The processing of special categories of personal data under this Regulation meets the requirements of Article 9(2) of the GDPR as data will be processed by courts acting in their judicial capacity in conformity with point (f), or the processing will be necessary for reasons of substantial public interest on the basis of this Regulation, which aims to facilitate the recognition of court decisions and authentic instruments on **parenthood filiation** in another Member State to ensure the protection of the fundamental rights and other rights of children in cross-border situations within the Union, in conformity with point (g) **and as regards children's right to access their origins**. Similarly, the processing of special categories of personal data under this Regulation meets the requirements of Article 10(2) of the EUDPR as the processing of data will be necessary for the establishment, exercise or defense of legal claims in conformity with point (f), or the processing will be necessary for reasons of substantial public interest on the basis of this Regulation, in conformity with point (g).

<p>(94) Personal data should be processed under this Regulation only for the specific purposes set out therein, without prejudice to further processing for archiving purposes in the public interest in accordance with Articles 5(1)(b) and 89 of the GDPR given that, once <del>parenthood</del> <b>filiation</b> has been <del>established</del> <b>ascertained</b> in a cross-border situation or has been recognised, Member State courts or other competent authorities may need to process personal data for archiving purposes in the public interest. As this Regulation concerns the cross-border aspects of <del>parenthood</del> <b>filiation</b>, which is a matter of civil status that may continue to be relevant for an indeterminate period of time, this Regulation should not limit the storage period of information and personal data processed.</p>
<p>(95) For the purposes of the <b>ascertainment or recognition of establishment of parenthood filiation</b> in a cross-border situation, the issuance of the attestations accompanying court decisions or authentic instruments, the issuance of a European Certificate of <del>Parenthood</del> <b>Filiation</b>, the presentation of documents for the recognition of <del>parenthood</del> <b>filiation</b>, the obtaining of a decision that there are no grounds for refusal of recognition of <del>parenthood</del> <b>filiation</b>, or the application for refusal of recognition of <del>parenthood</del> <b>filiation</b>, Member State courts or other competent authorities empowered <del>by the Member States</del> to apply this Regulation should be regarded as controllers within the meaning of Article 4, point 7 of the GDPR. For the purposes of the technical management, development, maintenance, security and support of <del>the European</del> <b>Member States'</b> electronic access point, and of the communication between natural persons or their legal representatives and Member State courts or other competent authorities through the <del>European</del> electronic access point and the decentralised IT system, the Commission should be regarded as controller within the meaning of Article 3, point 8 of the EUDPR. Controllers should ensure the security, integrity, authenticity and confidentiality of the data processed for the above purposes.</p>
<p>(96) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725 of the European Parliament and of the Council and delivered an opinion on [date].</p>
<p>(97) In accordance with Articles 1, 2 and 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.] OR</p> <p>(97a) [In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, Ireland has notified[, by letter of ...], its wish to take part in the adoption and application of this Regulation.]</p>
<p>(98) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.</p>
<p>(99) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States because of the differences between national rules governing jurisdiction, applicable law and the recognition of court decisions and authentic instruments, but can rather, by reason of the direct applicability and binding nature of this Regulation, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,</p>

### 10.1. Key Aspects

- The principle of *favor filiationis* needs to have a prominent role and be combined with that of the best interests of the child.

### 10.2. Priorities Emerging From the Text and Methods for Their Pursuit

In all decisions related to children, the best interests of the child are of paramount consideration, in accordance with Article 3 of the CRC. Together with the principle of non-discrimination (Article 2), the right to survival and development (Article 6), and the views of the child (Article 12), the best interests of the child create the four governing pillars of the CRC. At the same time, the rights of the child are non-hierarchical.

Despite a State's participation in the Regulation, and in all cases when national law is applied, the best interests of the child and the principle of non-discrimination must be taken into consideration, considering that all Member States participate in the CRC.

Identity of the Child: Article 24 of the ICCPR provides for the right of the child to be registered at birth, and to have a name and nationality. Article 7 on child registration, name, nationality, and care, and Article 8 on protection and preservation of identity of the child of the CRC again highlight these three elements of identity: registration, name, and nationality.

## PART II – Amendments to the Articles

The following text is limited to the most necessary explanations, to maintain a swift flow and overview of the amendments we propose, and the body of rules as a whole. For a more in-depth analysis of the changes, refer to the comments on the corresponding recitals.

### CHAPTER I – SUBJECT MATTER, SCOPE AND DEFINITIONS

*See also the relevant comments to the amendments to Recitals 1-35 above*

#### Article 1 – Subject Matter

This Regulation lays down common rules on jurisdiction and applicable law for the establishment of parenthood in a Member State in cross-border situations; common rules for the recognition or, as the case may be, acceptance in a Member State of court decisions on parenthood given, and authentic instruments on parenthood drawn up or registered, in another Member State; and creates a European Certificate of Parenthood.	This Regulation lays down common rules on jurisdiction and applicable law <b>on filiation matters</b> in cross-border situations <b>and</b> for the recognition or, as the case may be, acceptance in a Member State of court decisions on <b>filiation</b> given, and authentic instruments on <b>filiation</b> drawn up or registered, in another Member State; and creates a European Certificate of <b>Filiation</b> .
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Article 1 states the subject matter of the Proposal, which deals with private international law issues on filiation matters – such as the ascertainment, constitution, contestation and termination of filiation – in cross-border situations. The Proposal covers birth registrations, various types of filiation orders, adoption decrees, etc and the recognition of court decisions and authentic instruments. Overall, the Proposal attempts to create broad jurisdiction (see Chapter II), which includes forum of necessity.

The Article should highlight the distinction between:

- 1) court decisions or documents which reflect legal facts, findings and rulings; and
- 2) authentic or other instruments which reflect self-reported facts.

Clearly, both documents are equally acceptable but the conditions for the acceptance should not be identical.

It also addresses the legal challenges emerging from the different legal treatment of children born by gamete donation, which may discriminate them in the enjoyment of fundamental rights. In some countries, clinics propose egg donors and surrogate mothers to foreign clients and provide them with legal assistance in obtaining birth certificates without ensuring basic rights such as those prescribed by the HCCH 1993 Adoption

Convention to the benefit of adopted children.<sup>93</sup> The proposed changes address the need to ensure that all children enjoy the same fundamental rights.

## Article 2 – Relationship with Other Provisions of Union Law

<p>1. <del>This Regulation shall not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, including Directive 2004/38/EC. In particular, this Regulation shall not affect the limitations relating to the use of public policy as a justification to refuse the recognition of parenthood where, under Union law on free movement, Member States are obliged to recognize a document establishing a parent-child relationship issued by the authorities of another Member State for the purposes of rights derived from Union law.</del></p> <p>2. This Regulation shall not affect Regulation (EU) 2016/1191, in particular as regards public documents, as defined in that Regulation, on birth, parenthood and adoption.</p>	<p>1. Deleted</p> <p>2. <a href="#">Moved to public document</a> section (Article 44.2)</p>
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EU law requires Member States to grant certain rights based on child-parent relationships recognised by the Union but not by the Member States.

Article 2.1 attempts to codify the CJEU line of cases which has inspired the present Regulation. It can be deleted as the judicial rulings are substituted by the present Regulation.

In addition, this Article's location is strange compared to other EU instruments and might create more confusion than clarification.

<sup>93</sup> The practices of certain clinics do not always comply with the Oviedo Convention on prohibition of eugenics as also often observed with reference to Article 3.2 *Charter of Fundamental Rights of the European Union* [2000] OJ C 3 64/1 ('*Charter*'). 'Ethical Aspects of Cloning Techniques', *Opinion of the Group of Advisers on the Ethical Implications of Biotechnology to the European Commission* (No 9, 28 May 1997). See the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine \* Oviedo, 4.IV.1997 and the Explanatory Report to the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. European Treaty Series - No 164. <https://rm.coe.int/16800ccde5>.

### Article 3 – Scope

<p>1. This Regulation shall apply to civil matters of parenthood in cross-border situations.</p> <p>2. This Regulation shall not apply to:</p> <ul style="list-style-type: none"> <li>(a) the existence, validity or recognition of a marriage or of a relationship deemed by the law applicable to such relationship to have comparable effects, such as a registered partnership;</li> <li>(b) parental responsibility matters;</li> <li>(c) the legal capacity of natural persons;</li> <li>(d) emancipation;</li> <li>(e) intercountry adoption;</li> <li>(f) maintenance obligations;</li> <li>(g) trusts or succession;</li> <li>(h) nationality;</li> <li>(i) the 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.</li> </ul> <p>3. <del>This Regulation shall not apply to the recognition of court decisions establishing parenthood given in a third State, or to the recognition or, as the case may be, acceptance of authentic instruments establishing or proving parenthood drawn up or registered in a third State.</del></p>	<p>1. This Regulation shall apply to civil matters of <b>filiation</b> in cross-border situations, <b>which encompass, in particular:</b></p> <ul style="list-style-type: none"> <li><b>a) the ascertainment of a biological filiation on the basis of the fact of birth from a woman, or descent from the genetic mother or father;</b></li> <li><b>b) the constitution of a legal relationship between a child and an adult on the sole basis of another legal relationship, such as a marriage or civil partnership between the adult and the parent of the child;</b></li> <li><b>c) the constitution of a legal relationship between a child and an adult on the basis of an act of acknowledgement of filiation;</b></li> <li><b>d) the constitution of a legal relationship between a child and an adult on the basis of the adult's intention – whether pre-birth or by means of adoption – to be the legal parent of the child, under the conditions set by the competent legal order;</b></li> <li><b>e) the contestation of an ascertained filiation on the basis of the child's or adult's intention to acknowledge the non-existence of a presumed biological relation between them; and.</b></li> <li><b>f) the termination of filiation.</b></li> </ul> <p>2. This Regulation shall not apply to:</p> <ul style="list-style-type: none"> <li>(a) the existence, validity or recognition of a marriage or of a relationship deemed by the law applicable to such relationship to have comparable effects, such as a registered partnership;</li> <li>(b) parental responsibility matters;</li> <li>(c) the legal capacity of natural persons;</li> <li>(d) emancipation;</li> </ul>
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	<p>(e) <b>intercountry adoption;</b></p> <p>(f) e) maintenance obligations;</p> <p>(g) f) trusts or succession;</p> <p>(h) g) nationality;</p> <p>the legal requirements for the recording of <b>filiation</b> in a register of a Member State, and the effects of recording or failing to record <b>filiation</b> in a register of a Member State</p> <p><b>3. This—Regulation shall not apply to the recognition of court decisions establishing parenthood given in a third State, or to the recognition or, as the case may be, acceptance of authentic instruments establishing or proving parenthood drawn up or registered in a third State.</b></p>
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Article 3 states that the proposed Regulation should apply to all civil matters of parenthood in cross-border situations. In line with the most recent legislation on filiation matters, it is proposed to maintain a general approach, while also specifically including all the existing modes of ascertainment, constitution, contestation, and termination of filiation.

As regards the exclusions, it should be observed that the future Regulation will apply, although indirectly – to matters such as nationality, since nationality is expected to follow recognition of filiation. Moreover, if a suit is brought regarding national status, the Proposal would presumably be used to base the civil status of filiation on which the claim is brought. The exclusion is maintained with this caveat.

Article 3.2 lit c excludes ‘intercountry adoption’. While it is clear that some (most) intercountry adoptions are already covered by another instrument, namely the HCCH 1993 Adoption Convention, it must also be considered that not all intercountry adoptions are concluded through that Convention, and it is unclear why it would not be possible to coordinate the rules of the proposed Regulation with its rules. Moreover, these amendments would have the effect of introducing the same guarantees given to children adopted intercountry through that Convention to all children. Also, the rules for coordination would be consistent with the traditional EU coordination rules. Considering the guarantees established by the 1993 Hague Convention, the Convention would always prevail when the case is subject to its scope of application, while the Regulation may be applied to complement its rules, never to contradict them (see Chapter IX).<sup>94</sup>

Article 3.3 suggests that it is easy to differentiate between intra-community and extra-community cases. This is questionable. Once a judgment from a Third State is recognised in an EU Member State, the child will be provided with documents from that Member State that would most probably be recognised under the

<sup>94</sup> See the relevant comments by Child Identity Protection (CHIP), available at <https://www.child-identity.org/wp-content/uploads/2024/12/Doc-ELI-CHIP-final-12-24.pdf>.

Regulation. Many private international law systems use choice-of-law provisions to recognise the content of public documents. The Regulation would have to clarify whether the rules of the Regulation can be applied to recognise public documents issued by Third States. Instead, there is no need to differentiate between an EU and a non-EU case when the recognition of filiations ascertained or constituted on the basis of a foreign procedure follows or meets EU-set standards, such as those ELI Proposal suggests. The last paragraph of the Article could thus be deleted.

#### Article 4 – Definitions

<p>For the purposes of this Regulation, the following definitions apply:</p> <ol style="list-style-type: none"> <li>1. <del>'parenthood'</del> means the <del>parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents;</del></li> <li>2. <del>'child'</del> means a person of any age whose <del>parenthood</del> is to be <del>established</del>, recognised or proved;</li> <li>3. <del>'establishment of parenthood'</del> means the <del>determination in law of the relationship between a child and each parent</del> <del>, including the establishment of parenthood following a claim contesting a parenthood established previously;</del></li> <li>4. <del>'court'</del> means an authority in a Member State that exercises judicial functions in matters of <del>parenthood</del>;</li> <li>5. <del>'court decision'</del> means a decision of a court of a Member State, including a decree, order or judgment, concerning matters of <del>parenthood</del>;</li> <li>6. <del>'authentic instrument'</del> means a document that has been formally drawn up or registered as an authentic instrument in any Member State in matters of <del>parenthood</del> and the authenticity of which: <ol style="list-style-type: none"> <li>(a) relates to the signature and the content of the instrument; and</li> </ol> </li> </ol>	<p>For the purposes of this Regulation, the following definitions apply:</p> <ol style="list-style-type: none"> <li>1. <b>'civil status' is the legal characterisation of a specific and stable condition in which a person finds herself, also in relation to one or more others;</b></li> <li><b>1bis. 'filiation' means the civil status of a child in respect of the child's parents;</b></li> <li>2. <del>'child'</del> means a person of any age whose <b>filiation</b> is to be <b>ascertained, constituted</b>, recognised, proven, <b>contested or terminated</b>;</li> <li>3. <b>'ascertainment of biological filiation'</b> means the <b>recognition of the biological</b> relationship between a child and each <b>of the child's parents, including the ascertainment of a filiation relationship by means of a judicial decision pronounced against the will of the genetic parent of the child;</b></li> <li><b>3bis. 'constitution of a filiation relationship' means the creation of a civil status attesting that a child has either one or more adoptive parents, or one or more intentional parents or a parent by a relationship with the other parent such as a marriage or a registered partnership;</b></li> <li><b>3ter. 'contestation of filiation' means the ascertainment of the absence of a biological relationship between a child and the presumed biological parent;</b></li> <li><b>3quater. 'termination of a filiation relationship' means the dissolution of a previously constituted filiation relationship;</b></li> </ol>
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<p>(b) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;</p> <p>7. 'Member State of origin' means the Member State in which the court decision on <del>parenthood has been given</del>, the authentic instrument on <del>parenthood has been formally drawn up or registered</del>, or the European Certificate of Parenthood <del>has been issued</del>;</p> <p>8. 'decentralised IT system' means an IT system as defined in point (4) of Article 2 of [the Digitalisation Regulation];</p> <p>9. <del>'European electronic access point' means an interoperable access point as defined in point (5) of Article 2 of [the Digitalisation Regulation].</del></p>	<p>4. 'court' means an authority in a Member State that exercises judicial functions in matters of <b>filiation</b>;</p> <p>5. 'court decision' means a decision of a court of a Member State, including a decree, order or judgment, concerning matters of <b>filiation</b>;</p> <p>6. 'authentic instrument' means a document that has been formally drawn up or registered as an authentic instrument in any Member State in matters of <b>filiation</b> and the authenticity of which:</p> <p>(a) relates to the signature and the content of the instrument; and</p> <p>(b) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;</p> <p>7. 'Member State of origin' means the Member State which <b>has issued</b> the court decision on <b>filiation</b>, or which <b>has registered in its civil status record or otherwise certified</b> the authentic instrument on <b>filiation</b>, or <b>issued</b> the European Certificate of <b>Filiation</b>;</p> <p><b>7bis. 'presumption of status' refers to the presumption of the biological truth of the civil status of a child whose filiation has been ascertained. It can be rebuttable or non-rebuttable depending on the applicable law;</b></p> <p>8. '<b>centralised</b> IT system' means an IT system <b>created for the purpose of implementing the present Regulation.</b></p>
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Article 4(1) should highlight the distinction between:

- 1) court decisions or documents which reflect a biological filiation based on facts, such as the fact of birth from a woman, or descent attested through DNA testing or presumed by legally relevant indicators;
- 2) court decisions or decisions of authorities which constitute legal relationships between a child and an adult on the sole basis of another legal relationship, such as a marriage or civil partnership between such adult and the parent of the child; and
- 3) authentic or other instruments which constitute legal relationships between a child and an adult based on the adult's intention to be the legal parent of the child, under the conditions set by the competent legal order; and

- 4) court decisions or decisions of authorities that sever the child-parent relationship based on the child's intention to dissolve the legal relationship or because of the child's or adult's claim that the presumed biological link between them does not exist.

The distinction considers the differences in comparative law of filiation.

#### Article 5 – Competence in matters of parenthood within the Member States Rights of Children

<p><del>This Regulation shall not affect the competence of the authorities of the Member States to deal with parenthood matters.</del></p>	<p><a href="#">Move to Recitals</a></p>
	<ol style="list-style-type: none"> <li>1. <b>Member States respect the fundamental right of children to an identity. To prevent the creation of limping statuses, where a child-parent relationship would exist and be recorded in a Member State but not in another Member State, the filiation of a child constituted by the competent legal order in conformity with the fundamental rights of the child should be recognised in all Member States.</b></li> <li>2. <b>Member States respect the right of children to know their origins. The courts of the Member States exercising jurisdiction under this Regulation, and the authorities of the Member States drawing up a European Certificate of Filiation under this Regulation provide children with a genuine and effective opportunity to obtain information on their identity and origins, either directly or through a representative or an appropriate body. To this end, when recognising a filiation constituted by the competent legal order, Member States request the necessary information to place the child in a situation to enjoy this fundamental right.</b></li> </ol>

	<p>3. <b>Member States respect the right of children to express their views.</b> When exercising their jurisdiction under this Regulation, the courts of the Member States shall, in accordance with national law and procedure, provide children below the age of 18, whose <b>filiation</b> is to be established, with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body.</p>
	<p>4. <b>Member States respect all other rights of the child as guaranteed by the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, and the UN Convention on the Rights of the Child, which serves as the fundamental framework for children's rights. In Articles 7, 8 and 9 thereof, the Convention recognises the right of children to be cared for by their parents as far as possible, and 'the right not to be separated from them against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'.</b></p>

Article 5 of the Commission's Proposal appears to be a merely political statement already covered by the Recitals. Instead, it is important to insert here an article on the specific rights of the child.

The prominence given to the child's right to be heard in Article 15 of the Regulation – the content of which has been moved to Article 15.3 – is disproportionate as compared to the child's rights to know their origins, since all the rights of children need to be evaluated in the assessment of the best interests of the child. Also, in light of Article 24 of the Charter of Fundamental Rights, a precise provision should highlight the rights of the child.

The Commission's Proposal addresses, in particular, the situation of children whose birth was organised by fertility clinics specialised in the use of ART techniques employing women serving as egg donors as well as, in some cases, in the intermediation of surrogate mothers. The use of women for this purpose, whether lucrative or altruistic, is controversial and forbidden in many countries. However, through sophisticated legal schemes, clinics access markets where such practices are forbidden and attract clients via marketing techniques that interfere with, when not exploit, human emotions.

From this perspective, the status continuity of children is at risk.

The proposed amendments address the legal challenges emerging from the different legal treatment of children born by gamete donation, which may discriminate them in the enjoyment of fundamental rights.

In some countries, anonymous gamete donation and confidential birth may impair the enjoyment of the children's rights to an identity and origins, in violation of international law, expressed by rules such as those prescribed by the HCCH 1993 Adoption Convention.

In other countries, the relationship that the child has with the child's genetic ascendant is made dependent on the sex of the ascendant: genetic mothers who did not give birth to the child are subject to different rules, despite being in an identical situation, to those applicable to genetic fathers. The same discrimination exists as regards the spouse of the mother who consented to the heterologous insemination.

The proposed changes, which also echo and recall explicitly existing international covenants, address the need to ensure that all children enjoy the same fundamental rights.

## CHAPTER II - JURISDICTION

*See also the relevant comments to the amendments to Recitals 36-49 above*

### Articles 6 – 9 General and Special Grounds for Jurisdiction

<b>Article 6 - General jurisdiction</b>	
<p>In matters relating to parenthood, jurisdiction shall lie with the courts of the Member State:</p> <ul style="list-style-type: none"> <li>(a) of the habitual residence of the child at the time the court is seised, or</li> <li><del>(b) of the nationality of the child at the time the court is seised, or</del></li> <li><del>© of the habitual residence of the respondent at the time the court is seised, or</del></li> <li><del>(d) of the habitual residence of either parent at the time the court is seised, or</del></li> <li><del>© of the nationality of either parent at the time the court is seised, or</del></li> <li><del>(f) of birth of the child.</del></li> </ul>	<p><b>In matters relating to filiation, jurisdiction shall lie with the courts of the Member State of the habitual residence of the child at the time the court is seised.</b></p>
<b>Article 7</b>	
<p><b>Jurisdiction based on the presence of the child</b></p> <p>1. <del>Where jurisdiction cannot be determined on the basis of Article 6, the courts of the Member State where the child is present shall have jurisdiction.</del></p>	<p><b>Ascertainment of filiation</b></p> <p><b>In matters relating to the ascertainment of filiation, the child can also sue in the courts of the Member State</b></p> <ul style="list-style-type: none"> <li>(a) of the nationality of the child at the time the court is seised; or</li> <li>(b) of the habitual residence of the putative parent at the time the court is seised; or</li> <li>(c) of the nationality of the putative parent at the time the court is seised.</li> </ul>

<b>Article 8</b>	
<p><b>Residual jurisdiction</b></p> <p>1. <del>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.</del></p>	<p><b>Constitution of filiation</b></p> <p><b>As regards the constitution of filiation prior to the birth of the child, the case should be heard by the courts in the Member State of the intended habitual residence of the child. Where such a habitual residence cannot be determined, the case can be brought to the Member State of the habitual residence of either intending parent.</b></p>
<b>Article 9 – Forum necessitatis</b>	
<p>1. Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, rule on parenthood matters if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.</p> <p>2. The case must have a sufficient connection with the Member State of the court seised.</p>	

It is proposed to amend the jurisdiction chapter in order to privilege proximity and curtail forum shopping possibilities. This significantly reduces the possibility of contradictory decisions that might result in a limping status that is detrimental to the child. Reducing the number of available fora also reduces reproductive tourism that is sometimes associated with the exploitation of women and the sale of children. The rule is moreover fully respectful of national identity since it does not incentivise citizens habitually resident in one Member State, whose nationality they often also hold, to evade the law, which results from legal debate in a democratic society. This aspect is particularly important in the absence of a European consensus as is the case in filiation matters.

The general jurisdiction rule is simple and easy to apply. The difficulties associated with the determination of habitual residence have been tackled by the CJEU in its case law and there is guidance in connection to the most difficult matter, namely the habitual residence of infants that has been interpreted to be dependent upon the habitual residence of the person who effectively looks after the child. Reference to such case law is included in the Recitals as amended.

The general rule is supplemented with two special rules. The first refers to the ascertainment of filiation and requires that the child or, in the case of minority, the person representing the child legally, is the plaintiff and seeks to uncover the biological truth. The typical scenario would be paternity claims. In such a situation, access to court should be privileged since the child's identity might be compromised. Since the child would be able to sue in the courts of the Member State of their nationality or of the habitual residence or nationality of the putative parent, children residing in Third States would be granted access to EU courts. The rule is not available in cases where the claim is initiated by a putative parent since the focus is on the child and not on the rights of the putative parent who would have to sue under the general rule.

The second special rule refers to proceedings that take place before the birth of the child, which concern cases of constitution of filiation as a result of a surrogacy agreement or where filiation results from a contract. In such cases, the general rule is unworkable because the unborn is not a child and cannot have a habitual residence. Since, in these cases, filiation is planned for, it is proposed that jurisdiction should lie with the courts of the intended habitual residence of the child, ie the place where the child is going to be looked after, raised and

educated on a permanent basis with a fall back rule giving jurisdiction to the Member State of the habitual residence of either putative parent.

The reference to national jurisdiction rules should be struck and the preferred option should be for a complete set of European jurisdiction rules that supersedes national rules following the Maintenance and Property Regulations. This would recommend that the proposed *forum necessitatis* rule be maintained.

### **Articles 10 -14 – Incidental Questions, Seising of a Court, Examination as to Jurisdiction and Admissibility and *Lis Pendens***

<b>Article 10 – Incidental Questions</b>
<ol style="list-style-type: none"> <li>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 parenthood, a court in that Member State may determine that question for the purposes of those proceedings even if that Member State does not have jurisdiction under this Regulation.</li> <li>2. The determination of an incidental question pursuant to paragraph 1 shall produce effects only in the proceedings for which that determination was made.</li> </ol>
<b>Article 11 – Seising of a Court</b>
<p>A court shall be deemed to be seised:</p> <ol style="list-style-type: none"> <li>(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he or she was required to take to have service effected on the respondent;</li> <li>(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he or she was required to take to have the document lodged with the court; or</li> <li>(c) if the proceedings are instituted of the court's own motion, at the time when the decision to institute the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.</li> </ol>
<b>Article 12 – Examination as to Jurisdiction</b>
<p>Where a court of a Member State is seised of a case over which it has no jurisdiction as to the substance of the matter under this Regulation and over which a court of another Member State has jurisdiction as to the substance of the matter under this Regulation, it shall declare of its own motion that it has no jurisdiction.</p>
<b>Article 13 – Examination as to Admissibility</b>
<ol style="list-style-type: none"> <li>1. Where a respondent habitually resident in a State other than the Member State where the proceedings were instituted does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable the respondent to arrange for a defence, or that all necessary steps have been taken to this end.</li> </ol>

2. Article 22 of Regulation (EU) 2020/1784 shall apply instead of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.
3. Where Regulation (EU) 2020/1784 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

#### Article 14 – *Lis Pendens*

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. In the cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the requesting court of the date when it was seised.
3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of the court first seised.

#### Article 15 – Right of children to express their views

<p>Right of children to express their views</p> <ol style="list-style-type: none"> <li>1. <del>When exercising their jurisdiction under this Regulation, the courts of the Member States 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</del></li> <li>2. <del>Where the court, in accordance with national law and procedure, gives children below the age of 18 years an opportunity to express their views in accordance with this Article, the court shall give due weight to the views of the children in accordance with their age and maturity.</del></li> </ol>	<p>Nb: moved to the first chapter. See new article 5</p>
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The proposed rules correspond to the EU *acquis* and could be kept.

The provision on the rights of the child has been modified in order to include a reference to the rights of the child to know their origins, which should be given a central role in filiation matters. See the text proposed under Article 5.

## CHAPTER III - APPLICABLE LAW

*See also the relevant comments to the amendments to Recitals 50-57 above*

### Article 16 – Universal Application

Any law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State.

This is a standard rule in EU private international instruments. No amendments are needed, the Recital could be removed as the rule is clear.

### Article 17 – Applicable Law

<ol style="list-style-type: none"> <li>1. The law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of <del>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 State of birth of the child.</del></li> <li>2. <del>Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent, the law of the State of nationality of that parent or of the second parent, or the law of the State of birth of the child, may apply to the establishment of parenthood as regards the second parent.</del></li> </ol>	<ol style="list-style-type: none"> <li>1. The law applicable to <b>filiation</b> shall be the law of the State of the habitual residence of the <b>child</b>.</li> <li>2. <b>For the ascertainment or constitution of filiation prior to the birth of the child, the law of the State of the prospective habitual residence of the child shall apply.</b></li> <li>3. If the habitual residence of the <b>child</b> cannot be determined, <b>filiation shall be governed by the law of the State with which it is most closely connected.</b></li> <li>4. <b>If a filiation cannot be contested or terminated in accordance with the applicable law pursuant to paragraph 1, the law which applied to the ascertainment or constitution of this filiation may be applied upon request of the child or the contesting parent.</b></li> </ol>
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Article 17.1 provides for a general rule that in all possible situations a child-parent relationship is subject to one, and only one, applicable law. The application of the same substantive law that is fixed in time to a child-parent relationship is thus guaranteed if the authorities of a Member State (re-) assess the situation.

ELI Proposal strongly approves of this single rule approach. The proposed amendments to Article 17.1 further enhance this approach by building on a more appropriate connecting factor. As already elaborated above (Recitals 51 ff), the habitual residence of the child – instead of the habitual residence of the person giving birth – is child-focused, in line with other rules on the applicable law in family issues, equally suitable for adoptions and any filiation which is ascertained or constituted sometime after birth.

In Article 17.1 of the Proposal, the chosen connecting factor is fixed in time (the time of birth), thereby the applicable law is unchangeable. This is advantageous because it avoids situations of contradicting substantive laws (ie simultaneous application of different laws). However, the chosen (and frozen) connecting factor might

not at all times represent the closest connection or correspond to legitimate expectations due to its fixation in time, in particular if the ascertainment or constitution of filiation takes place sometime after birth (for example, by adoption or by acknowledgement of filiation by declaration).<sup>95</sup>

The same criticism would apply if the ‘habitual residence of the child’ were to be fixed at the time of birth. Thus, ELI Proposal suggests to refer to the law of the habitual residence of the child at the time of ascertainment, constitution, contestation or termination of filiation. If filiation is ascertained or constituted at birth, the law at the habitual residence of the child at birth applies. If filiation is ascertained or constituted at a later moment (eg acknowledgement when a child is five-years-old or adoption of a ten-year-old), the law of the habitual residence of the child at the moment filiation comes into being applies. Naturally, this approach makes it necessary to take the possibly applicable substantive law into consideration as it is the applicable substantive law rule which determines how filiation is established.

For pre-birth situations, ie if filiation is ascertained or constituted before the child is born, the prospective habitual residence of the child at birth shall be applied.

As in the Commission’s Proposal, ELI Proposal includes a subsidiary rule in Article 17.1 last sentence. However, instead of a reference to the law of the State of birth of the child, ELI suggests a broader rule. If the habitual residence of the child cannot be determined, the law of the State with which the filiation is most closely connected shall be applied.

Although Article 17 of the Proposal also covers contestation and termination (cf Articles 4.3 and 18 lit a) as well as Recital 33), it does not say so explicitly, but rather mentions only the ‘establishment of parenthood’. This Report includes in its Article 17.1 explicit references to contestation and termination. The law applicable to contestation and termination is also the law of the State of the habitual residence of the child at the moment of contestation or termination. For cases, in which the filiation cannot be contested or terminated in accordance with the applicable law pursuant to Article 17 (1), the law pursuant to which the filiation was ascertained or constituted may be applied to its contestation or termination at the request of the child or the parent.

A recital is also proposed to clarify that a subsequent change of the conditions governing the connection to a particular legal system (ie child moves from State A to State B and changes their habitual residence) does not influence the filiation status already constituted or ascertained by the competent legal order.

As in the Commission’s Proposal, ELI Proposal includes a subsidiary rule in Article 17 para 1. However, instead of a reference to the law of the State of birth of the child, ELI suggests a broader rule referring to the closest connection.

The provision in Article 17.2 of the Proposal – a fall back-rule – is similar to Article 10 Rome III Regulation. It is apparently set in the Proposal to provide protection from discrimination due to the parents’ sex (see Recital 52). It favours a connection to both members of a parental couple to strengthen the social family. While the rule pursues a valuable political aim, it also inserts yet another substantive objective into a preferably neutral private international law rule. Moreover, as already pointed out in the literature,<sup>96</sup> the wording of the rule raises questions (eg which situations are, and should be, addressed?). Besides the choice of the alternative

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<sup>95</sup> Also Budzikiewicz, *Auf dem Weg zu einer europäischen Abstammungsverordnung? – Licht und Schatten im Vorschlag der Europäischen Kommission*, ZEuP 2024, 253 (257).

<sup>96</sup> Marburg Group Comments, 33, available at <https://www.larcier-intersectia.com/en/the-marburg-group-s-comments-the-parenthood-proposal-9781839705137.html#product.info.tab.excerpts>.

connecting factors, the use of alternative connecting factors – especially if their use is optional<sup>97</sup> – as such is challenging. Hence, the Report rejects the use of an alternative rule and provides for a general rule and a subsidiary rule only.

### Article 18 – Scope of the Applicable Law

<p>The law designated by this Regulation as the law applicable to the <del>establishment of parenthood</del> shall govern, in particular:</p> <ul style="list-style-type: none"> <li>(a) the <del>procedures to establish or contest parenthood</del>;</li> <li>(b) the <del>binding legal effect and/or the</del> evidentiary effects of authentic instruments;</li> <li>(c) the standing of persons in proceedings involving the <del>establishment or contestation of parenthood</del>;</li> <li>(d) any time limits to <del>establish or contest parenthood</del>.</li> </ul>	<p>The law designated by this Regulation as the law applicable to the <b>status of filiation</b> shall govern, in particular:</p> <ul style="list-style-type: none"> <li>(a) the <b>ascertainment, constitution, contestation, or termination of filiation</b>;</li> <li>(b) the <b>substantive</b> evidentiary effects of authentic instruments;</li> <li>(c) the standing of persons in relation to the <b>ascertainment, constitution, contestation or termination of filiation</b>;</li> <li>(d) any time limits to <b>ascertain, constitute, contest, or terminate filiation</b>;</li> <li>(e) <b>the material validity of an act intended to have legal effect on the ascertainment, constitution, contestation or termination of filiation</b>;</li> <li>(f) rules which raise presumptions of law or determine the burden of proof.</li> </ul>
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The non-exclusive character of the list in Article 18 ('in particular') is to be welcomed and mirrors similar provisions in other EU Regulations, such as Article 23 Succession Regulation and Article 28 Property Regulation for spouses and registered partners. However, terminological and semantic amendments are needed<sup>98</sup> – also in order to adapt the provision to the proposed changes in 'categorisation' (ie ascertainment and constitution of filiation; contestation and termination of filiation).

First, as already pointed out in the literature, the reference to 'procedures' in (a) suggests that procedural aspects are covered by the applicable law rather than the *lex fori*. However, the application of foreign procedural law is usually excluded from EU Regulations in the area of private international law, which follow the '*forum regit processum*' rule. Hence, the applicable law is rather meant to cover the requirements and steps to ascertain or constitute filiation (eg court certificate, admissibility of private declarations of the recognition of parenthood).

<sup>97</sup> Also González Beilfuss/ Pretelli, Recognition of Status Filiationis within the EU and beyond, YPIL 2022/23, Vol n°24, 275 (298).

<sup>98</sup> See also the Marburg Group Comments, 39.

Second, the evidentiary effects of authentic instruments are traditionally determined by the procedural law of the forum. So far, there is no such thing as autonomous legal and evidentiary effects. Typically, these effects (as in the Member State of origin) are extended to other Member States (see CJEU C-456/11, *Gothaer Allgemeine Versicherung*). This also seems to be the case in the Parenthood Proposal (see Articles 35 and 44), which contradicts the application of the *lex causae* to these evidentiary effects as suggested in (b). However, if one differentiates between procedural evidentiary effects (which are governed by procedural law) and substantive evidentiary effects, the latter should be governed by the *lex causae*. Such substantive evidentiary effects exist, for example, in Sweden. A recital could point out the various categories of ‘effects’ covered.

Third, ELI Proposal suggests to re-phrase point (c) in accordance with the Marburg Group comments: procedural questions are to be excluded.

Fourth, Article 18 should make a reference to the material validity of an act intended to have legal effects on the ascertainment, constitution, contestation or termination of filiation.

Finally, Article 18 should refer to the material validity of an act (unilateral or joint) intended to have legal effects on the ascertainment or constitution of filiation.

### Article 19 – Change of Applicable Law

Where parenthood has been established in a Member State pursuant to this Regulation, a subsequent change of the applicable law shall not affect the parenthood already established.	<b>A subsequent change of the applicable law pursuant to this Regulation shall not affect a child-parent relationship already ascertained or constituted in a Member State.</b>
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As regards the Commission’s Proposal, the need for, and purpose of, Article 19 may be questioned as the general rule in Article 17.1 determines the applicable law in time for all cases, so that a change of the applicable law is rather impossible. Article 19 might address the law applicable according to Article 17.2, which does not contain a time reference, but as suggested above, should contain such a reference.

However, in view of the changes to Article 17, Article 19 should be adapted to strengthen the *favor filiationis*.

### Article 20 – Formal Validity

<ol style="list-style-type: none"> <li>1. <b>An unilateral act intended to have legal effect on the establishment of parenthood a person’s filiation status</b> shall be valid as to form where it meets the requirements of one of the following laws: <ol style="list-style-type: none"> <li>(a) the law applicable to the establishment of parenthood pursuant to Article 17;</li> <li>(a) the law of the State in which the person doing the act has their habitual residence; or</li> <li>(b) the law of the State in which the act was done.</li> </ol> </li> <li>2. An act intended to have legal effect on the establishment of parenthood <b>a filiation status</b> may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in paragraph 1 under which that act is formally valid, provided that such mode of proof can be administered by the forum.</li> </ol>
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This provision concerns the formal validity of an act. It has been adapted to display the new terminology. Furthermore, it is suggested to broaden the scope of application by referring to any act (rather than only unilateral acts) intended to have a legal effect on filiation.

## Article 21-22 Exclusions of Renvoi and Limits to Public Policy

### Article 21 – Exclusion of renvoi

The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.

### Article 22 – Public policy (*ordre public*)

1. The application of a provision of the law of any State specified by this Regulation may be refused only if **the result of** such application is manifestly incompatible with the public policy (*ordre public*) of the forum.
2. Paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination.

In accordance with the traditional understanding of public policy exceptions, the result of the application of a foreign substantive law rule – rather than the rule as such – should be the measure of incompatibility. This means that public policy must be assessed *in concreto* without any abstract consideration for the foreign rule as such.<sup>99</sup> What results from the application of the foreign rule cannot be rejected on the basis of an abstract evaluation based on its substantive content.

Article 22.2, which requires the observance of particular rules, should be deleted and its content should rather form part of a recital (see proposed Recital 56). On the one hand, fundamental rights and principles should not only be observed but also respected and complied with (see Article 22.1). On the other hand, it should go without saying that fundamental rights, and thus the Charter of Fundamental Rights of the European Union, are at the heart of a public policy exception. Also, the reference points have already been included in the proposed recital (Recital 56) and do not need to be referred to in the legal rule itself.

## Article 23 – States with More Than One Legal System

1. ~~Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law~~ **In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons or different territorial units** in respect of ~~parenthood~~ **filiation** matters, the internal conflict-of-laws rules of that State shall determine **the system of law or set of rules or relevant** territorial unit whose rules of law are to apply.
2. In the absence of such internal conflict-of-laws rules, **the system of law or the set of rules or law of the territorial unit with which the child has the closest connection shall apply.**
  - (a) ~~any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to the provision referring to the habitual residence of the person giving birth at the time of birth, be construed as referring to the law of the territorial unit in which the person giving birth has the habitual residence;~~

<sup>99</sup> Also Twardoch, Regulating International Filiation Law at the EU Level, *European Review of Private Law* 2024, 259 (290).

~~(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to the provisions referring to the State of birth of the child, be construed as referring to the law of the territorial unit where the child was born.~~

~~(c) A Member State which comprises several territorial units each of which has its own rules of law in respect of parenthood matters shall not be required to apply this Regulation to conflicts of laws arising between such units only.~~

No crucial amendments are needed.

However, the Commission may want to expand this rule to cover not only situations of geographical-legal divisions within a State (eg UK, Spain), but also regarding societal or religious differentiations (see Article 37 Successions Regulation).<sup>100</sup> In this regard, the rule could also be shortened to – subsidiarily – apply the principle of the closest connection to determine the relevant set of rules if the law of the State in question does not contain a conflict-of-laws rule.

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<sup>100</sup> As suggested by the European Group for Private International Law (GEDIP), 'Observations on the Proposal for a Council Regulation in matters of Parenthood', Meeting of September 2023, point 14, <https://gedip-egpil.eu/wp-content/uploads/2023/06/Observations-on-the-Proposal-for-a-Council-Regulation-in-matters-of-Parenthood.pdf>.

## CHAPTER IV - RECOGNITION

*See also the relevant comments to the amendments to Recitals 58-67 above*

### Articles 24-30 – General Provisions on Recognition

#### SECTION 1 General Provisions on Recognition

##### Article 24 – Recognition of a Court Decision

1. A court decision on ~~parenthood~~ **filiation** given in a Member State shall be recognised in all other Member States without any special procedure being required.
2. In particular, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a court decision on ~~parenthood~~ **filiation** given in another Member State ~~and against which no further appeal lies under the law of that Member State.~~
3. Where the recognition of a court decision is raised as an incidental question before a court of a Member State, that court may determine that issue.

##### Article 25 Decision that there are no Grounds for Refusal of Recognition

1. Any interested party may, in accordance with the procedures provided for in Articles 32 to 34, apply for a decision that there are no grounds for refusal of recognition referred to in Article 31.
2. The local jurisdiction of the court communicated to the Commission pursuant to Article 71 shall be determined by the law of the Member State in which proceedings in accordance with paragraph 1 are brought.

##### Article 26 – Documents to be Produced for Recognition

1. A party who wishes to invoke in a Member State a court decision given in another Member State shall produce the following:
  - (a) a copy of the court decision that satisfies the conditions necessary to establish its authenticity; and
  - (b) the appropriate attestation issued pursuant to Article 29.
2. The court or other competent authority before which a court decision given in another Member State is invoked may, where necessary, require the party invoking it to provide a translation or transliteration of the translatable content of the free text fields of the attestation referred to in point (b) of paragraph 1 of this Article.
3. The court or other competent authority before which a court decision given in another Member State is invoked may require the party to provide a translation or transliteration of the court decision in addition to a translation or transliteration of the translatable content of the free text fields of the attestation if it is unable to proceed without such a translation or transliteration.

### Article 27 – Absence of Documents

1. If the documents specified in Article 26(1) are not produced, the court or other competent authority before which a court decision given in another Member State is invoked may specify a time for its production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with its production.
2. If the court or other competent authority before which a court decision given in another Member State is invoked so requires, a translation or transliteration of such equivalent documents shall be produced.

### Article 28 – Stay of Proceedings

The court before which a court decision given in another Member State is invoked may stay its proceedings, in whole or in part, where:

- (a) an ordinary appeal against that court decision has been lodged in the Member State of origin; or
- (b) an application has been submitted for a decision that there are no grounds for refusal of recognition referred to in Article 25 or for a decision that the recognition is to be refused on the basis of one of those grounds.

### Article 29 – Issuance of the Attestation

1. The court of a Member State of origin as communicated to the Commission pursuant to Article 71 shall, upon application by a party, issue an attestation for a court decision on ~~parenthood~~ **filiation** using the form set out in Annex I.
2. The attestation shall be completed and issued in the language of the court decision. The attestation may also be issued in another official language of the institutions of the European Union requested by the party. This does not create any obligation for the court issuing the attestation to provide a translation or transliteration of the translatable content of the free text fields.
3. ~~The attestation shall contain a statement informing Union citizens and their family members that the attestation does not affect the rights that a child derives from Union law and that, for the exercise of such rights, proof of the parent-child relationship can be presented by any means.~~
4. No challenge shall lie against the issuance of the attestation.

### Article 30 – Rectification of the Attestation

1. The court of a Member State of origin as communicated to the Commission pursuant to Article 71 shall, upon application, and may, of its own motion, rectify the attestation where, due to a material error or omission, there is a discrepancy between the court decision to be recognised and the attestation.
2. The law of the Member State of origin shall apply to the procedure for rectification of the attestation.

The provisions of this chapter adopt the same solutions (and the same wording) as the corresponding chapter in the Brussels II ter Regulation for divorce (Article 30.1, 2 and 5). The aim is to implement Article 81.1 TFEU.

Article 28 is a particularly welcome provision. It allows the authorities in the Member State where recognition is sought to take account of the existence of an appeal in the Member State of origin. In this respect, it allows a better coordination with Article 24, which seems to limit recognition to court decisions ‘against which no further appeal lies under the law of that Member State’. Since decisions on filiation are never a *res judicata* and may be challenged as a consequence of changes in the circumstances, it is suggested to delete the limitation.

Similarly, Article 24.2 is important in practice as updating the registers does not prevent the recognition of the decision from being challenged.

The issues that Article 24 raises are then the same (for example, extent of the *res judicata* effect of the decision taken pursuant to Article 30.5 Brussels II ter Regulation).

The usefulness of Article 29.3 is not clear. The statement it adds to the certificate could first be incorporated into the form. Beyond that, it detracts from the legibility of the legal situation that the attestation is intended to certify.

## Articles 31-34 – Refusal of Recognition

Article 31 – Grounds for Refusal of Recognition	
<p>1. The recognition of a court decision shall be refused:</p> <p>(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the child’s interests;</p> <p>(b) where it was given in default of appearance if the persons in default were not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable those persons to arrange for their defence unless it is determined that such persons have accepted the court decision unequivocally;</p> <p>(c) <del>upon application by any person claiming that the court decision infringes his fatherhood or her motherhood over the child if it was given without such person having been given an opportunity to be heard;</del></p>	<p>1. The recognition of a court decision shall be refused:</p> <p>(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the child’s interests;</p> <p>(b) where it was given in default of appearance if the persons in default were not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable those persons to arrange for their defence unless it is determined that such persons have accepted the court decision unequivocally;</p> <p>(c) if and to the extent that it is irreconcilable with an <b>earlier</b> court decision relating to <b>filiation</b> given in the Member State in which recognition is invoked;</p>

<p>(d) if and to the extent that it is irreconcilable with a <del>later</del> court decision relating to <del>parenthood</del> given in the Member State in which recognition is invoked;</p> <p>(e) if and to the extent that it is irreconcilable with a <del>later</del> court decision relating to parenthood given in another Member State provided that the later court decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked.</p> <p>2. Point (a) of paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination.</p> <p>3. The recognition of a court decision in matters of parenthood may be refused if it was given without children having been given an opportunity to express their views, unless this is against the interest of the child. Where children were below the age of 18 years, this provision shall apply where the children were capable of forming their views in accordance with Article 15.</p>	<p>(d) if and to the extent that it is irreconcilable with <b>an earlier</b> court decision relating to <b>filiation</b> given in another Member State provided that the <del>later</del> <b>earlier</b> court decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked.</p> <p>2. Point (a) of paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination.</p> <p>3. The recognition of a court decision in matters of filiation may be refused if it was given without children having been given <b>a clear and effective opportunity to enjoy the rights recalled by Article 5 of the present Regulation, especially in cases where the filiation status of children does not reflect their biological ascent, and namely:</b></p> <ul style="list-style-type: none"> <li>- <b>if the decision was given without children having been given an opportunity to trace their origins, unless this is against the interests of the child. Where children were below the age of 18, this provision shall entitle the court to verify the accessibility of the child's origins in the Member State of origin.</b></li> <li>- if it was given without children having been given an opportunity to express their views, unless this is against the interests of the child. Where children were below the age of 18, this provision shall apply where the children were capable of forming their views in accordance with <b>Article 5</b>.</li> </ul>
<p><b>SECTION 2 -Procedure for Refusal of Recognition</b></p> <p><b>Article 32 – Application for Refusal of Recognition</b></p>	
<p>1. The procedure for making an application for refusal of recognition shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State in which proceedings for non-recognition are brought.</p>	

2. The recognition of a court decision in matters of parenthood shall be refused if one of the grounds for refusal of recognition referred to in Article 31 is found to exist.
3. The local jurisdiction of the court communicated to the Commission pursuant to Article 71 shall be determined by the law of the Member State in which proceedings for non-recognition are brought.
4. The applicant shall provide the court with a copy of the court decision and, where applicable and possible, the appropriate attestation issued pursuant to Article 29.
5. The court may, where necessary, require the applicant to provide a translation or transliteration of the translatable content of the free text fields of the appropriate attestation issued pursuant to Article 29.
6. If the court is unable to proceed without a translation or transliteration of the court decision, it may require the applicant to provide such a translation or transliteration.
7. The court may dispense with the production of the documents referred to in paragraph 4 if:
  - (a) it already possesses them; or
  - (b) it considers it unreasonable to require the applicant to provide them.
8. The party seeking the refusal of the recognition of a court decision given in another Member State shall not be required to have a postal address in the Member State in which proceedings for non-recognition are brought. That party shall be required to have an authorised representative in the Member State in which proceedings for nonrecognition are brought only if such a representative is mandatory under the law of the Member State in which proceedings for non-recognition are brought irrespective of the nationality of the parties.

### **Article 33 – Challenge or Appeal**

1. Any party may challenge or appeal against a court decision on the application for refusal of recognition.
2. The challenge or appeal shall be lodged with the court communicated by the Member States to the Commission pursuant to Article 71 as the court with which such a challenge or appeal is to be lodged.

### **Article 34 – Further Challenge or Appeal**

A court decision given on the challenge or appeal may only be contested by a challenge or appeal where the courts with which any further challenge or appeal is to be lodged have been communicated by the Member State concerned to the Commission pursuant to Article 71.

The public policy reservation as a reason for refusal of recognition in Article 31.1 lit. a) is classical. But, for the first time in European private international law, its wording highlights the interests of the child.

The child's best interests are, of course, a primary consideration when it comes to the question of whether the recognition of a court decision in matters of filiation may be refused.

The best interests of the child are to be taken in consideration following Article 24 of the Charter of Fundamental Rights of the EU. Instead of a generic reference, the provision should highlight the precise rights of the child, the assessment of which could lead to a refusal and thus be linked to Article 5 of the Proposal as amended: ie

the right to demand access to origins and the right to be heard.

The provision authorising a refusal of the recognition in the case of lack of hearing (Article 31.1 lit c) is taken from Regulation 2019/1111 without taking into account its specific importance in matters of parental responsibilities. In matters of filiation, the domestic law will not foresee the hearing of all the potential parents and certainly not foresee the hearing of a newborn. As a result, Article 31.1 lit c) could lead to a refusal of recognition in violation of one of the objectives of the Regulation, which is to meet the best interests of the child. Article 31.1 lit c) gives a too narrow definition of procedural public policy. The right to be heard is indeed more demanding than the mere principle which prescribes that all proceedings should be adversarial, a principle which is not itself systematically part of procedural public policy within the European judicial area.

Article 31.1 lit d) and Article 31.1 lit e) are copy-pasted from Article 39.1 lit d) and Article 39.1 lit e) Brussels IIter Regulation. This is not appropriate. Decisions regarding parental responsibility are, by nature, temporary. They must be able to be modified to adapt to the child's needs. Decisions on filiation should not be amenable to be changed too easily, as the stability of civil status is at stake. However, a later court decision may have to be recognised if it is incompatible with an earlier one and there is a risk of creating a limping status. The solution should be found after carefully considering the circumstances of the particular case in the light of the best interests of the child.

Article 31.2 sets a limit to the public policy reservation. It states that recognition of a judicial decision may not be refused on grounds of public policy if this violates the fundamental rights and principles laid down in the Charter, in particular the right to non-discrimination. Here again, the question arises as to whether this clarification is necessary. Article 31.2 tends to impose an appreciation *in abstracto* of the public policy reservation where it is admitted that the appreciation should be made *in concreto*: public policy (*ordre public*) is to be used exceptionally and in the light of the circumstances of each particular case, analysing the result of the recognition in the concrete case, not the earlier applied rules in an abstract manner. Moreover, from the wording of the provision, it could appear that the Commission is seeking to promote a material conception of filiation, by trying to impose a reading of fundamental rights. The desire to impose a European public policy on family matters on the Member States is questionable.

## Articles 35-39 – Authentic Instruments with Binding Legal Effect

<b>Article 35 – Scope</b>
<p>This Section shall apply to authentic instruments establishing parenthood that:</p> <ul style="list-style-type: none"> <li>(a) <del>have been formally drawn up or registered in a Member State assuming jurisdiction under Chapter II; and</del></li> <li>(b) <del>have binding legal effect in the Member State where they have been formally drawn up or registered.</del></li> </ul>
<b>Article 36 – Recognition of authentic instruments</b>
<p>Authentic instruments establishing parenthood with binding legal effect in the Member State of origin shall be recognised in other Member States without any special procedure being required. Sections 1 and 2 of this Chapter shall apply accordingly, unless otherwise provided for in this Section.</p>

**Article 37 – Attestation**

1. The competent authority of the Member State of origin as communicated to the Commission pursuant to Article 71 shall, upon application by a party, issue an attestation for an authentic instrument establishing parenthood with binding legal effect using the form set out in Annex II.
2. 2.The attestation may be issued only if the following conditions are met:
3. (a)the Member State which empowered the public authority or other authority to formally draw up or register the authentic instrument establishing parenthood had jurisdiction under Chapter II; and
4. (b)the authentic instrument has binding legal effect in that Member State.
5. 3.The attestation shall be completed in the language of the authentic instrument. It may also be issued in another official language of the institutions of the European Union requested by the party. This does not create any obligation for the competent authority issuing the attestation to provide a translation or transliteration of the translatable content of the free text fields.
6. 4.The attestation shall contain a statement informing Union citizens and their family members that the attestation does not affect the rights that a child derives from Union law and that, for the exercise of such rights, proof of the parent-child relationship can be presented by any means.
7. 5.If the attestation is not produced, the authentic instrument shall not be recognised in another Member State.

**Article 38 – Rectification and withdrawal of the attestation**

1. The competent authority of the Member State of origin as communicated to the Commission pursuant to Article 71 shall, upon application, and may, of its own motion, rectify the attestation where, due to a material error or omission, there is a discrepancy between the authentic instrument and the attestation.
2. The competent authority referred to in paragraph 1 of this Article shall, upon application or of its own motion, withdraw the attestation where it was wrongly granted, having regard to the requirements laid down in Article 37.

The procedure, including any appeal, with regard to the rectification or withdrawal of the attestation shall be governed by the law of the Member State of origin.

**Article 39 – Grounds for refusal of recognition**

1. The recognition of an authentic instrument establishing parenthood with binding legal effect shall be refused:
  - a. if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the child's interests;

- b. ~~upon application by any person claiming that the authentic instrument infringes his fatherhood or her motherhood over the child, if the authentic instrument was formally drawn up or registered without that person having been involved;~~
  - c. ~~if and to the extent that it is irreconcilable with a later court decision relating to parenthood given, or a later authentic instrument establishing parenthood with binding legal effect drawn up or registered, in the Member State in which recognition is invoked;~~
  - d. ~~if and to the extent that it is irreconcilable with a later court decision relating to parenthood given, or a later authentic instrument establishing parenthood with binding legal effect drawn up or registered, in another Member State provided that the later court decision or authentic instrument fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked.~~
2. ~~Point (a) of paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination.~~

~~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. Where the children were below the age of 18 years, this provision shall apply where the children were capable of forming their views.~~

While it has been submitted that in exceptional circumstances, an authentic act in filiation matters may serve to establish the filiation link, it appears that all authentic acts in filiation matters have evidentiary effects. With the amendment, Chapter V would apply to the all authentic acts, without there being any need to characterise such acts. The operation of characterisation would only be required for those instruments having constitutive effects.

The existence of a specific regime creates difficulties and uncertainties in the characterisation process, thereby undermining a coherent application of the Regulation.

With the proposed amendment, all authentic instruments, including those which also have 'binding legal effects' would follow the same regime. This would make it possible for parents to rely on authentic instruments 'with binding legal effects' in other Member States without having to produce an attestation. An additional advantage of this amendment is that Chapter V would become the 'default' regime for all authentic acts.

## Articles 40-43 – Provisions on Procedural Guarantees

### SECTION 4 Other Provisions

#### Article 40 – Prohibition of Review of Jurisdiction of the Court of Origin

The jurisdiction of the court of the Member State of origin ~~establishing parenthood with binding legal~~ **ascertaining, constituting, or terminating a filiation status** may not be reviewed. The test of public policy referred to in point (a) of Article 31(1) may not be applied to the rules relating to jurisdiction set out in Articles 6 to 9.

**Article 41 – Non-review as to Substance**

Under no circumstances may a court decision given in another Member State, or an authentic instrument establishing parenthood with binding legal **ascertaining, constituting, or terminating a filiation status** in the Member State of origin, be reviewed as to their substance.

**Article 42 – Costs**

This Chapter shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation.

**Article 43 – Legal Aid**

1. An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the proceedings provided for in Article 25(1) and Article 32, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State in which proceedings are brought.
2. An applicant who, in the Member State of origin, has benefited from free proceedings before an administrative authority communicated to the Commission pursuant to Article 71 shall be entitled, in any procedures provided for in Articles 25(1) and 32, to benefit from legal aid in accordance with paragraph 1 of this Article. To that end, that party shall present a statement from the competent authority in the Member State of origin to the effect that he or she fulfils the financial requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.

## CHAPTER V - AUTHENTIC INSTRUMENTS WITH NO BINDING LEGAL EVIDENTIARY EFFECTS

See also the relevant comments to the amendments to Recitals 68-75 above

### Articles 44-45 – Scope and Acceptance of Foreign Certificates

Article 44 – Scope	
<p>This Chapter shall apply to authentic instruments which have no binding legal effect in the Member State of origin but which have evidentiary effects in that Member State.</p>	<ol style="list-style-type: none"> <li>1. This Chapter shall apply to authentic instruments <b>issued in a Member State</b> which have <b>evidentiary effects</b>.</li> <li>2. <b>This Regulation shall not affect Regulation (EU) 2016/1191, in particular as regards public documents, as defined in that Regulation, on birth, parenthood and adoption.</b></li> </ol>
Article 45 - Acceptance of Authentic Instruments	
<ol style="list-style-type: none"> <li>1. An authentic instrument which has <del>no binding legal effect</del> in the Member State of origin shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (<i>ordre public</i>) in the Member State where it is presented.</li> <li>2. <del>The public policy (ordre public) referred to in paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination.</del></li> <li>3. A person wishing to use such an authentic instrument in another Member State may ask the authority that has formally drawn up or registered the authentic instrument in the Member State of origin to fill in the form in Annex III describing the evidentiary effects which the authentic instrument produces in the Member State of origin.</li> </ol>	<ol style="list-style-type: none"> <li>1. An authentic instrument which has <b>evidentiary effects</b> in the Member State of origin shall have the same evidentiary effects in another Member State as it has in the Member State of origin <b>or under the law governing filiation</b>, or the most comparable effects, provided that <b>the result</b> is not manifestly contrary to public policy (<i>ordre public</i>) in the Member State where it is presented.</li> <li>2. A person wishing to use such an authentic instrument in another Member State may ask the authority that has formally drawn up or registered the authentic instrument in the Member State of origin to fill in the form in Annex III describing the evidentiary effects which the authentic instrument produces in the Member State of origin <b>or under the law governing filiation</b>.</li> </ol>

<p>4. <del>The attestation shall contain a statement informing Union citizens and their family members that the attestation does not affect the rights that a child derives from Union law and that, for the exercise of such rights, proof of the parent-child relationship can be presented by any means.</del></p> <p>5. <del>Any challenge relating to the authenticity of such an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that Member State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State as long as the challenge is pending before the competent court.</del></p> <p>6. <del>Any challenge relating to the legal acts or legal relationships recorded in such an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged as long as the challenge is pending before the competent court.</del></p> <p><del>If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in such an authentic instrument, that court shall have jurisdiction over that question.</del></p>	
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Article 44 focuses on one category of authentic acts, ie acts which have no binding legal effects in the Member State of origin but which have evidentiary effects in that Member State. This category is opposed to authentic instruments with binding legal effects. The latter are subject to a specific regime set out in Articles 35 ff.

The Article is ambiguous in referring to authentic instruments ‘which have evidentiary effects in that Member State’, meaning the Member State of origin. It fails to take into account that the extended evidentiary effects are governed by the law applicable to filiation. In most cases, this law will coincide with the law of the Member State where the authentic act is issued. It could be, however, that the law governing filiation is different to that of the Member State in which the act was issued. The text may be adapted as follows: ‘This Chapter shall apply to authentic instruments issued in a Member State and which have evidentiary effects’ or deleted.

As explained above under Recitals 65-73:

- the emphasis of the Proposal on authentic acts with binding legal effects is misplaced, as it is still a question mark whether such acts exist at all in the laws of Member States. In any case, their constitutive effects are not what parents seek to rely on;
- the Proposal seems to restrict the cross-border effects of authentic acts with binding legal effects to the constitutive effects. In practice, the evidentiary effects of such acts are more important. The Proposal should clarify that authentic acts with binding legal effects may also be relied upon insofar as they produce evidentiary effects;
- the Proposal subjects the recognition of authentic acts with binding legal effects to the production of an attestation. This is a formal obstacle which unduly restricts the possibility for parents to rely on the evidentiary effects of such acts.

With the proposed amendment, Chapter V would apply to all authentic instruments having evidentiary effects, including those which also have 'binding legal effects'. This would make it possible for parents to rely on authentic instruments 'with binding legal effects' in other Member States without having to produce an attestation. An additional advantage of this amendment is that Chapter V would become the 'default' regime for all authentic acts.

## CHAPTER VI - EUROPEAN CERTIFICATE OF PARENTHOOD FILIATION

*See also the relevant comments to the amendments to Recitals 76-83 above*

### Articles 46-57 – Coordination between Member States and the Commission

Article 46 – Creation of a European Certificate of Parenthood Filiation	
<ol style="list-style-type: none"> <li>1. This Regulation creates a European Certificate of <del>Parenthood</del> ('the Certificate') which shall be issued for use in another Member State and shall produce the effects listed in Article 53.</li> <li>2. The use of the Certificate shall not be mandatory.</li> <li>3. <del>The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 53 in the Member State whose authorities issued it in accordance with this Chapter.</del></li> </ol>	<ol style="list-style-type: none"> <li>1. This Regulation creates a European Certificate of <b>Filiation</b> ('the Certificate') which shall be issued for use in another Member State and shall produce the effects listed in Article 53.</li> <li>2. The use of the Certificate shall not be mandatory.</li> <li>3. <b>In the absence of a Certificate, parties may provide evidence of the status of filiation on the basis of national law and national documents, subject to the rules on recognition of decisions and acceptance of authentic acts provided for in the preceding chapters.</b></li> </ol>
Article 47 – Purpose of the Certificate	
<p>The Certificate is for use by a child or a legal representative who, in another Member State, needs to invoke the child's <del>parenthood</del> <b>filiation</b> status.</p>	
Article 48 – Competence to Issue the Certificate	
<ol style="list-style-type: none"> <li>1. The Certificate shall be issued in the Member State <del>parenthood was established and</del> whose courts, as defined in Article 4(4), have jurisdiction under Article 6, Article 7, <b>Article 8</b> or Article 9.</li> <li>2. The issuing authority, as communicated to the Commission pursuant to Article 71, of the Member State referred to in paragraph 1 shall be: <ol style="list-style-type: none"> <li>a. a court as defined in Article 4(4); or</li> <li>b. another authority which, under national law, has competence to deal with <del>parenthood</del> <b>filiation</b> matters.</li> </ol> </li> </ol>	

Article 49 – Application for a Certificate	
<ol style="list-style-type: none"> <li>1. The Certificate shall be issued upon application by the child ('the applicant') or, where applicable, a legal representative.</li> <li>2. For the purposes of submitting an application, the applicant may use the form established in Annex IV.</li> <li>3. The application shall contain the information listed below, to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified, and shall be accompanied by all relevant documents either in the original or by way of copies which satisfy the conditions necessary to establish their authenticity, without prejudice to Article 50(2): <ol style="list-style-type: none"> <li>a. details concerning the applicant: surname(s) (if applicable, surname(s) at birth), given name(s), sex, date and place of birth, nationality (if known), identification number (if applicable), address;</li> <li>b. if applicable, details concerning the legal representative of the applicant;</li> <li>c. surname(s) (if applicable, surname(s) at birth), given name(s), address and representative capacity;</li> <li>d. details concerning <del>each parent</del>: surname(s) (if applicable, surname(s) at birth), given name(s), date and place of birth, nationality, identification number (if applicable), address;</li> <li>e. the place and Member State where the <del>parenthood</del> of the child is registered;</li> </ol> </li> </ol>	<ol style="list-style-type: none"> <li>1. The Certificate shall be issued upon application by the child ('the applicant') or, where applicable, a legal representative.</li> <li>2. For the purposes of submitting an application, the applicant may use the form established in Annex IV.</li> <li>3. The application shall contain the information listed below, to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified, and shall be accompanied by all relevant documents either in the original or by way of copies which satisfy the conditions necessary to establish their authenticity, without prejudice to Article 50(2): <ol style="list-style-type: none"> <li>a. details concerning the applicant: surname(s) (if applicable, surname(s) at birth), given name(s), sex, date and place of birth, nationality (if known), identification number (if applicable), address;</li> <li>b. if applicable, details concerning the legal representative of the applicant;</li> <li>c. surname(s) (if applicable, surname(s) at birth), given name(s), address and representative capacity;</li> <li>d. details concerning <b>the parent or the parents</b>: surname (if applicable, surname(s) at birth), given name(s), date and place of birth, nationality, identification number (if applicable), address;</li> <li>e. the place and Member State <b>or Member States</b> where <b>filiation</b> of the child is registered <b>and a copy of the registration dated and signed by the registrar not earlier than six months prior to the application</b>;</li> </ol> </li> </ol>

<p>f. the elements on which the applicant founds parenthood, appending the original or a copy of the document(s) <del>establishing parenthood with binding legal effect or providing evidence of the parenthood;</del></p> <p>g. the contact details of the Member State's court <del>that established parenthood, of the competent authority that issued an authentic instrument establishing parenthood with binding legal effect, or of the competent authority that issued an authentic instrument with no binding legal effect in the Member State of origin but with evidentiary effects in that Member State;</del></p> <p>h. <del>a declaration stating that, to the applicant's best knowledge, no dispute is pending relating to the elements to be certified;</del></p> <p style="padding-left: 40px;"><del>any other information which the applicant deems useful for the purposes of the issuance of the Certificate.</del></p>	<p>f. the elements on which the applicant founds <b>filiation</b>, appending the original or a copy of the document(s) which <b>ascertain or constitute filiation</b>;</p> <p>g. the contact details of the Member State's <b>authority that ascertained or constituted the status of filiation</b> in that Member State;</p> <p>h. <b>in cases of adoption, the relevant documentation as kept by the authorities involved in the adoption procedure;</b></p> <p>i. <b>in cases of confidential birth, all relevant medical records, including, in particular, the document which contains the declaration of the biological mother;</b></p> <p>j. <b>in cases of children born by heterologous fertilisation (sperm, egg or embryo transfer) or intervention of a surrogate mother, all relevant medical records, including, in particular, the documents which contain the declarations exchanged between the biological parents and the intended parents;</b></p> <p>k. <b>in cases h), i), and j), the application shall include the request for an ECF electronic number to be associated with the medical records mentioned therein, which will enable children who come of age to enjoy the right to know the child's origins or which will enable the child's representative to obtain access to the child's information before the child comes of age.</b></p>
<b>Article 50 – Examination of the Application</b>	
<ol style="list-style-type: none"> <li>1. Upon receipt of the application, the issuing authority shall verify the information and declarations and the documents and other evidence provided by the applicant. It shall carry out the enquiries necessary for that verification of its own motion where this is provided for or authorised by its national law, or shall invite the applicant to provide any further evidence which it deems necessary.</li> <li>2. Where the applicant has been unable to produce copies of the relevant documents which satisfy the conditions necessary to establish their authenticity, the issuing authority may decide to accept other forms of evidence.</li> </ol>	

3. Where this is provided for by its national law and subject to the conditions laid down therein, the issuing authority may require that declarations be made on oath or by a statutory declaration in lieu of an oath.
4. For the purposes of this Article, the competent authority of a Member State shall, upon request, provide the issuing authority of another Member State with information held, in particular, in the civil, personal or population registers and other registers recording facts of relevance for the ~~parenthood~~ **filiation** of the applicant, where that competent authority would be authorised, under national law, to provide another national authority with such information.

#### Article 51 – Issuance of the Certificate

1. The issuing authority shall issue the Certificate without delay in accordance with the procedure laid down in this Chapter when the elements to be certified have been established under the law applicable to the ~~establishment of parenthood~~ **ascertainment or constitution of filiation**. It shall use the form in Annex V.
2. The issuing authority shall not issue the Certificate in particular if:
  - a. the elements to be certified are being challenged; or
  - b. the Certificate would not be in conformity with a court decision covering the same elements.
3. The fee collected for issuing a Certificate shall not be higher than the fee collected for issuing a certificate under national law providing evidence of the ~~parenthood~~ **filiation** of the applicant.

#### Article 52 – Contents of the Certificate

The Certificate shall contain the following information, as applicable:

- a) the name, address and contact details of the Member State's issuing authority;
- b) if different, the name, address and contact details of the Member State's court **or authority** that ~~established parenthood~~ **ascertained or constituted filiation** of the competent authority that issued an authentic instrument establishing parenthood with binding legal effect, or of the competent authority that issued an authentic instrument with no binding legal effect in the Member State of origin but with evidentiary effects in that Member State;
- c) the reference number of the file;
- d) the date and place of issue;
- e) ~~the place and Member State where the parenthood of the child is registered;~~
- f) details concerning the applicant: surname(s) (if applicable, surname(s) at birth), given name(s), sex, date and place of birth, nationality (if known), identification number (if applicable), address;
- g) if applicable, details concerning the legal representative of the applicant: surname(s) (if applicable, surname(s) at birth), given name(s), address and representative capacity;

- h) details concerning each parent: surname(s) (if applicable, surname(s) at birth), given name(s), date and place of birth, nationality, identification number (if applicable), address;
- i) the elements on the basis of which the issuing authority considers itself competent to issue the Certificate;
- j) the law applicable to the ~~establishment of parenthood~~ **ascertainment or constitution of filiation** and the elements on the basis of which that law has been determined;
- k) a statement informing Union citizens and their family members that **copies of the Certificate can be retrieved from the European register** ~~the Certificate does not affect the rights that a child derives from Union law and that, for the exercise of such rights, proof of the parent-child relationship can be presented by any means;~~
- l) signature and/or stamp of the issuing authority.

**The registrars issuing an ECF include the name of the surrogate mother in the ECF when required by the applicable law or by the Member State of destination as a condition for the constitution of filiation with the intending parents.**

#### **Article 53 – Effects of the Certificate**

1. The Certificate shall produce its effects in all Member States without any special procedure being required.
2. ~~The Certificate shall be presumed to demonstrate accurately elements which have been established under the law applicable to the establishment of parenthood.~~ The person mentioned in the Certificate as the child of a particular parent or parents shall be presumed to have the status mentioned in the Certificate.
3. The Certificate shall constitute a valid document for the recording of ~~parenthood~~ **filiation** in the relevant register of a Member State, without prejudice to point (i) of Article 3(2).

#### **Article 54 – Certified copies Recording of the Certificate in the Register**

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|---|---|
| <ol style="list-style-type: none"> <li>1. <del>The issuing authority shall keep the original of the Certificate and shall issue one or more certified copies to the applicant or a legal representative.</del></li> <li>2. <del>The issuing authority shall, for the purposes of Articles 55(3) and 57(2), keep a list of persons to whom certified copies have been issued pursuant to paragraph 1.</del></li> </ol> | <ol style="list-style-type: none"> <li>1. <b>The information to be certified as true is recorded and kept in the centralised register in conformity with the rules governing privacy of information.</b></li> <li>2. <b>In the following cases, the issuing authorities enter additional information in an encrypted database associated to the register and set up in conformity with Article 58bis:</b> <ul style="list-style-type: none"> <li>- <b>in the case of adoption: the procedure for requesting information or, as the case may be, access to the adopted child's parents;</b></li> </ul> </li> </ol> |
|---|---|

	<ul style="list-style-type: none"> <li>- in the case of confidential birth: the procedure for requesting information or, as the case may be, access to the biological mother;- in the case of gamete or embryo donation: the procedure to guarantee to the child the right to know and seek access to the donors;</li> <li>- in the case of birth from a surrogate mother: the procedure to guarantee to the child the right to know and seek access to the surrogate mother.</li> </ul> <p>3. The authority in charge of issuing the European Certificate of Filiation records the documents guaranteeing the right of the child to know the child's origin with a specific ECF electronic number.</p> <p>4. The ECF number must allow the child coming of age or the child's representative to seek and obtain access to information regarding the child's biological ascent.</p>
<b>Article 55 – Rectification, Modification or Withdrawal of the Certificate</b>	
<p>1. The issuing authority shall, at the request of any person demonstrating a legitimate interest or of its own motion, rectify the Certificate in the event of a clerical error.</p> <p>2. The issuing authority shall, at the request of any person demonstrating a legitimate interest or, where this is possible under national law, of its own motion, modify or withdraw the Certificate where it has been established that the Certificate or individual elements thereof are not accurate.</p> <p>5. The issuing authority shall <del>inform all persons to whom certified copies of the Certificate have been issued pursuant to Article 54(1) of any</del> <b>record the rectification, modification or withdrawal thereof in the European centralised register.</b></p>	
<b>Article 56 - Redress Procedures</b>	
<p>1. Decisions taken by the issuing authority pursuant to Article 51 may be challenged by the applicant for a Certificate or a legal representative.</p>	

2. Decisions taken by the issuing authority pursuant to Article 55 and point (a) of Article 57(1) may be challenged by any person demonstrating a legitimate interest. The challenge shall be lodged before a court in the Member State of the issuing authority in accordance with the law of that Member State. If, as a result of a challenge as referred to in paragraph 1, it is established that the Certificate issued is not accurate, the competent court shall rectify, modify or withdraw the Certificate or ensure that it is rectified, modified or withdrawn by the issuing authority. If, as a result of a challenge as referred to in paragraph 1, it is established that the refusal to issue the Certificate was unjustified, the competent court shall issue the Certificate or ensure that the issuing authority re-assesses the case and makes a fresh decision.

#### Article 57 – Suspension of the Effects of the Certificate

1. The effects of the Certificate may be suspended by:
  - a) the issuing authority, at the request of any person demonstrating a legitimate interest, pending a modification or withdrawal of the Certificate pursuant to Article 55; or
  - b) the court, at the request of any person entitled to challenge a decision taken by the issuing authority pursuant to Article 56, pending such a challenge.
2. The issuing authority or, as the case may be, the court shall without delay ~~inform all persons to whom certified copies of the Certificate have been issued pursuant to Article 54(1) of any~~ **record the suspension of the effects of the Certificate in the European centralised register.**
3. During the suspension of the effects of the Certificate no further certified copies of the Certificate may be issued.

The Report capitalises on the amendments proposed to the ‘authentic acts section’ with a view to overcoming the opacity of the notion of ‘acts with binding/no binding legal effects’ and thus describes the documentation which each Member State designs to address the specific needs of all children, in particular as regards their right to have equal access to, and knowledge of, their origins. In line with the HCCH 1993 Adoption Convention, Article 49 prescribes that the application contains the ‘relevant documentation as kept by the authorities involved in the adoption procedure’, ensuring comprehensive record-keeping of the adoption process.

In the case of confidential birth situations, ‘all relevant medical records, including, in particular, the document which contains the declaration of the biological mother’ have to be included, thus providing a framework for preserving maternal information while respecting confidentiality.

Assisted reproduction cases require detailed documentation for both heterologous fertilisation (involving third-party genetic tissues) and surrogacy arrangements, including ‘all relevant medical records’ and ‘documents which contain the declarations exchanged between the biological parents and the intended parents’.

Because of the confidentiality of the information provided, these medical records should remain covered by privacy and uploaded in an encrypted database. As in the case of DNA databases, the anonymous information should be linked to the centralised register through an ‘ECF electronic number’ – the number of the file referred to in Article 52 lit c). This system would enable children to request access to this information about their origins when they reach majority age, and parents to request it in the case of medical or other necessities.

A transformative change is proposed in Article 54, which is completely restructured to establish a centralised European register system. The original provision, which simply addressed certified copies, is replaced with a comprehensive framework for the recording and preservation of information.

The new Article 54 establishes that certified information will be recorded and kept in a database associated with the centralised register in conformity with the rules governing the privacy of information. The amendment creates specific protocols addressing the need of children to know their original parents in cases of adoption, confidential birth, assisted reproduction with gamete donors, and surrogacy.

The amendment introduces the ECF electronic numbering system as a key mechanism for organising and accessing this information, with specific provisions ensuring that fertility clinics provide complete documentation and that authorised registrars verify a file's completeness before linking documents to electronic numbers.

Crucially, the amendment establishes that the ECF number must allow the child coming of age or the child's representative to seek and obtain access to the information regarding the child's biological origin, directly implementing the right of children to know their origins while maintaining appropriate privacy protections.

In an effort to mediate between competing Member States' interests that have resulted in divisive positions regarding surrogacy, it is proposed that registrars issuing an ECF may include the name of the surrogate mother in the Certificate when required by applicable law or by the destination Member State as a condition for certifying filiation with the intended parents.

In essence, the proposed improvements aim at ensuring that accurate information is uploaded in the encrypted database to create a child's record before a ECF is issued.

On the basis of such information, the Certificate would become retrievable from the centralised register and accessible at any time by any Member State, whilst ensuring that only the competent legal order has exclusive competence to modify the child's record and access the encrypted database.

## CHAPTER VII - DIGITAL COMMUNICATION

*See also the relevant comments to the amendments to Recitals 84-99 above*

### Articles 58-62 – The Centralised Register

#### Article 58 - Communication through the European electronic access point

##### The European Centralised Register

1. The European ~~electronic access point~~ **centralised register** established on the European e-Justice Portal pursuant to Article 4 of [the Digitalisation Regulation] may be used for electronic communication between natural persons or their legal representatives and Member State courts or other competent authorities in connection with the following:
  - a) proceedings for a decision that there are no grounds for the refusal of recognition of a court decision or an authentic instrument on ~~parenthood~~ **filiation**, or proceedings for the refusal of recognition of a court decision or an authentic instrument on ~~parenthood~~ **filiation**;
  - b) the application for, issuance, rectification, modification, withdrawal, suspension or redress procedures of the European Certificate of ~~Parenthood~~ **Filiation**.
2. Articles 4(3), 5(2) and (3), 6, 9(1) and 3, and 10 of [the Digitalisation Regulation] shall apply to electronic communications pursuant to paragraph 1.

#### Article 58bis – Database Associated with the European Centralised Register

**Member States required to issue, rectify, modify, withdraw, or suspend a European Certificate of Filiation record the information relied upon to issue the Certificate in an encrypted database associated with the European centralised register, and in conformity with the rules governing privacy of information.**

**The persons requiring an ECF are recorded in the database as ascendant and descendant of each other. In order to respect the rights of the child in conformity with Article 15(5), under the entry created for the descendant, the national authority records, in addition:**

- **in the case of gamete donation, the procedure for accessing biological parents as made available by the law of the State in which the donation has taken place;**
- **in the case of adoption, the procedure for accessing biological parents in conformity with the law of the State in which adoption has been formalised;**
- **in the case of surrogacy, or confidential birth, the procedure for accessing the biological mother as made available by the law of the State in which the relinquishment of the child has taken place.**

**The documents provided for the registration procedure by the clinic in charge of the gamete donation are kept by the authority in charge of drawing up the European Certificate of Filiation in the associated database and recorded with a specific ECF electronic number.**

**The authorised registrar verifies that the file sent by the clinic is complete before linking it to the electronic number of the ECF. If the file is incomplete, unsigned or irregular, the authorised registrar returns the file to the clinic to remedy the irregularity and upload the accurate information in the encrypted database.**

**The ECF number is kept by the authorities to guarantee that the child coming of age or the child's representative obtain access to information regarding the child's biological ascent, retrievable from the database upon request.**

#### **Article 59 - Adoption of Implementing Acts by the Commission**

1. For the purposes of electronic communications pursuant to Article 58(1), the Commission shall adopt implementing acts setting out the following:
  - a) the technical specifications ~~defining the methods of communication by electronic means;~~ **of the register**;
  - b) the technical specifications for communication protocols;
  - c) the information security objectives and relevant technical measures ensuring minimum information security standards and a high level of cybersecurity for the processing and communication of information.
  - d) ~~the minimum availability objectives and possible related technical requirements for electronic communication through the decentralised IT system.~~
2. The implementing acts referred to in paragraph 1 of this Article shall be adopted in accordance with the examination procedure referred to in Article 62(2).
3. The implementing acts referred to in paragraph 1 shall be adopted by [2 years after the entry into force of this Regulation].

#### **Article 60 – ~~Reference implementation software~~ Implementation of the European Centralised Register**

1. The Commission shall be responsible for the creation, maintenance and development of ~~reference implementation software which Member States may choose to apply as their back-end system instead of a~~ **centralised register accessible by** national IT systems. The creation, maintenance and development of the reference implementation software shall be financed from the general budget of the Union.
2. The Commission shall provide, maintain and support on a free-of-charge basis the ~~reference implementation software~~ **European centralised register**.

### Article 61 – Costs of the decentralised European Centralised IT System, ~~European electronic access point and national IT portals~~

1. Each Member State shall bear the costs of the installation, operation and maintenance of the ~~decentralised IT system's access points which are located on their territory.~~
2. Each Member State shall bear the costs of establishing and adjusting its national IT systems to make them interoperable with the ~~access points~~, and shall bear the costs of administering, operating and maintaining those systems.
3. Member States shall not be prevented from applying for grants to support the activities referred to in paragraphs 1 and 2 under the relevant Union financial programmes.
4. ~~The Commission shall bear all costs related to introducing support for electronic communications through the European electronic access point pursuant to Article 58(1).~~

1. **The Commission** shall bear the costs of the installation, operation and maintenance of the **centralised** IT system.
2. Each Member State shall bear the costs of establishing and adjusting its national IT systems to make them interoperable with the **centralised register**, and shall bear the costs of administering, operating and maintaining those systems.
3. Member States shall not be prevented from applying for grants to support the activities referred to in paragraphs 1 and 2 under the relevant Union financial programmes.

### Article 62 – Committee Procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council.

Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council shall apply.

Articles 58 to 62 should serve as a basis for the progressive creation of a centralised EU register where all data of newborn EU citizens or residents could be collected in order to provide them with an additional level of certification of identity, in addition to that offered by the competent national legal order. Differently from national registers, the collection of data to be recorded in the EU centralised register should be optional. The main purpose of the register would be to ensure that information uploaded to create a child's record in order to issue a European Certificate of Filiation becomes retrievable from the centralised register and accessible at any time by any Member State.

## CHAPTER VIII - DELEGATED ACTS

### Articles 63-64 – Coordination between Member States and the Commission

#### Article 63 – Delegation of Powers

The Commission is empowered to adopt delegated acts in accordance with Article 64 concerning the amendment of Annexes I to V in order to update or make technical changes to those Annexes.

#### Article 64 – Exercise of the Delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 63 shall be conferred on the Commission for an indeterminate period of time from [date of entry into force of this Regulation].
3. The delegation of power referred to in Article 63 may be revoked at any time by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
5. As soon as it adopts a delegated act, the Commission shall notify it to the Council.
6. A delegated act adopted pursuant to Article 63 shall enter into force only if no objection has been expressed by the Council within a period of two months of notification of that act to the Council or if, before the expiry of that period, the Council has informed the Commission that it will not object. That period shall be extended by two months at the initiative of the Council.
7. The European Parliament shall be informed of the adoption of delegated acts by the Commission, of any objection formulated to them, or of the revocation of the delegation of powers by the Council.

## CHAPTER IX - GENERAL AND FINAL PROVISIONS

### Articles 65-66 – Formalities and relationship with other Conventions

<b>Article 65 – Legalisation and other Similar Formality</b>	
No legalisation or other similar formality shall be required in the context of this Regulation.	
<b>Article 66 – Relationship with Existing or Future International Conventions</b>	
<ol style="list-style-type: none"> <li>1. This Regulation shall not affect the international conventions to which one or more Member States are party at the time when this Regulation is adopted and which lay down provisions on matters governed by this Regulation.</li> <li>2. <del>However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.</del></li> <li>3. This Regulation shall not affect the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption.</li> </ol> <p>This Regulation shall not affect Conventions No 16, No 33 and No 34 of the International Commission on Civil Status.</p>	<ol style="list-style-type: none"> <li>1. This Regulation shall not affect the international conventions to which one or more Member States are party at the time when this Regulation is adopted and which lay down provisions on matters governed by this Regulation.</li> <li>2. <b>Nothing in this Regulation precludes Member States from concluding agreements or arrangements between two or more of them to further facilitate the recognition of filiations, provided that such agreements are compatible with this Regulation and respect fundamental rights of children.</b></li> <li>3. <b>The Regulation does not prevent the recognition of foreign decisions on filiation under national law.</b></li> <li>4. This Regulation shall not affect the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption.</li> <li>5. This Regulation shall not affect Conventions No 16, No 33 and No 34 of the International Commission on Civil Status.</li> </ol>

In recent years, many Member States have adopted new rules or amended their rules on the recognition of filiation. There are also rules in bilateral or multilateral treaties<sup>101</sup>. Said national, bilateral or multilateral rules might be more favourable and easier to apply with a view to recognising the child's relationship with the parents than the Regulation.

<sup>101</sup> For instance, inter-Nordic rules

The question of which treaties might fall under an exception is a political decision, but, as a matter of principle, rules more favourable to the child's interests and the continuity of filiation should always be applicable. The Regulation's provisions are available whenever they will facilitate the portability of an existing child-parent(s) filiation, facilitate the recognition of biological truth (eg genetic-social motherhood), and work in favour of family stability. Article 66 (2) and (3) in our proposal are based on the example of other HCCH and EU instruments, which aim to *facilitate* mutual cross-border cooperation.<sup>102</sup> The Regulation should not give the impression of being the only legal source of recognition of filiation, which can simply be avoided by a Member State's non-participation in this instrument.

## Articles 67-72 – Other Norms of Coordination

### Article 67 - List of Conventions

1. By [six months before the date of application of this Regulation], Member States shall notify the Commission of the conventions referred to in Article 66(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.
2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the European e-Justice Portal:
  - (a) a list of the conventions referred to in paragraph 1;
  - (b) the denunciations referred to in paragraph 1

### Article 68 – Data Protection

1. The personal data required for the application of this Regulation shall be processed by Member State courts or other competent authorities for the purposes of ~~establishing parenthood~~ **ascertaining or constituting filiation** in cross-border situations and of the recognition of ~~parenthood~~ **filiation**, in connection with the establishment of parenthood pursuant to Chapter II, the issuance of attestations pursuant to Articles 29, 37 and 45, the issuance of a European Certificate of  ~~Parenthood~~ **Filiation** pursuant to Article 51, the presentation of the documents for the recognition of ~~parenthood~~ **filiation** pursuant to Article 26, the obtaining of a decision that there are no grounds for refusal of recognition of ~~parenthood~~ **filiation** pursuant to Article 25, or the application for refusal of recognition of ~~parenthood~~ **filiation** pursuant to Article 32.
2. Processing of personal data under this Regulation shall be limited to the extent necessary for the purposes set out in paragraph 1, without prejudice to further processing for archiving purposes in the public interest in accordance with Articles 5(1)(b) and 89 of the GDPR.
3. For the purposes of this Regulation, Member State courts or other competent authorities shall be regarded as data controllers within the meaning of Article 4, point 7 of the GDPR.

<sup>102</sup> See 2019 Hague Judgments Convention, Article 15, Recognition and enforcement under national law provides: 'Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law'. CJEU, *ProRail* case (332/11) (on EU Evidence Regulation) Regulation does not govern exhaustively the taking of cross-border evidence, and courts of Member States follow other methods rather than following only one of the methods laid down by the Regulation.

4. The personal data required for the application of this Regulation shall be processed by the Commission in connection with the electronic communication between natural persons or their legal representatives and Member State courts or other competent authorities through the European ~~electronic access point in the context of the decentralised IT system.~~
5. Processing of personal data under this Regulation shall be limited to the extent necessary for the purposes set out in paragraph 4.
6. For the purposes of this Regulation, the Commission shall be regarded as controller within the meaning of Article 3, point 8 of the EUDPR.

#### Article 69 – Transitional Provisions

1. This Regulation shall apply to legal proceedings instituted and to authentic instruments formally drawn up or registered on or after [date of application of this Regulation].
2. Notwithstanding paragraph 1, where **filiation was ascertained or constituted** ~~the parenthood was established~~ in conformity with one of the laws designated as applicable under Chapter III in a Member State whose courts had jurisdiction under Chapter II, Member States shall recognise:
  - a. ~~a the court decision establishing parenthood~~ **ascertaining or constituting filiation** in another ~~that~~ Member State in legal proceedings instituted prior to [date of application of this Regulation], and
  - b. ~~an the authentic instrument establishing parenthood with binding legal effect~~ **ascertaining or constituting filiation** in the ~~that~~ Member State of origin ~~which was if~~ formally drawn up or registered prior to [date of application of this Regulation].
3. Chapter IV shall apply to the court decisions and authentic instruments referred to in this paragraph.
4. Notwithstanding paragraph 1, Member States shall accept an authentic instrument ~~which has no binding legal effect in the Member State of origin but~~ which has evidentiary effects in **the Member State of origin** ~~that Member State~~, provided that this is not manifestly contrary to the public policy (*ordre public*) of the Member State in which acceptance is sought.
5. Chapter V shall apply to the authentic instruments referred to in this paragraph.

#### Article 70 – Review

1. By [5 years from date of application of this Regulation], the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, including an evaluation of any practical problems encountered, supported by information supplied by the Member States. The report shall be accompanied, where necessary, by a legislative proposal.
2. The Member States shall provide the Commission upon request, where available, with information relevant for the evaluation of the operation and application of this Regulation, in particular on:

- a) the number of applications for the refusal of recognition of a court decision or of an authentic instrument ~~establishing parenthood with binding legal effect~~ **ascertaining or constituting filiation** in the Member State of origin pursuant to Article 32, and the number of cases in which the refusal of recognition was granted;
- b) the number of appeals lodged pursuant to Articles 33 and 34, respectively;
- c) the number of applications challenging the contents of an authentic instrument ~~which has no binding legal effect~~ in the Member State of origin but which has evidentiary effects in that Member State, and the number of cases in which the challenge was successful;
- d) the number of European Certificates of ~~Parenthood~~ **Filiation** issued; and
- e) the costs incurred under Article 61(2) of this Regulation.

#### Article 71 – Information to be Communicated to the Commission

1. The Member States shall communicate to the Commission the following:
  - (a) the authorities empowered to draw up or register authentic instruments in matters of ~~parenthood~~ **filiation** as referred to in Article 4, point (6);
  - (b) the courts and authorities competent to issue attestations as referred to in Article 29, Article 37 and Article 45, and the courts and authorities competent to rectify attestations as referred to in Article 38;
  - (c) the courts competent to deal with applications for a decision that there are no grounds for refusal of recognition in accordance with Article 25, and the courts competent to deal with applications for refusal of recognition in accordance with Article 32 and with appeals against court decisions on such applications for refusal in accordance with Articles 33 and 34, respectively; and
  - (d) the courts and authorities competent to issue the European Certificate of ~~Parenthood~~ **Filiation** pursuant to Article 51, and the courts competent to deal with the redress procedures referred to in Article 56.
2. The Member States shall communicate the information referred to in paragraph 1 to the Commission by [6 months after the date of entry into force of this Regulation].
3. The Member States shall communicate to the Commission any changes to the information referred to in paragraph 1.

The Commission shall make the information referred to in paragraph 1 publicly available through appropriate means, including through the European e-Justice Portal.

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from [the first day of the month following a period of 18 months from the date of entry into force of this Regulation].

However, Article 71 shall apply from [date of entry into force of this Regulation].

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the Council

The President

## PART III Conclusions and Recommendations

The Commission's Proposal is a good starting point to harmonise questions of cross-border filiation in the EU. Alongside existing regulations and international agreements, it represents the EU's continuing efforts to provide legal certainty for citizens in cross-border family situations while respecting the balance between national sovereignty in domestic family law and the need for international cooperation in cross-border cases.

ELI Proposal aims to identify a range of desirable regulatory options intended to facilitate its unanimous adoption and ensure the recognition of filiations between Member States as well as children's rights and human rights compliance.

In order to encourage Member States to unanimously accept this fundamental piece of legislation, the ELI Proposal suggests a series of improvements which: i) create consistency within the instrument and with other EU instruments in related matters; ii) favours consensus by adopting a balanced and equidistant view on the interests of stakeholders and Member States interests; iii) guarantees the fundamental rights of the child in cross-border filiation situations by the introduction of the European Certificate of Filiation and a complementing centralised register, iv) guarantees the fundamental right to non-discrimination of parents united in a same-sex couple as well as of all other parents, whether single parents, adoptive parents, multiple parents or biological parents; v) guarantees the fundamental rights of women and children by ensuring that Member States respect the peremptory norms of international law prohibiting child trafficking and women trafficking, in line with the 1993 Hague Adoption Convention; vi) guarantees the fundamental rights of women by ensuring that Member States prevent women trafficking or exploitation in relation to reproduction.

ELI Proposal, therefore, concludes with the following:

### 1) Specific Article on Rights of Children

ELI Proposal recommends introducing, at the beginning of the Regulation, a specific article on the rights of children in connection to filiation, which would refer to the 1989 UN Convention on the right of the child (CRC) to the same extent as other EU instruments refer to fundamental rights described by other supranational instruments. Articles 7 and 8 CRC are particularly relevant in filiation matters. The first, echoing Article 24 of the 1966 ICCPR, recognises the right of every newborn child to be 'registered immediately at the time of his or her birth' to guarantee the infant the 'right to a name', the right 'to acquire a nationality' and 'the right to know and be cared for by his or her parent'. The second requires States Parties to preserve all these elements of a child's identity and provide assistance to the child 'with a view to re-establishing speedily his or her identity'. In filiation matters, as in all decisions related to children, the best interests of the child are of paramount consideration, under Article 3 of the CRC. The rights of the child are non-hierarchical and include the right to non-discrimination (Article 2), the right to life and harmonious development (Article 6), and the hearing of the child (Article 12).

This recommendation has led us to recall, in an amended Article 5, the right of the child to status continuity, the right to know, and request access to, the child's origins, and the right of the child to be heard to ensure that all children, regardless of their coming into existence, enjoy the same rights.

## 2) Jurisdiction

The Report recommends introducing one general jurisdiction ground focusing on the child and their habitual residence; three alternative jurisdiction grounds for the ascertainment of filiation (nationality of the child, habitual residence or nationality of the putative parent) and one for the constitution of filiation in pre-birth situations (intended habitual residence of the child, subsidiarily habitual residence of one of the intending parents). Furthermore, the *forum necessitatis* remains as a safeguard.

Granting jurisdiction preferably to the courts of the Member State of the habitual residence of the child is justified on several grounds. Jurisdiction rules have been carefully designed, on the one hand, to reduce the risks of children suffering from a limping status of filiation and, on the other, to encourage Member States to adopt the proposed Regulation by recognising their competence to continue to regulate assisted reproductive technologies at home. In addition, limiting the grounds of jurisdiction also reduces the possibility of *lis pendens* and the risk of contradictory judgments or certificates.

Specifically, jurisdiction is based on the habitual residence in Articles 6 and 8, while Article 7 complements that change and Article 9 does not need to be changed.

## 3) Applicable Law

ELI Proposal recommends using the habitual residence of the child in Article 17, rather than the habitual residence of the person giving birth, as this connecting factor reflects better both the child-centred approach of the Report and the principle of the closest connection. This connecting factor may be adapted to cases where a future child-parent relationship can be pre-assessed prior to the child's birth: in those cases, the Report recommends referring to the child's 'prospective' habitual residence. This solution has the advantage of one single rule for all cases. In addition, where the habitual residence cannot be determined, ELI Proposal recommends introducing the classical fallback rule of the closest connection. As a result, the structure will allow the interpreter to apply the law which is most closely connected to the child. This solution also has the advantage of ensuring conformity with the jurisdiction rules with the result that, in most cases, the competent authority will apply its own law. ELI Proposal also recommends to clarify that the public policy exception does not aim at considering the content of the foreign law and disregard it on abstract grounds but may only be opposed if the concrete result of its application clashes with the local values and the best interests of the child.

Article 19 reflects the principle of *favor filiationis*, and ensures stability of status, so that the *conflict mobile* of the main connecting factor (which is not anchored in a given moment in time) always operates in favour of the child's filiation to guarantee continuity of status.

## 4) Recognition of Decisions

ELI Proposal recommends substituting 'later decision' with 'earlier decision' in line with the EU *acquis*, to prevent forum shopping to the detriment of the child-parent status continuity. Unlike parental responsibility, which needs to be adapted to the life course of the child (eg, in the case of divorce of the parents), filiation requires the pursuit of stability and continuity via the traditional rule enshrined in all other EU regulations in private international law (except Brussels IIter). In the recognition procedure, ELI Proposal recommends introducing safeguards drawing from the experience of the 1993 Hague Convention on Intercountry Adoption (HCCH 1983 Adoption Convention) on the need to prevent the abduction, the sale of, or the traffic in children. ELI Proposal also recommends removing those parts on 'authentic instruments with binding effects' since the

notion is unknown to private international law so far, and gives the false impression that an act alone may create a filiation status.

ELI Proposal further recommends to align Article 31 c) and d) to the drafting of most of the EU Regulations on procedural public policy and to delete Articles 34-39 on authentic acts with binding legal effects.

## **5) Authentic Instruments**

ELI Proposal recommends focusing on the 'evidentiary effect' of authentic acts, such as various forms of birth certificates, which necessarily stem from all kinds of authentic instruments. This effect in practice is the most important for the parties. ELI Proposal also recommends clarifying the relationship between applicable law governing filiation, law of the forum, and law of the authority drawing up the authentic instrument relating to presumptions and effects of an authentic instrument.

With the proposed amendment, Chapter V would apply to all authentic instruments having evidentiary effects, including those which may be regarded as having a constitutive effect. This would make it possible for parents to rely on authentic instruments in other Member States, and Chapter V would become the 'default' regime for all authentic acts.

## **6) European Certificate of Filiation (ECF)**

ELI Proposal recommends introducing a facilitated recognition of a filiation status based on a certification to be named the European Certificate of Filiation, ECF. The ECF would only be available to filiation statuses respectful of the rights of children and rights of those involved, especially the child's right to know her origins. The ECF would guarantee a speedier recognition of filiation status, respectful of the right of children to know their origins as part of their identity and introduce EU minimum standards based on fundamental rights. As the ECF would be optional, in cases these EU standards were not met, eg in the case of child trafficking, a recognition of the filiation status would still be possible, albeit after having given to the EU Member State requested to recognise the filiation with cross-border elements the possibility to consider the situation of the child victim of trafficking.

It is proposed to add four additional letters to Article 49, requiring ECF applications to include comprehensive documentation of the child's origins, which will be maintained in an encrypted database linked to the centralised register through an ECF electronic number. This framework ensures privacy protection while maintaining accessible records that enable the child, upon reaching majority, to access information on her origins, or that allow the child's parents while the child is still a minor to access such information when medical, psychological, or other essential circumstances necessitate disclosure.

## **7) Establishment of a Centralised Register**

ELI Proposal recommends introducing a centralised register to complement the ECF work in practice and allow the retrieval of a certificate by all national authorities from the same register. The amendments create a confidential but accessible system where sensitive medical records, protected by secrecy provisions, are uploaded in an encrypted database linked to an EU centralised register via an ECF electronic number. The ECF electronic numbering system serves as the technical backbone of this framework, requiring adoption centres,

hospitals, and fertility clinics to provide complete documentation and mandating authorised registrars to verify the integrity of files before uploading them onto the system.

It is proposed to add Article 58bis governing the operation of the database for anonymised information on the child's origins. This collaborative mechanism should advance European integration while reinforcing mutual trust among Member States.

## 8) Coordination with Other Acts and Instruments on International Filiation

ELI Proposal recommends including a clause, inspired by the 2019 Hague Judgments Convention, that Member States can decide to continue to apply their national acts or bi- or multilateral instruments if they are more favourable to the child's interests and the continuity of filiation.

Article 66 is modified accordingly.

## 9) Terminology

To emphasise the child-centred focus of the proposed Regulation, the English term *filiation* is proposed instead of that of *parenthood*. To ensure a more precise assessment of the interests regarding each different case of filiation allocation, the Report recommends, in line with the ECtHR jurisprudence, to introduce a clear distinction between the ascertainment and contestation of a biological filiation – important in the determination of the child's identity and origins – and the constitution and termination of a non-biological filiation. ELI Proposal provides more precise language that better captures the various ways child-parent relationships exist, to guarantee all children the enjoyment of identity rights on equal footing.





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