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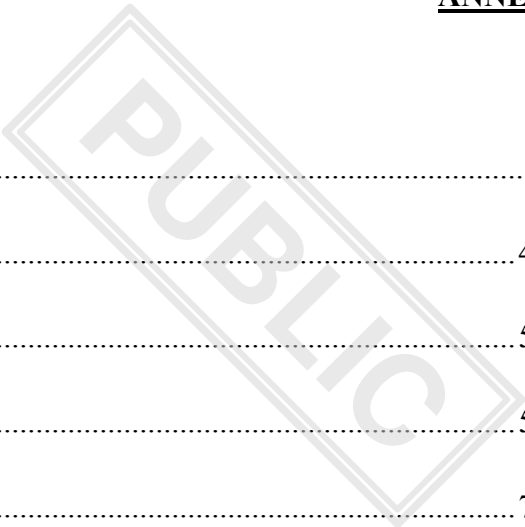
NOTE

From:	General Secretariat of the Council
To:	Delegations
No. Cion doc.:	15837/22 + ADD 1 - ADD 5
Subject:	Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood - Compilation of comments

Delegations will find in the Annex the compilation of comments received from BE, CZ, EE, IT, LT, HU, MT, NL, AT, FI and SE on the above mentioned proposal following the request for contributions in CM 3770/2023.

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BELGIUM

BELGIUM

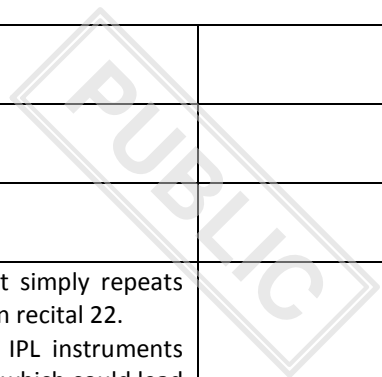
Written comments and drafting suggestions on the Chapters I to IV in the Commission proposal (ST 15837/22) and the proposed redrafted Articles 6 and 17 of the proposal in the discussion paper (ST 8488/23)

General remarks/observations

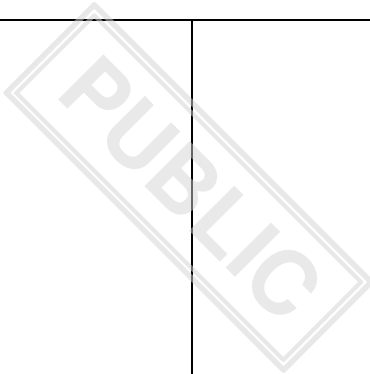
Surrogacy: In BE surrogacy is not regulated, nor prohibited. In most cases, surrogacies concerning Belgian citizens performed in other countries (mostly Third states) are recognized in BE – either through the court or directly through the civil registrar. Recent jurisprudence shows that in most court cases the court will recognize the parenthood based on the surrogacy as regard to one parent (genetic parent with adoption possibilities for the other parent) or both parents (intended parents) based on the best interest of the child. Only in rare cases recognition is not allowed due to a violation of public policy or evasion in law. In those cases, parenthood can be established through adoption. **BE is not in favour of excluding the establishment or recognition of parenthood based on surrogacy from the scope of the Proposal.**

Authentic instruments: BE is not in favour of the distinction between authentic instruments with binding legal effect and authentic instruments with no binding legal effect but with evidentiary effect, as the distinction is highly theoretical and not practical. **BE proposes to clarify this point more thoroughly and if possible, to delete the proposed distinction between the authentic instruments in the proposal.**

ORIGINAL TEXT	WRITTEN COMMENTS	DRAFTING SUGGESTIONS
Chapter I. Subject matter, scope and definitions		



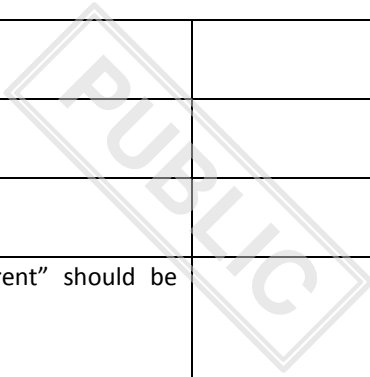
<u>Art. 1 – Subject matter</u>		
<p>This Regulation lays down common rules on jurisdiction and applicable law for the establishment of parenthood in a Member State in cross-border situations; common rules for the recognition or, as the case may be, acceptance in a Member State of court decisions on parenthood given, and authentic instruments on parenthood drawn up or registered, in another Member State; and creates a European Certificate of Parenthood.</p>	<ul style="list-style-type: none">• This article has no added value: it simply repeats the goals of the Regulation stated in recital 22.• BE proposes to delete. Other EU IPL instruments don't have a comparable provision which could lead to confusion. The scope of the Regulation is clearly defined in Art. 3.• If kept: clarification needed that the Regulation also applies to contestation or termination of parenthood as this article precedes Artt. 3 and 4 (scope and definitions). Otherwise possible confusion.	
<u>Art. 2 – Relationship with other provisions of Union law</u>	<ul style="list-style-type: none">• Relocation to Chapter IX (General and final provisions) seems more appropriate and in line with other EU IPL instruments (specifically 2nd paragraph) OR just leave it in the recitals.	<u>Art. 65a – Relationship with other provisions of Union law</u>
<p>1. 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</p>	<ul style="list-style-type: none">• Purpose of this paragraph is not very clear and possible confusion with specific rules on public policy in the proposal itself: Therefore better placed in recitals.• The second sentence is self-evident so it seems unnecessary. The interpretation of case law of ECJ has never before been codified in Regulations.	



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 recognise a document establishing a parent-child relationship issued by the authorities of another Member State for the purposes of rights derived from Union law.		
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.	<ul style="list-style-type: none">• Suggestion: relocation to Chapter IX (General and final provisions).	
<u>Art. 3 – Scope</u>		
1. This Regulation shall apply to civil matters of parenthood in cross-border situations.	<ul style="list-style-type: none">• There is no clear description of what must be understood under a “cross-border situation” in the recitals.• <i>See general comment on surrogacy above</i>	

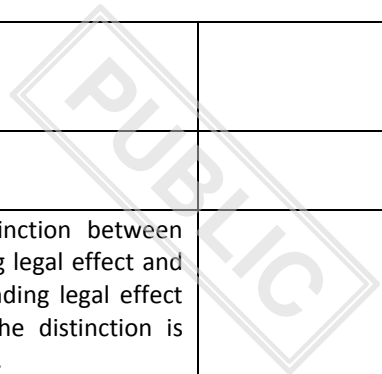
2. This Regulation shall not apply to:	<ul style="list-style-type: none"> • Add “determination or recognition of (sur)names” to the list of excluded matters: the surname of a person is often a direct effect of the person’s parenthood/filiation. (see suggestion for redraft) 	
(a) the existence, validity 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;	<ul style="list-style-type: none"> • Recital 67 states that the recognition of parenthood of a child should not imply the recognition of the possible marriage or RP of the parents: How is this possible regarding parenthood based on legal presumptions concerning a possible invalid marriage or RP? Should we approach this like a ‘putative marriage’, where we recognize the effects of a marriage/RP regarding to the children born during the marriage, but not the marriage/RP itself? 	
(b) parental responsibility matters;		
(c) the legal capacity of natural persons;		
(d) emancipation;		
(e) intercountry adoption;		
(f) maintenance obligations;		
(g) trusts or succession;		
(h) nationality;		
(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.		

		(j) determination or recognition of (sur)names
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.	<ul style="list-style-type: none"> • No remarks regarding the exclusion itself, but: • It remains unsure what the consequences are of a recognition/acceptance by a Member State of such court decisions/authentic instruments from a third State: is such a recognition itself also excluded from the scope or not? Yes or no. The text needs to be clarified on this specific point. • The use of the term “re-establishment of parenthood” for these cases as proposed during the discussions is not clear and possibly confusing when not explicitly defined in the text and recitals. • Keep in mind in practice: it is not always possible or difficult to detect whether the initial parenthood was established within or outside of the EU (e.g. national birth certificates based on foreign court decisions/authentic instruments). 	
	<ul style="list-style-type: none"> • Recital 41 states that for the purpose of this Regulation, a child or a parent possessing multiple nationalities may choose the court or the law of any MS whose nationality he/she possesses at the time of seizing the court or at the time the parenthood is established. This rule should be included in a specific provision in the Regulation in order to clarify this point and to exclude any doubt, as this will be a very common situation. Preferably such provision can be placed here. (see suggestion for redraft) 	4. For the purposes of this Regulation, a child or a parent possessing multiple nationalities may choose the court (assigned by the rules of jurisdiction in Chapter II) or the law of any of the Member States (assigned by the rules of applicable law in Chapter III) whose nationality he or she possesses at the time of seizing the court or at the time the parenthood is established.



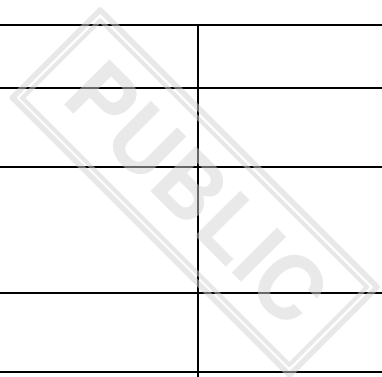
<u>Art. 4 – Definitions</u>		
For the purposes of this Regulation, the following definitions apply:	<ul style="list-style-type: none">• Recital 24: the definition of “parent” should be included in this Article.	
1. ‘parenthood’ means the parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents;	<ul style="list-style-type: none">• “Parenthood established in law” can possibly be (mis)interpreted restrictively as parenthood solely based on a legal presumption: parenthood can also be established on the basis of a voluntary legal act (e.g. acknowledgement of a child) or judicially (by court)• Recitals 25-27 regarding the inclusion of domestic adoption also need to be reflected in the definition of ‘parenthood’.	
2. ‘child’ means a person of any age whose parenthood is to be established, recognised or proved;	<ul style="list-style-type: none">• Add “contestation of parenthood” (see suggestion for redraft)• Recital 24 states unborn or deceased children are covered in the proposal: this should also be reflected in the definition of ‘child’.	2. ‘child’ means a person of any age whose parenthood is to be established or contested , recognised or proved and includes a deceased child or a child not yet born/unborn child.
		2./1. ‘parent’ means, as applicable, as referring to

		the legal parent, the intended parent, the person who claims to be a parent or the person in respect of whom the child claims parenthood;
3. 'establishment of parenthood' means the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously;	<ul style="list-style-type: none"> • Contestation of parenthood does not always imply the establishment of a new parenthood. It can also just terminate the existing parenthood without replacing it. (see suggestion for redraft) • It could be useful to list the different methods of determination in the definition: i.e. by operation of law, by voluntary legal act (e.g. acknowledgement of a child) or judicially. (see suggestion for redraft) 	3. 'establishment of parenthood' means the legal determination in law of the relationship between a child and each parent, by operation of law or by voluntary legal act or judicially. This (also) includes including the contestation of establishment of parenthood following a claim contesting a parenthood established previously;
4. 'court' means an authority in a Member State that exercises judicial functions in matters of parenthood;	<ul style="list-style-type: none"> • As stated by the Commission, "court" must be interpreted sensu stricto. Definition must be more precise. It must be clear that civil status authorities are not considered to be a 'court'. • If so, should there not also be a definition of (administrative) authorities competent for establishing/recognising/accepting parenthood? • Do administrative authorities follow the same jurisdiction rules? 	
5. 'court decision' means a decision of a court of a		



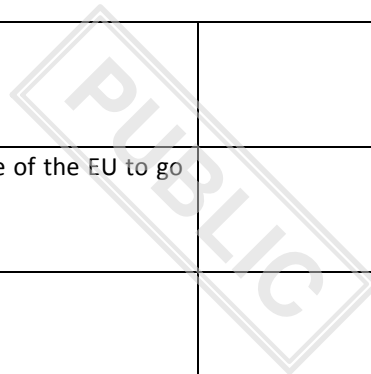
Member State, including a decree, order or judgment, concerning matters of parenthood;		
6. 'authentic instrument' means a document that has been formally drawn up or registered as an authentic instrument in any Member State in matters of parenthood and the authenticity of which:	<ul style="list-style-type: none">• BE is not in favour of the distinction between authentic instruments with binding legal effect and authentic instruments with no binding legal effect but with evidentiary effect, as the distinction is highly theoretical and not practical.• However: if the distinction is kept in the proposal:<ul style="list-style-type: none">- These two authentic instruments need their own specific definition in Article 4 under point 6 which also points out which category falls under the rules of "recognition" respectively "acceptance";- List of every MS which specifies which authentic instruments establish parenthood in their country and in which category they fall (Art. 71: add to the list of information to be communicated to the Commission)	
(a) relates to the signature and the content of the instrument; and		
(b) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;		
7. 'Member State of origin' means the Member State in which the court decision on parenthood has been	<ul style="list-style-type: none">• The 'Member State of origin' should be limited to the Member State where parenthood was first established in order to have a clear priority in case	7. 'Member State of origin' means the Member State where parenthood was established first in which the

<p>given, the authentic instrument on parenthood has been formally drawn up or registered, or the European Certificate of Parenthood has been issued;</p>	<p>of conflicting parenthood decisions or authentic instruments regarding the same child in different Member States (see suggestions for redraft).</p> <ul style="list-style-type: none"> • Sometimes the Articles just mention “establishment of parenthood” (regardless how), sometimes “given, drawn up or registered”: needs to be more consistent. 	<p>court decision on parenthood has been given, the authentic instrument on parenthood has been formally drawn up or registered, or the European Certificate of Parenthood has been was issued first;</p> <p><i>OR</i></p> <p>7. 'Member State of origin' means the Member State in which the first court decision on parenthood has been given, the authentic instrument on parenthood has been was formally drawn up or registered first, or the European Certificate of Parenthood has been was issued first;</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. ‘European electronic access point’ means an interoperable access point as defined in point (5) of</p>		



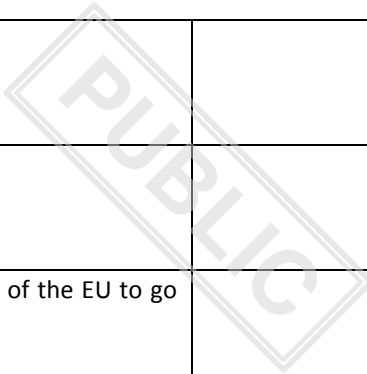
Article 2 of [the Digitalisation Regulation].		
<u>Art. 5 – Competence in matters of parenthood within the Member States</u>		
This Regulation shall not affect the competence of the authorities of the Member States to deal with parenthood matters.		
Chapter II. Jurisdiction		
<u>Art. 6 – General jurisdiction</u>	<ul style="list-style-type: none">• Recital 41 – multiple nationalities: see previous remark in Art. 3.• No specific remark regarding the multiple options provided in Art. 6 as the establishment or contestation of parenthood is a fundamental right and may relate to many different parties (child, parents, intended parents, relatives, same-sex parents etc.) so there should always be a forum available. The choice of options doesn't affect the applicable law, which decreases the risk of forum shopping.• Reducing the options given in Art. 6, specifically the jurisdictions under e) and f), can have important	

	<p>unwanted consequences for same-sex parents. It can reduce their rights to parenthood as their options are often more limited regarding their specific situation;</p> <ul style="list-style-type: none"> • Prenatal situations: The application of this article in prenatal situations should also be clarified: in the text or in the recitals as for example in BE parenthood of an unborn child can be contested during the pregnancy. • As the proposal retains a large number of alternative forums, the possibility of transferring a case to a court in another MS can be considered (see art. 12 R 2019/1111 Brussels IIb). This possibility could constitute a useful counterweight to the large choice between a number of alternative jurisdictions, all the more so as some of these jurisdictions in Art. 6 could prove to be fragile (e.g. child's place of birth). However: If such transfer mechanism is put in place, this should also include some guarantees surrounding its application. It is not in the best interest of the child when such transfer between jurisdictions causes undue delay in the judicial process of the dispute relating to his parenthood. • 'parent' is unclear. A definition of parent would be useful (cfr. Recital 24 & comments above) 	
<p>In matters relating to parenthood, jurisdiction shall lie with the courts of the Member State:</p>		



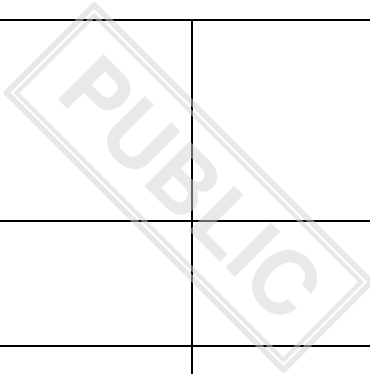
(a) of the habitual residence of the child at the time the court is seised, or		
(b) of the nationality of the child at the time the court is seised, or	<ul style="list-style-type: none">• Useful for families that live outside of the EU to go to a court in the EU.	
(c) of the habitual residence of the respondent at the time the court is seised, or		
(d) of the habitual residence of either parent at the time the court is seised, or		
(e) of the nationality of either parent at the time the court is seised, or	<ul style="list-style-type: none">• Important for same-sex parents	
(f) of birth of the child.	<ul style="list-style-type: none">• Important for same-sex parents• useful for births 'sous X'.• useful for foundlings. It could be added in a recital that a foundling found in a MS is presumed to be born in that MS.	
<i>Discussion paper redraft</i>		
<u>Art. 6 – General jurisdiction</u>	<ul style="list-style-type: none">• Recital 41 – multiple nationalities: see previous remark in Art. 3.• No specific remark regarding the multiple options provided in Art. 6 as the establishment or contestation of parenthood is a fundamental right	

	<p>and may relate to many different parties (child, parents, intended parents, relatives, same-sex parents etc.) so there should always be a forum available. The choice of options doesn't affect the applicable law, which decreases the risk of forum shopping.</p> <ul style="list-style-type: none"> • Reducing the options given in Art. 6, specifically the jurisdictions under e) and f), can have important unwanted consequences for same-sex parents. It can reduce their rights to parenthood as their options are often more limited regarding their specific situation; • Prenatal situations: The application of this article in prenatal situations should also be clarified: in the text or in the recitals as for example in BE parenthood of an unborn child can be contested during the pregnancy. • As the proposal retains a large number of alternative forums, the possibility of transferring a case to a court in another MS can be considered (see art. 12 R 2019/1111 Brussels IIb). This possibility could constitute a useful counterweight to the large choice between a number of alternative jurisdictions, all the more so as some of these jurisdictions in Art. 6 could prove to be fragile (e.g. child's place of birth). However: If such transfer mechanism is put in place, this should also include some guarantees surrounding its application. It is not in the best interest of the child when such transfer between jurisdictions causes undue delay in the judicial process of the dispute relating to his parenthood. • 'parent' is unclear. A definition of parent would be useful (cfr. Recital 24 & comments above) 	

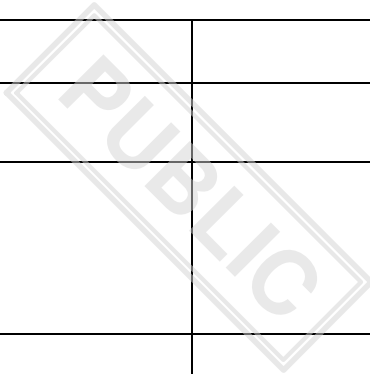


In matters relating to parenthood, jurisdiction shall lie with the courts of the Member State:		
(a) of the habitual residence of the child at the time the court is seised, or		
(b) of the nationality of the child at the time the court is seised, or	<ul style="list-style-type: none">• Useful for families that live outside of the EU to go to a court in the EU.	
(c) of the habitual residence of the respondent at the time the court is seised, or		
(d) of the habitual residence of either parent at the time the court is seised, or	<ul style="list-style-type: none">• After further consideration, we prefer to keep d) for same-sex parents. (e.g. A same-sex parent with a nationality that cannot establish same-sex parenthood)	
(e) of the nationality of either parent at the time the court is seised, or	<ul style="list-style-type: none">• Important for same-sex parents	
(f) of birth of the child.	<ul style="list-style-type: none">• Important for same-sex parents• useful for births 'sous X'.• useful for foundlings. It could be added in a recital that a foundling found in a MS is presumed to be born in that MS.	
<u>Art. 7 – Jurisdiction based on the presence of the child</u>		

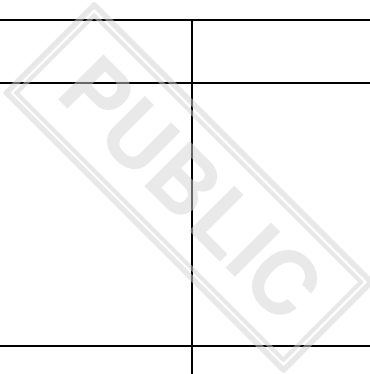
<p>Where jurisdiction cannot be determined on the basis of Article 6, the courts of the Member State where the child is present shall have jurisdiction.</p>	<ul style="list-style-type: none"> • The Commission stated that this Article applies only to minors: this should be made clear in the Article itself. • We agree as was suggested by other MS to add a second paragraph like the one in Article 11.2 R 2019/1111 (Brussels IIb): 2. <i>The jurisdiction under paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their Member State of habitual residence.</i> 	
<p><u>Art. 8 – Residual jurisdiction</u></p>		
<p>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.</p>	<ul style="list-style-type: none"> • What is the added value of this Article, it seems excessive considering the already broad jurisdiction in Artt. 6, 7 and 9. We suggest to delete this provision. 	
<p><u>Art. 9 – Forum necessitatis</u></p>		
<p>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,</p>		



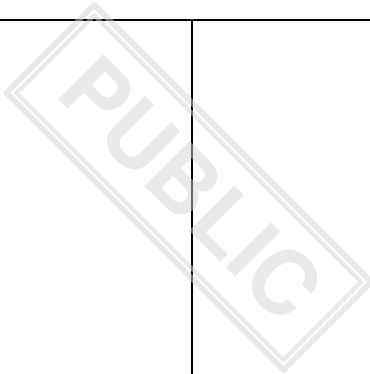
rule on parenthood matters if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.		
The case must have a sufficient connection with the Member State of the court seised.		
<u>Art. 10 – Incidental questions</u>	<ul style="list-style-type: none">• BE is in favour of redrafting this entire Article.• The article is not adjusted to the context of parenthood. Parenthood is a fundamental right, not a consequence or aspect of a certain status but the status itself = different situation than situation regulated in R 2019/1111 (Brussels IIb).• If such an incidental question arises, it would be necessary to suspend the incidental procedure while the competent court rules on parenthood, and then the incidental procedure can continue taking into account the ruling on parenthood. This should be reflected clearly in the text.	
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		



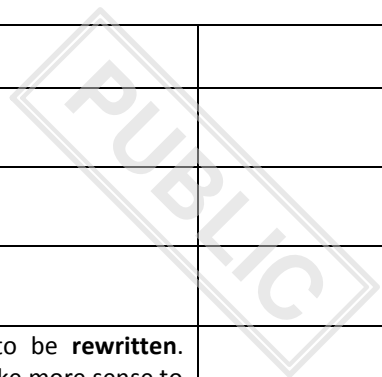
State does not have jurisdiction under this Regulation.		
2. The determination of an incidental question pursuant to paragraph 1 shall produce effects only in the proceedings for which that determination was made.		
<u>Art. 11 – Seising of a court</u>		
A court shall be deemed to be seised:		
(a) at 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;		
(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		



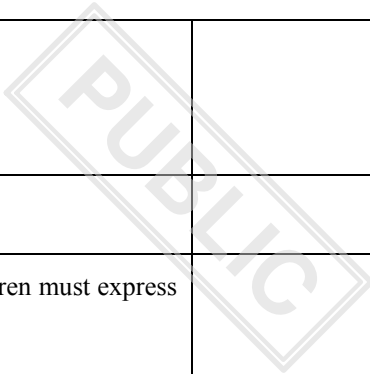
document lodged with the court; or		
© if the proceedings are instituted of the court's own motion, at the time when the decision to institute the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.		
<u>Art. 12 – Examination as to jurisdiction</u>		
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.		
<u>Art. 13 – Examination as to admissibility</u>		



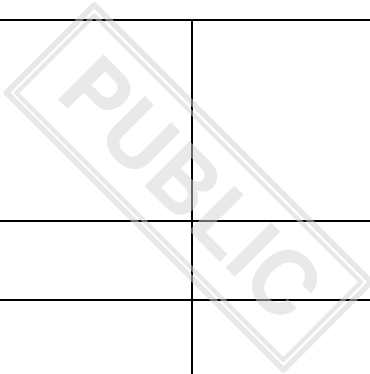
<p>1. Where a respondent habitually resident in a State other than the Member State where the proceedings were instituted does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting 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.</p>		
<p>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.</p>		
<p>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</p>		



pursuant to that Convention.		
<u>Art. 14 – Lis pendens</u>		
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.	<ul style="list-style-type: none">• The text of paragraph 1 needs to be rewritten. Regarding parenthood it would make more sense to make a link with the child when it is involved in parallel cases concerning its parenthood. Perhaps by saying “proceedings involving the same cause of action regarding the same child”. Parallel cases with potentially contradictory results should be avoided. This should be clarified in a recital (e.g. same cause of action: one parent that wants to contest its parenthood and another parent that wants to establish its parenthood).• Also, parenthood proceedings generally have erga omnes effect.	
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	<ul style="list-style-type: none">• See also earlier suggested option on implementing the possibility of transferring cases given by Article 6 which could provide a solution for this problem.	



established, any court other than the court first seised shall decline jurisdiction in favour of the court first seised.		
<u>Art. 15 - Right of children to express their views</u>	<p>BE agrees with the principle that children must express their views, but:</p> <ul style="list-style-type: none">• It is not entirely clear what the scope of the Article is considering the context of the judicial proceedings where decisions are made in the best interest of the child by the court but without having heard the child itself (e.g. sufficient DNA evidence, etc.).• Specifically in relation to Article 31.3 where the rights regarding Article 15 forms a very specific ground for refusal of recognition.• Therefore, more context and information concerning the interpretation and application of this Article should be made clear in the recitals or in the Article itself, as was said during the discussions in the WP. BE prefers to incorporate the reference to the best interest of the child of recital 49 in the text (e.g.).	
1. 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 to express their views, either directly or through a representative or an appropriate body.		
2. 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.		
Chapter III. Applicable law		
<u>Art. 16 – Universal application</u>		
Any law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State.	<ul style="list-style-type: none">• As stated during the discussions there seems to be a possible unwanted contradiction in cases of Third-country surrogacy between the Articles 3 and Articles 16-17 where due to Articles 16-17 the law of a Third state can be determined as the applicable law. However, court decisions/authentic	

	instruments establishing parenthood (including those based on surrogacy) in a Third State (including those based on surrogacy)- fall out of the scope of the proposal.	
<u>Art. 17 – Applicable law</u>	<ul style="list-style-type: none"> • <i>Comments redraft: see below</i> 	
1. The law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time of birth or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child.	<ul style="list-style-type: none"> • Although according to the Proposal establishment of parenthood also entails contestation of parenthood, the text of 17.1 needs further clarification on this point to avoid problems of interpretation (cfr. also Articles 1 and 3). • BE has no problem with the main connecting factor of the habitual residence. However, some points are still unclear as mentioned below: 	
	<ul style="list-style-type: none"> • Recital 51 – when habitual residence cannot be determined: recital 51 says to ensure applicable law can be determined in all circumstances, the law of the State of birth of the child should apply in the <i>rare</i> cases where the habitual residence of the person given birth at the time of birth cannot be established (e.g. refugee or internationally displaced mother). → This restrictive application of the subsidiary rule is not reflected in the text so it is not clear how this should be interpreted. In what circumstances may the subsidiary rule be invoked? • When there is only uncertainty about the habitual residence? Or • Only in circumstances where there is apparently 	

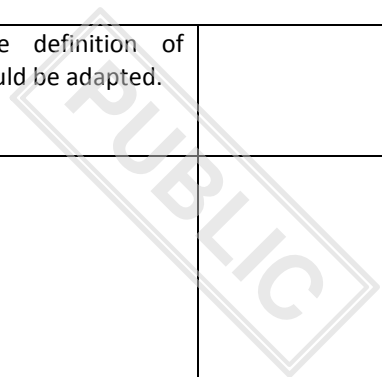
	<p>no habitual residence? → A more flexible approach seems desirable and is in line with the text of the Article. → From a practical point of view: as this Regulation will in most cases be used by administrative authorities (e.g. civil registrars), the subsidiary rule should not only apply in <i>rare</i> cases where the habitual residence cannot be determined (e.g. refugee). It should be applied more flexible as it is not always possible for a civil registrar to determine the habitual residence due to different reasons, like insufficient information, multiple possible habitual residencies, short legal deadlines within which the birth certificate must be drawn up, late establishment of parenthood (after time of birth), etc.</p>	
	<ul style="list-style-type: none"> • Persons without a residence permit or precarious residence permit: it would be appropriate to clarify in the recitals that the precarious nature of a person’s stay on the territory of a MS should not prevent that person from having his or her habitual residence there. Uncertainty about this can be harmful to a child whose parents are already in a vulnerable position. 	
	<ul style="list-style-type: none"> • Recital 40: the description of “habitual residence” with some relevant and non-relevant factors regarding its determination are based on established case law of the Court of Justice regarding Article 8 R 2201/2003: • This can be helpful as civil registrars will be less familiar with this case law than judges. • Existing jurisprudence of the Court of Justice concerning the determination of the habitual residence is based on other Regulations than in parenthood matters 	

	<ul style="list-style-type: none"> • BE proposes to provide accessible information for civil registrars about the evolution on the case law on habitual residence in parenthood matters. 	
	<ul style="list-style-type: none"> • Late(r) establishment/contestation of parenthood: Both Article 17.1 and 17.2 are less applicable in situations where parenthood is established or contested later in life, not at the time of birth, which is a common situation. 	
	<ul style="list-style-type: none"> • Recital 51 – prenatal establishment of parenthood: says where parenthood needs to be established before birth, the law of the State of the habitual residence of the person giving birth at the time of birth should apply by analogy. → This solution/interpretation isn't very pleasing: Does this mean that in case of a prenatal establishment of parenthood instead of the "habitual residence of the person giving birth at the time of birth at the time of birth" we must look at the "habitual residence of the person giving birth at the time of the pregnancy"? This is not as specific as "at the time of birth" as people can move or travel to various places during pregnancy. "By analogy" also assumes a time in the future = uncertain. → It would be better to clarify this further in the recitals or even in the Article. → Possible suggestion: where parenthood needs to be established before the birth of the child, the law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth/that will give birth "<i>at the time when parenthood is established</i>". 	

<p>2. 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.</p>	<ul style="list-style-type: none"> • It's not clear what should be understood under "where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent"? Who decides? • Same-sex parenthood: It is not clear what happens when the applicable law options under the subsidiary rule in 17.2 don't provide the possibility to establish parenthood as regards to the second parent. Or could public policy be a solution for this problem? This point needs to be further clarified in the recitals. 'may apply': it should be clarified who decides if the law is applied or not. Does the civil registrar decide? Or the public authorities? It is difficult for a civil registrar to decide on this. This may lead to different interpretations and application in practice. Is there any appeal possible against a refusal? 	
<p><i>Discussion paper redraft art. 17</i></p>		
<p><u>Art. 17 – Applicable law to the establishment of parenthood</u></p>	<ul style="list-style-type: none"> • <i>See comments above</i> 	
<p>1. The law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the child at the time when parenthood is established.</p>	<ul style="list-style-type: none"> • We agree with the new time criteria (at the time when parenthood is established). In this way, the applicable law for the contestation of parenthood seems more appropriate. • Important to adjust the definition 4.3 of 'establishment of parenthood' concerning the 	

<p>In context of this regulation, the habitual residence of a child at the time of birth shall be deemed to be where the law of the State of the habitual residence of the person giving birth has habitual residence at the that 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.</p>	<p>contestation.</p> <ul style="list-style-type: none"> • It should be clarified how the habitual residence “cannot be determined” should be interpreted. <i>See comments above. (flexible or very strict)?</i> • The back-up option ‘where the habitual residence of .. cannot be determined’ should be formulated generally for all the paragraphs (and not only for par. 1.). It might be better to provide this in a separate paragraph. • Recital 51 – prenatal establishment of parenthood : <i>see comments above – ‘by analogy’ is unclear.</i> • It should be clarified in a recital if the presumption about the habitual residence of the child (i.e. shall be deemed to be where the person giving birth has habitual residence at that time) is a rebuttable or irrebuttable presumption. E.g. the mother moves to another country than the country where she was living with the father and were she was supposed to stay, right before giving birth. BE proposes to make it a rebuttable presumption. 	
<p>2. Where the law designated by paragraph 1 is the law of a third state, and either parent is habitually resident in a Member State at the time when parenthood is established, the law of the forum shall apply.</p>	<ul style="list-style-type: none"> • BE is not convinced that a derogation of article 16 is desirable to solve this problem. • Who is considered to be a ‘parent’: are intended parents or the surrogate mother and her husband/spouse included? The parenthood still needs to be established at this point. There is recital nr 24 , but this should be clarified in the text of the article. There can be more than 2 possible ‘parents’. E.g. an adulterous child. • If the derogation of article 16 is maintained, than it should be clarified that this paragraph is a 	<p>2. Notwithstanding article 16, where the law designated by paragraph 1 is the law of a third state, and the person who wants to establish parenthood is habitually resident in a Member State at the time when parenthood is established, the law of the forum shall apply.</p>

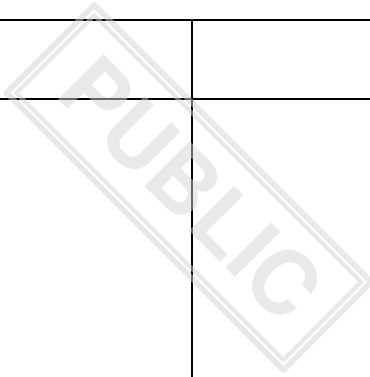
	<p>derogation of article 16 (universal application), in the article.</p> <ul style="list-style-type: none"> • This paragraph leads to more application of the national rules of the MS (because the law of the forum is applicable), and therefore to more diversity between the MS. 	
<p>3. Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent, the following may apply as regards the other parent:</p>	<ul style="list-style-type: none"> • 'may apply': it should be clarified who decides if the law is applied or not. Does the civil registrar decides? Or the public authorities? It is difficult for a civil registrar to decide on this. This may lead to different interpretations and application in practice. Is there any appeal possible against a refusal? • 'shall apply' seems more appropriate for legal certainty. 	
<p>(a) the law of the [Member] State of nationality of that either parent or of the second parent; or</p>		
<p>(b) or the law of the [Member] State of birth of the child, may apply to the establishment of parenthood as regards the second parent.</p>		
<p><u>Art. 17a – Applicable law to the contestation of parenthood</u></p>	<ul style="list-style-type: none"> • This article doesn't seem to have any added value, whilst the redraft of article 17.1 (that introduces a distinction between the establishment of parenthood at the time of birth or after birth). 	



<p>1. The law applicable to the contestation of parenthood shall be the law of the State of the habitual residence of the child at the time when parenthood <u>was</u> established.</p>	<ul style="list-style-type: none">• If this article is retained, the definition of ‘establishment of parenthood’ should be adapted.	
<p>[In context of this regulation, the habitual residence of a child at the time of birth shall be deemed to be where the person giving birth has habitual residence at that time 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.]</p>	<ul style="list-style-type: none">• <i>See comments above</i>	
<p>2. Where the law designated by paragraph 1 is the law of a third state, and either parent is habitually resident in a Member State at the time when the court is seized, the law of the forum shall apply.</p>	<ul style="list-style-type: none">• <i>See comments above</i>• Who is the parent? In a contestation case, there are often 3 parties instead of 2.	
<p><u>Art. 18 – Scope of the applicable law</u></p>		
<p>The law designated by this Regulation as the law applicable to the establishment of parenthood shall govern, in particular:</p>	<ul style="list-style-type: none">• BE agrees with the aim of this article: The applicable law must be fully applied. It cannot be allowed that only a selection of provisions of the applicable law are applied (no “cherry picking”). However:• When establishing (or contesting) parenthood, you have substantive law and procedural law. Here there seems to be a risk of getting both mixed up.	

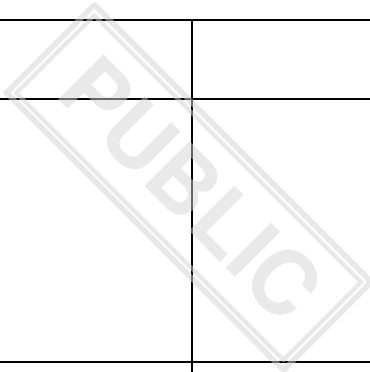
	<ul style="list-style-type: none"> • Redraft of the Article is necessary to clarify that it only applies to substantive law, and that the time limits (d) are supposed to be substantial law under this proposal. 	
(a) the procedures to establish or contest parenthood;	<ul style="list-style-type: none"> • The scope or meaning of the term “procedures” is unclear: during the discussions the Commission pointed out that “procedures” must be read as “conditions” or “requirements”. The text should be amended accordingly, and “conditions” or “requirements” should be explained more thoroughly (in the recitals). 	(a) The conditions which have to be met in order to establish or terminate parenthood.
(b) the binding legal effect and/or the evidentiary effects of authentic instruments;	<ul style="list-style-type: none"> • BE is not in favour of the distinction between authentic instruments with binding legal effect and authentic instruments with no binding legal effect but with evidentiary effect, as the distinction is highly theoretical and not practical (<i>see also general comments</i>) • The evidentiary value/legal effects of an authentic instrument is a matter of national procedural law. Another MS cannot judge this. • BE proposes to delete this. 	(b) the binding legal effect and/or the evidentiary effects of authentic instruments;
(c) the standing of persons in proceedings involving the establishment or contestation of parenthood;	<ul style="list-style-type: none"> • Seems unnecessary as this can also fall under (a): this can be deleted. 	(c) the standing of persons in proceedings involving the establishment or contestation of parenthood;
(d) any time limits to establish or contest parenthood.	<ul style="list-style-type: none"> • Are these procedural time limits regarding judicial proceedings or is it more extensive (e.g. legal time frame within which a declaration of birth has to be done)? Needs to be clarified. 	
		(e) the burden of proof and the elements to be proved regarding the parenthood, as well as the determination of the means of proof.

<u>Art. 19 – Change of applicable law</u>		
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.	<ul style="list-style-type: none"> The goal of the Article is clear but the wording is not correct: it doesn't speak of the change of connecting factors, but only the change of applicable law. It should be a subsequent change of connecting factor in the text (see suggestion for redraft). 	Where parenthood has been established in a Member State pursuant to this Regulation, a subsequent change of the connecting factor in the applicable law shall not affect the parenthood already established.
<u>Art. 20 – Formal validity</u>		
1. A unilateral act intended to have legal effect on the establishment of parenthood shall be valid as to form where it meets the requirements of one of the following laws:	<ul style="list-style-type: none"> BE proposes to follow the advice of CCBE to add 'joint declaration' in the text. 	1. A unilateral act, or joint declaration , intended to have legal effect on the establishment of parenthood shall be valid as to form where it meets the requirements of one of the following laws:
(a) the law applicable to the establishment of parenthood pursuant to Article 17;		
(b) the law of the State in which the person doing the act has the habitual residence; or		
(c) the law of the State in which the act was done.		

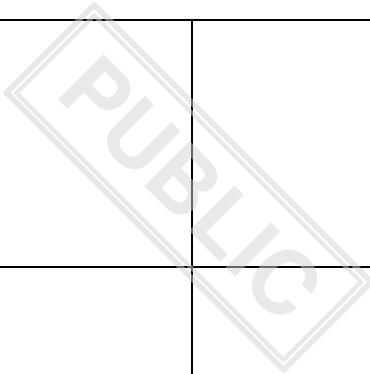


2. An act intended to have legal effect on the establishment of parenthood may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in paragraph 1 under which that act is formally valid, provided that such mode of proof can be administered by the forum.		
<u>Art. 21 - Exclusion of renvoi</u>		
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.		
	<ul style="list-style-type: none">• BE proposes an additional provision that provides a solution to the hypothesis where it is not possible:<ul style="list-style-type: none">- to determine the applicable law or;- to determine the content of the applicable law. <p>In practice it may happen that the applicable law in certain countries cannot be found which holds a risk of</p>	

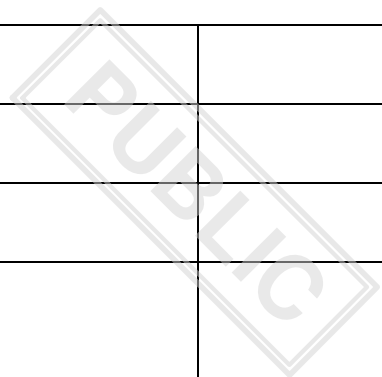
	deadlock which is not in the interest of the child and the other parties.	
<u>Art. 22 – Public policy (ordre public)</u>	<p>The establishment of parenthood – current legislation in BE:</p> <p>The Belgian public policy includes the concept of a fraudulent acknowledgement of a child: There is no parenthood possible between the child and the acknowledger when all the circumstances show that the intention of the acknowledger is apparently only aimed at obtaining a residence right for himself, the child or the other parent based on the parenthood. The acknowledgement of the child will be refused in those cases by the civil registrar with a right of appeal to the Court. In case of an appeal the Court will decide, taken into account the child’s best interest.</p>	
1. The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (<i>ordre public</i>) of the forum.	<ul style="list-style-type: none"> • When applicable law is excluded on the basis of public policy: which law applies? Probably <i>lex fori</i>: this should be clarified in the recitals. 	



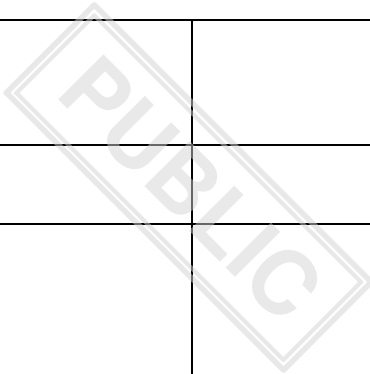
2. Paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination.		
<u>Art. 23 – States with more than one legal system</u>		
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 respect of parenthood matters, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.		
2. In the absence of such internal conflict-of-laws rules:		
(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the		



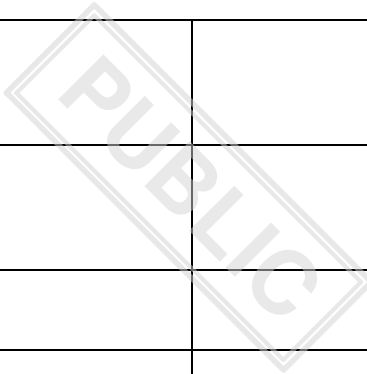
law applicable pursuant to the provision referring to the habitual residence of the person giving birth at the time of birth, be construed as referring to the law of the territorial unit in which the person giving birth has the habitual residence;		
(b) any reference to the law of the State referred 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.		
Chapter IV. Recognition		
Section 1. General provisions on recognition	<ul style="list-style-type: none">• BE proposes to clarify in this section that the court decision has to be a final decision, against which no further appeal lies.	



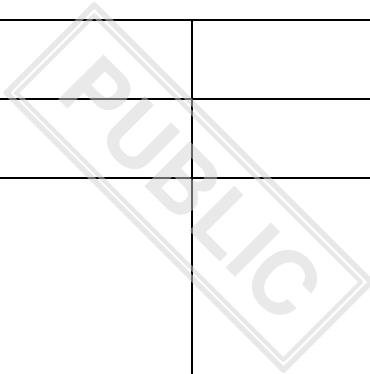
<u>Art. 24 - Recognition of a court decision</u>		
1. A court decision on parenthood given in a Member State shall be recognised in all other Member States without any special procedure being required.		
2. In particular, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a court decision on parenthood given in another Member State and against which no further appeal lies under the law of that Member State.	<ul style="list-style-type: none">• The wording ‘parenthood that can no longer be challenged in the Member State of origin’ in recital 60 differs from the wording used in Art. 24.2., which could lead to confusion. Recital 60 should be rephrased as ‘against which no further appeal lies’.• If proceedings under Artt. 25 or 32 are pending, a civil registrar should refrain from making a decision on updating the registry. (see redraft suggestion).	2. In particular, and without prejudice to art. 25 and art. 32 , 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 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.	<ul style="list-style-type: none">• The recognition of a court decision as an incidental question can also be raised before another authority than the court, so this should be added in the provision.	3. Where the recognition of a court decision is raised as an incidental question before a court or other competent authority of another Member State, that court or authority may determine that issue.



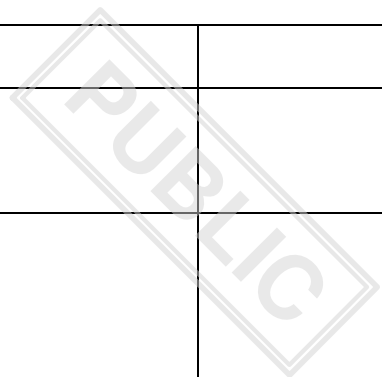
<u>Art. 25 – Decision that there are no grounds for refusal of recognition</u>		
1. Any interested party may, in accordance with the procedures provided for in Articles 32 to 34, apply for a decision that there are no grounds for refusal of recognition referred to in Article 31.		
2. The local jurisdiction 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.		
<u>Art. 26 – Documents to be produced for recognition</u>		
1. A party who wishes to invoke in a Member State a court decision given in another Member State shall produce the following:		



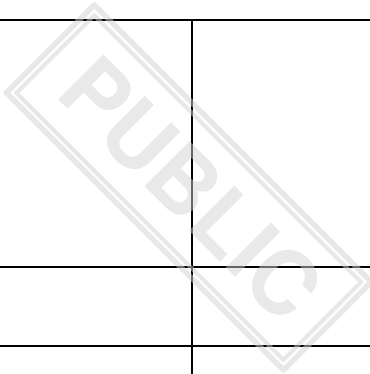
(a) a copy of the court decision that satisfies the conditions necessary to establish its authenticity; and		
(b) the appropriate attestation issued pursuant to Article 29.		
2. The court or other competent authority before which a court decision given in another Member State is invoked may, where necessary, 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.		



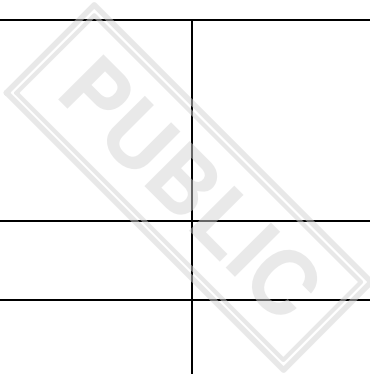
<u>Art. 27 – Absence of documents</u>		
1. If the documents specified in Article 26(1) are not produced, the court or other competent authority before which a court decision given in another Member State is invoked may specify a time for its production, accept equivalent documents or, if it considers 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.		
<u>Art. 28 – Stay of proceedings</u>		
The court before which a court decision given in another Member State is invoked may stay its		



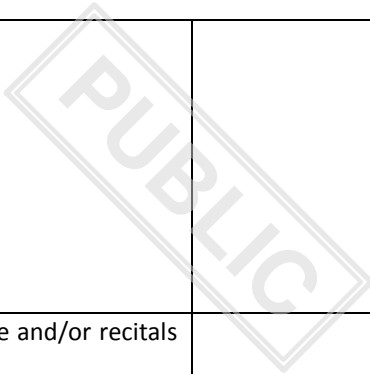
proceedings, in whole or in part, where:		
(a) an ordinary appeal against that court decision has been lodged in the Member State of origin; or		
(b) an application has been submitted for a decision that there are no grounds for refusal of recognition referred to in Article 25 or for a decision that the recognition is to be refused on the basis of one of those grounds.		
<u>Art. 29 – Issuance of the attestation</u>		
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 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.		
<u>Art. 30 – Rectification of the attestation</u>		
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.		
<u>Art. 31 - Grounds for refusal of recognition</u>	<ul style="list-style-type: none">• The recognition of a parenthood established in another MS – current legislation in BE: see comments Article 22 regarding fraudulent acknowledgement of a child. BE also uses public policy if a parent acknowledged a child in another MS and this acknowledgement was fraudulent regarding to BE.	
1. The recognition of a court decision shall be refused:	<ul style="list-style-type: none">• It could be useful to clarify that this provision concerns only decisions on parenthood given in a Member State	
(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) where it was given in default of appearance if the		



<p>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) 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;</p>	<ul style="list-style-type: none">• It needs to be clarified in the Article and/or recitals to who this provision applies to.• The use of the words 'his fatherhood or her motherhood' is too limited. These terms are not defined in the proposal. The proposal is neutral and should stay neutral by using 'parenthood' as defined by the proposal.• Co-motherhood is not mentioned and may therefore not fall under this provision, which is problematic. In BE co-motherhood has the same legal value as motherhood or fatherhood. It is established in a similar manner as fatherhood (legal presumption based on marriage, by acknowledgement or by court decision). Consequently under Article 31, 1c, a court decision can also infringe a person's co-motherhood over the child. This should be clear from the text.• BE proposes to replace 'fatherhood or motherhood' by (alleged?) 'parenthood'. If not, it should at least be clarified in a recital that 'motherhood' also includes 'co-motherhood'.	
<p>(d) if and to the extent that it is irreconcilable with a later court decision relating to parenthood given in the Member State in which recognition is invoked;</p>	<ul style="list-style-type: none">• The specific context of the points (d) and (e) isn't very clear. BE suggests to clarify this in the text and/or recitals.• Decisions on parenthood are primarily based on unchangeable circumstances.• BE also suggests to clarify what needs to be	

	understood under ‘ irreconcilable ’ in the recitals. (e.g. a decision on a contestation of parenthood regarding parent A is not necessarily irreconcilable with a decision on an establishment of parenthood regarding another person.)	
(e) if and to the extent that it is irreconcilable with a later 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.	<ul style="list-style-type: none"> The specific context of the points (d) and (e) isn't very clear. BE suggests to clarify this in the text and/or recitals. 	
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.		
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	<ul style="list-style-type: none"> See also written comments on Article 15. If the recognising authority were to find that the interests of the child were not taken into account, it would be possible to invoke the public policy exception. Recital 64 should be included in the text to emphasise that the use of a different method to hear the child is not a ground of refusal. What if it's impossible to hear the child (e.g. the 	

capable of forming their views in accordance with Article 15.	recognition of unborn child or deceased child? This should be clarified in a recital .	

PUBLIC

Comments and drafting suggestions on Chapters I to IV of the Commission proposal (ST 15837/22) and the proposed redrafted Articles 6 and 17 (Discussion paper ST 8488/23)

CZECH REPUBLIC

Comments on the proposal

Chapter I

Article 2

The Czech Republic considers this provision to be of explanatory and confirmatory nature; therefore, we would insert it in a recital, not in the normative part.

Article 3

While international adoption does not fall within the scope of the Regulation primarily, it could fall within the scope secondarily if a child is adopted internationally (regardless of whether this international adoption happens according to the Hague Convention of 1993 or not) and this adoption is recognised by one Member State. In such a case, this adoption would then, upon application, be recognised by other Member States according to the Regulation, as these states may not even be aware that it was originally an international adoption. The problem is analogous to the recognition of parenthood from non-EU countries and also opens up the question of the EU's external competences.

Article 4

The Czech Republic welcomes recital 25 specifying that the proposal does not cover the recognition of parenthood in national situations without a cross-border element, such as a national adoption in a Member State, although it does concern the recognition of parenthood established in such a national situation in a Member State. Overall, the definition correlates with the concept of parenthood determination in the Czech legal order, as it covers both determination and denial of parenthood.

We can generally accept the definitions as they are proposed, subject to further changes pursuant to the content of the draft regulation.

Chapter II

In general, the Czech Republic can accept this chapter as it is proposed – most of its provisions are similar to those in Brussels IIb and other union acts and are therefore acceptable in their current form.

Article 13

We would like to clarify when the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters would be used and would consider whether the application of bilateral agreements covering the judicial service of documents should also be mentioned.

Article 15

We would suggest a drafting change in Article 15, specifically the part “*whose parenthood is to be established,*” as it may be confusing language-wise who it is referring to.

Chapter III

Article 17

Although the Czech Republic is aware that the concept of universal applicability poses certain risks (in respect of the protection of fundamental rights and freedoms in general and the protection of the rights of the child), as it may lead to the law of a third country being applicable, we understand that this is a concept which is regularly used in many European instruments like the Succession regulation, as well as the Hague protocol on Maintenance Obligations.

The Czech Republic always puts emphasis on the interest of the child in any situation where there is a choice of applicable law. We also welcome the Commission's efforts to resolve potential practical issues through the "alternative" conflict-of-law rule created for cases where it would be possible to determine the parenthood of only one of the parents, as it has the potential to significantly contribute to ensuring legal certainty and the principle of non-discrimination. However, we do have both substantive and legal reservations about the proposed solution.

It is understandable that the Commission is trying to cover the whole range of possible parent-child relationships, but in this case the attempt to cover mainly same-sex unions, or the non-genetic parent, seems quite convoluted. In relation to the Czech legal order, it is also rather restrictive, since, as in the case of the general rules for determining the applicable law, it sets out exhaustive connecting factors without giving any room for discretion with regard to the interests of the child.

The Czech Republic is cautious regarding the universal application principle in matters of determination of parenthood and will further analyse whether it is appropriate here, also bearing in mind the possibility of the application of the public policy exception. While we are in favour of establishing common rules for determining the applicable law, we are more critical of the current rules proposed and will need to discuss further whether the best interest of the child is always taken into account and whether courts will be granted enough discretion. Currently, it is also not clear which national authorities active in parenthood cases are covered by the proposal. These concerns were raised and discussed by SE PRES in the discussion document during the WG meeting in June (see below).

The Czech Republic considers it unrealistic for civil registry offices in the current national system to apply foreign law as our civil registrars are usually not legal practitioners and formal legal education is not a prerequisite for the job. We also believe that the obligation to ascertain the habitual residence of the persons concerned would be unnecessarily burdensome for civil registry offices.

Article 19

The Czech Republic agrees with the exclusion of the possibility of mobile conflict as it is proposed.

Article 20

Beyond our position on Article 17 above, the approach to determining the applicable law in two different ways seems to be unnecessarily complicated. In the Czech legal system, recognition of parenthood includes not only recognition through court proceedings, but also voluntary recognition of parenthood (usually paternity), for example by a joint declaration of the parents.

Article 22

While most of this provision is conceived in the traditional manner of the public order reservation, the Czech Republic views a provision obliging courts and other competent authorities of a Member State to apply the public order reservation as impermissibly intrusive. Our view of the public order reservation is more restrictive, its use is up to the discretion of the courts. Therefore, we believe that this is sufficiently covered by national law, and we do not find it conceptual to include it in the Regulation.

The Czech Republic considers it appropriate to include the perspective of the best interests of the child in the normative text of the Regulation. We propose the deletion of paragraph 2 of this provision. Similarly to paragraph 2 of Article 31, of Article 39 and of Article 45, we find the statement of this provision unnecessary as it points out an existing obligation according to the Charter while referencing only one specific provision of the Charter.

Chapter IV

Article 24

The overall concept of the provision corresponds to Article 30 of the Brussels IIb Regulation. From the point of view of the Czech legal system, the adoption of the proposal in this form would mean that in matters of recognition of foreign decisions in matters of parenthood between Member States, the aforementioned “double track” system, where cases involving a Czech citizen are more strictly assessed, would automatically disappear, while at the same time the discriminatory approach, where the form of establishment is decisive for the recognition of parenthood, would be abandoned – this would also be in line with the international obligations of the Czech Republic and the established case law of the ECtHR. Generally speaking, recognition of foreign decisions on parenthood and adoption of children between Member States would no longer be bound by the existing conditions set out in our national legal norms and case law.

In general, the Czech Republic considers that the proposed concept could be supported if considered in the light of the best interests of the child. However, in view of the sensitivity of this issue, we expect a further discussion, both at the political and legal level.

Article 25

The Czech Republic finds that systematically it would seem more appropriate to insert this provision with the articles to which it refers.

Article 29

The Czech Republic would consider it appropriate to formulate Article 29 in a way that is understandable to citizens and thinks that its wording should be harmonised across Member States.

Article 31

The Czech Republic would appreciate further clarification on the use of the ground for refusal to recognise a decision where it has been issued without the children having had the opportunity to express their views, unless this is contrary to the best interests of the child, which seems rather problematic in terms of its assessment in light of the specificities of the field of recognition of parenthood. The Czech Republic also supports the removal of paragraph 2 of this provision from the proposed Regulation as mentioned in Article 22. It is essential for the Czech Republic to be able to refuse recognition of a decision if there is a purposeful involvement of a cross-border element.

Comments on the discussion document

Article 17

Discussion point 8

The newly inserted paragraph 2 states that *lex fori* will apply provided that two conditions are met, namely that the law applicable to the Regulation is the law of a third country and that at least one of the parents is habitually resident in a Member State. Based on the available information on model parenthood cases which have been recognised in the Czech Republic, the condition that at least one parent is habitually resident in a Member State seems problematic. In these model cases, recognition of parenthood in the Czech Republic was sought by couples where both parents were habitually resident in third countries. The reason they applied for recognition of parenthood in the Czech Republic was that one of them was a Czech citizen. Therefore, the current wording of this provision would not apply to these cases.

Our second substantive comment is to consider what the relationship would be between the possibility of excluding the application of the law of a third country and replacing it with *lex fori* and the possibility of applying the public policy exception under Article 22 of the Regulation, which is systematically included in Chapter III on applicable law and allows the application of foreign law to be denied under given conditions.

The Czech Republic generally supports the exclusion of surrogacy from the scope of the proposal, irrespective of whether it comes from third countries or Member States and is therefore naturally open to discussing the legislative technique by which this objective will be achieved. We consider the proposal of SE PRES to be a good start in this direction.

Discussion point 9

As mentioned, the newly inserted paragraph 2 states that *lex fori* will apply provided that two conditions are met. In our view, there is a certain number of cases which would fall under this provision, and there is no information available as to what percentage of the total number of cases fall within the scope of the proposal. Therefore, it is not possible to assess whether it would increase the possibility of applying *lex fori*.

Article 6

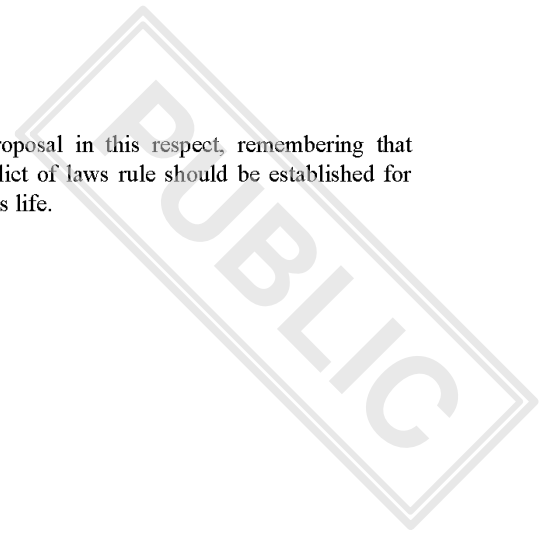
Discussion point 10

The Czech Republic believes that it will be necessary to test the individual rules of jurisdiction to ensure that they are sufficiently compact and that the possibility of undesirable forum shopping is eliminated as much as possible. At the same time, it will be necessary to consider whether it is appropriate to make the establishment of jurisdiction in the case of the proposal in question subject to the procedural status of the parties, as is the case in Article 6(c), since the procedural laws of the various Member States in the area of recognising and denying parenthood may differ.

Discussion point 11

The Czech Republic generally perceives differences between recognising parenthood in the majority manner, i.e. in the context of childbirth, and determining parenthood later in the child's life. While in the first case the connecting factor of the habitual residence of the person who gave birth to the child (in the original wording of the proposal) appears to be legitimate, representing a real material link to the applicable law, in the second case it may be lacking such a real link, after some time has elapsed since the birth.

The Czech Republic therefore supports changing the proposal in this respect, remembering that consideration should be given to whether a separate conflict of laws rule should be established for situations where parenthood is determined later in the child's life.



ESTONIA

Written comments on Chapters I to IV of the Commission proposal on parenthood (ST 15837/22) and the proposed redrafted Articles 6 and 17 of the proposal in the discussion paper (ST 8488/23) from Estonian delegation

We thank the Presidency for providing the opportunity to present written comments. We are pleased to see the discussions in working group meetings that have been very detailed and have given valuable input and understanding. However, we believe that there is still room for further discussions and clarifications.

Article 1 (Subject matter)

According to the article 1, the regulation lays down common rules on jurisdiction and applicable law for the establishment of parenthood in a Member State in cross-border situations.

After the discussions in working group meetings and further analysis, we believe that article 1 should also involve „contestation“ to avoid misunderstandings and ensure clarity of the subject matter and to be more compatible with legal systems in different member states.

Throughout the article 18, on the scope of the applicable law, it is written „to establish or contest parenthood“. Definition in article 4 on „establishment of parenthood“ says that contestation of parenthood includes „the establishment of parenthood following a claim contesting a parenthood established previously“. In that context we see that it would be more clear to separate „establishment“ and „contestation“ in the subject matter in article 1, similarly to article 18.

*Wording proposal for the article would be: „This Regulation lays down common rules on jurisdiction and applicable law for the establishment **or contestation** of parenthood in a Member State in cross-border situations; ...“.*

Article 3 (Scope)

We are concerned that the article 3 is not clear enough on excluding the birth certificates or other documents that are not fully processed by another member state, in situations where child is born with the help of a surrogate mother – in those situations national law should be applicable. Proposal needs to be clear that member states recognize only fully established parenthood and that we are not forced to recognize surrogacy. Child needs to be adopted or parenthood must be established in some other way for recognition of parenthood in the member state.

Article 6 (General jurisdiction)

Estonian delegation would like to emphasize the importance of the child's wellbeing and the general jurisdiction should be based on the criterion of proximity. That means the jurisdiction should be determined mainly on the basis of the habitual residence or the nationality of the child.

Estonia prefers to define jurisdiction based on the proximity criterion, which is related to the child's habitual residence, as nationality doesn't always mean that the child resides in the country of nationality (similarly question could rise with point (f) of birth of the child).

Our proposal would be to exclude points (d)-(f). Alternative would be to establish hierarchy of the list or that the habitual residence or nationality of either parent can be used only as an exception in certain situations (i.e. cases with unborn child), where habitual residence or nationality of the child is not possible to use.

For us it is unclear, how the proposal in discussion paper to exclude from the list only point (d) would be relevant change if either parent's nationality still remains and in that situation also from child's point of view, it might not be most convenient basis of general jurisdiction as it might not be the child's habitual residence.

Article 9 (Forum necessitatis)

According to the article, 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. COM replied to our delegation's question in a meeting that such an exceptional basis may be for example because of civil war and that this is used also in other EU instruments. In general, we understand that exceptional basis but nevertheless we see that this point need clarifications, as even if there's war in the country, it doesn't always necessarily mean that the court is not able to proceed or function to some extent.

Article 15 (Right of children to express their views)

In our view points 1 and 2 are contradictory. Point 1 says courts shall provide children below age of 18 years with a genuine and effective opportunity to express their views, which according to the current wording would be interpreted as mandatory. In the same the wording of point 2 indicates that it is an advisory action (the wording "where the court gives"). We would recommend to consider different wording to avoid different understandings and approaches in different member states.

In Estonia, there is no age limit for hearing a child, but we do not have the knowledge and conviction that this is the case in all member states. It is important for us that the situation of our children in cases where recognition of parenthood takes place in a court of another member state should not deteriorate compared to if it had taken place in an Estonian court. In our understanding article 17 point 1 should mitigate that risk.

Article 17 (applicable law)

It is crucial that the regulation would not result with a „backdoor“ to recognize surrogacy and that we would need to apply law's from a third state. Proposal says that the proposal does not cover the recognition or, as the case may be acceptance, of court decisions and authentic instruments establishing or proving parenthood drawn up or registered in a third State. We are concerned that controversial regulation may result with the open door to surrogacy in third states.

The proposal in the discussion paper is in our opinion more in line and gives more clear regulation. However, we are not convinced that article 17a would have any added value.

Article 29 (issuance of the attestation) and Article 37 (attestation)

Estonia is a highly digitized country and our X-road services allow us to submit documents/applications in digital form with valid e-signature etc. Also we use digital attestations. For us it is important to have flexible ways for issuing documents and attestations and we also favor the use of digital options within this regulation as well.

It is unclear if the attestation is issued only on paper or digital attestations are also regulated and considered valid. In our opinion the regulation should be clear in what form the attestation may be issued.

ITALY

COMMENTS ON CHAPTERS I TO IV OF THE COMMISSION PROPOSAL ON "PARENTHOOD"

- Italian delegation -

Following the Presidency request for comments on the Commission proposal on parenthood (“delegations’ attention is drawn to CM 3770/23 which requests written comments and drafting suggestions on Chapters I to IV of the Commission proposal on parenthood (ST 15837/22) and the proposed redrafted Articles 6 and 17 of the proposal in the discussion paper (ST 8488/23) by 18 September 2023 COB.”) the Italian delegation would like to submit the following notes.

1. As regards articles 6 and 17 as redrafted by the Presidency, the delegation totally agrees with the redrafting of article 6. As for article 17, we recall what has been already represented at the meeting held on 21-22 June 2023. The idea of simplifying the rules establishing the applicable law to the recognition of parenthood moves on the right track. Nevertheless, the delegation is proposing a further simplification, as specified below.
2. As for the request to suggest drafting on Chapters I to IV of the proposal, please find below the suggested amendments.

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Recitals	Recitals
(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	(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 solely 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.	parenthood.
<p>(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, Regulation (EU) No 650/2012 of the European Parliament and of the Council and Council Regulation (EU) 2019/1111 . However, these Regulations do not include provisions on the establishment or the recognition of parenthood. For its part, Regulation (EU) 2016/1191 of the European Parliament and of the Council includes public documents on birth, parenthood 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.</p>	<p>(9) At Union level, a number of Union instruments deal, among others, with certain rights of children in cross-border situations, in particular Council Regulation (EC) No 4/2009, Regulation (EU) No 650/2012 of the European Parliament and of the Council and Council Regulation (EU) 2019/1111. However, these Regulations do not include provisions on the establishment or the recognition of parenthood. For its part, Regulation (EU) 2016/1191 of the European Parliament and of the Council includes public documents on birth, parenthood 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.</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</p>	<p>(17) Any reference to the ‘best interests of the child’ in this Regulation should apply to children within the meaning of Article 2 (2) n. 6 of Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction 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</p>

<p>(‘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>	<p>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>
<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 established abroad between a child born out of surrogacy and the biological intended parent, and to provide for a mechanism for the recognition in law of the parent-child relationship with the non-biological intended parent (for example through the adoption of the child)</p>	<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 established abroad between a child born out of surrogacy and the biological intended parent, and to provide for a mechanism for the recognition in law of the parent-child relationship with the non-biological intended parent (for example through the adoption of the child), thus ruling out that the relationship between the intended</p>

	<p>parent and the child must be directly registered in civil-status records.</p>
<p>(38) This Regulation should respect the different systems for dealing with parenthood 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 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'), 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'). 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>(38) This Regulation should respect the different systems for dealing with parenthood 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 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'), 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'). 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>(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,</p>	<p>(51) As a rule, the law applicable to the establishment of parenthood in cross-border situations should be the law of the State of nationality of the child. 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-</p>

<p>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).</p>	<p>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).</p>
<p>(53) Any of the laws designated as applicable by this Regulation should apply even if it is not the law of a Member State.</p>	<p>(53) Any of the laws designated as applicable by this Regulation should apply even if it is not the law of a Member State. Nevertheless, if the law designated as applicable involve the recognition of parenthood between a child born out of surrogacy and the intended</p>

	parent, the law of the forum should be applied.
(54) To ensure legal certainty and the continuity of parenthood, where parenthood has been established in a Member State in accordance with one of the laws designated as applicable by this Regulation, the change of applicable law 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 already established.	(54) To ensure legal certainty and the continuity of parenthood, where parenthood has been established in a Member State in accordance with one of the laws designated as applicable by this Regulation, the change of applicable law 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 already established.
	(63-bis) The recognition of parenthood between a child born out of surrogacy and the intended parent shall be refused if the law of the member State provides another instrument, like the adoption
(68) In order to take into account the different systems of dealing with parenthood in the Member States, this Regulation should guarantee the acceptance in all Member States of authentic instruments 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. Depending on the national law, authentic instruments providing evidence of parenthood already established can be, for example, a birth certificate, a parenthood certificate or an extract from the	(68) In order to take into account the different systems of dealing with parenthood in the Member States, this Regulation should guarantee the acceptance in all Member States of authentic instruments 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. Depending on the national law, authentic instruments providing evidence of parenthood already established can be, for example, a birth certificate, a parenthood certificate or an extract from the

<p>civil register on birth. Authentic 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 establishment of parenthood, 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 state.</p>	<p>civil register on birth. Authentic 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 establishment of parenthood, 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 state.</p>
<p>(69) Authentic instruments which have no binding legal effect in the Member State of origin but which have evidentiary effects in that Member State 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 no binding legal effect in the Member State of origin but which have evidentiary effects in that Member State 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>(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</p>	<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</p>
<p>(71) The term ‘legal act’ (for example, an acknowledgment of paternity or the giving of consent) or ‘legal relationship’ (for example, the parenthood 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</p>	<p>(71) The term ‘legal act’ (for example, an acknowledgment of paternity or the giving of consent) or ‘legal relationship’ (for example, the parenthood 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</p>

<p>applicable to the establishment of parenthood designated by this Regulation.</p>	<p>applicable to the establishment of parenthood designated by this Regulation.</p>
<p>(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.</p>	<p>(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.</p>
<p>(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</p>	<p>(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</p>

evidentiary effects.	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	(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
Articles	Articles
Art. 4 par. 3	Art. 4 par. 3
3. ‘establishment of parenthood’ means the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously	3. ‘establishment of parenthood’ means the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously, or the establishment by last will

	and testament
Art. 6 lett. d	Art. 6 lett. d
(d) of the habitual residence of either parent at the time the court is seised, or	(d) of the habitual residence of either parent at the time the court is seised, or
Art. 10	Art. 10
<p>Incidental questions</p> <p>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.</p> <p>2. The determination of an incidental question pursuant to paragraph 1 shall produce effects only in the proceedings for which that determination was made.</p>	<p>Incidental questions</p> <p>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.</p> <p>2. The determination of an incidental question pursuant to paragraph 1 shall produce effects only in the proceedings for which that determination was made.</p>
Art. 17	Art. 17
<p>Applicable law</p> <p>1. The law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time of birth or, where the</p>	<p>Applicable law</p> <p>1. The law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time of birth or, where the</p>

<p>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.</p> <p>2. 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.</p>	<p>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 nationality of the child at the time of birth</p> <p>2. 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.</p>
	<p>Art. 17 b</p>
	<p>Exceptions</p> <p>Where the law designated by previous article involves the recognition of the parent-child relationship established between a child born out of surrogacy and the intended parent, the requested authority can apply the law of the forum.</p>
<p>Art. 19</p>	<p>Art. 19</p>
<p>Change of applicable law</p> <p>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.</p>	<p>Change of applicable law</p> <p>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.</p>

Art. 22	Art. 22
<p>Public policy (<i>ordre public</i>)</p> <p>1. The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (<i>ordre public</i>) of the forum.</p> <p>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.</p>	<p>Public policy (<i>ordre public</i>)</p> <p>1. The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (<i>ordre public</i>) of the forum and in the cases provided for by article 17 b.</p> <p>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.</p>
Art. 31	Art. 31
<p>Grounds for refusal of recognition</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</p>	<p>Grounds for refusal of recognition</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</p>

<p>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) 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;</p> <p>(d) if and to the extent that it is irreconcilable with a later court decision relating to parenthood given in the Member State in which recognition is invoked;</p> <p>(e) if and to the extent that it is irreconcilable with a later 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</p>	<p>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) 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;</p> <p>(d) if and to the extent that it is irreconcilable with a later court decision relating to parenthood given in the Member State in which recognition is invoked;</p> <p>(e) if and to the extent that it is irreconcilable with a later 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>(f) if and to the extent that it involves the recognition of the parent-child relationship established between a child born out of surrogacy and the intended parent, if the law of the member State provides another instrument, like the adoption.</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</p>
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<p>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>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>Art. 39</p>	<p>Art. 39</p>
<p>Grounds for refusal of recognition</p> <p>1. The recognition of an authentic instrument establishing parenthood with binding legal effect 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) 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;</p> <p>(c) if and to the extent that it is</p>	<p>Grounds for refusal of recognition</p> <p>1. The recognition of an authentic instrument establishing parenthood with binding legal effect 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) 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;</p> <p>(c) if and to the extent that it is</p>

<p>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;</p> <p>(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.</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 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.</p>	<p>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;</p> <p>(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.</p> <p>(e) if and to the extent that it involves the recognition of the parent-child relationship established between a child born out of surrogacy and the intended parent, if the law of the member State provides another instrument, like the adoption.</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 an authentic instrument establishing parenthood with</p>
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	<p>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.</p>
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LITHUANIA

Written comments of the Lithuanian delegation on the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood.

Lithuanian delegation would like to thank the Presidency for the opportunity to send comments and suggestions to the text of the proposal. We would like to reserve the right to make further comments at a later stage with respect to the entire document.

1. We would like to ask to elaborate the impact of the proposal on Member States' social security systems, such as the payment of social benefits to the parents of a child, where the national regulation on the payment of social benefits does not cover certain family relationships as defined in the Proposal.
2. Article 6 of the Proposal provides for a broad list of grounds of jurisdiction in matters relating to the origin of the child. A broad list of alternative grounds of jurisdiction can create preconditions for uncertainty, reduce predictability and encourage going to courts. We therefore propose to shorten the list of grounds of jurisdiction in Article 6 of the Proposal, for example, by waiving the ground referred to in point (e) of this Article.
3. In Article 14(2) of the Proposal, setting out the procedure for *lis pendens*, we suggest to provide more clarity in which language the court of another Member State should be informed (for example, similarly to Article 29(2) of the Proposal).
4. Under Article 17 of the Proposal, it would be challenging for Lithuanian administrative authorities to determine the parenthood by applying foreign law, in particular if it is the law of a third country. In this context, other alternatives could be considered for the main rule proposed in this Article. For example, the revised Article 17(2) allowing for the disapplication of the law of a third country and the application of the law of the *lex fori* could be a reasonable solution.
5. The provision of Article 18(c) of the Proposal concerning the determination of the position of persons in proceedings is, in principle, a procedural matter, whereas procedural matters are generally governed by the national procedural law of the court seised. We propose to delete point c of this Article.
6. We would like to ask for concrete examples for practical application of Article 22(2) of the Proposal. Given the limited scope of the public policy (*ordre public*), it is not clear which specific adaptations to the '*ordre public*' clause (such as those which are not regulated by national legislation (certain ways of conceiving child's birth) or those which are regulated by national regulation but only relate to a particular family relationship) would be considered incompatible with the prohibition of discrimination laid down in Article 21 of the Charter.
7. For consistency reasons, we propose to replace in Article 29 of the Proposal (and other articles) the term of "attestation" to term "certificate", as it is already used in European Union law (e.g. Article 36 of the 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 (hereinafter referred to as Brussels IIb Regulation)).

8. We question the added value of the provision of Article 29(3) of the Proposal, according to which the attestation contains a statement informing individuals that the attestation does not affect the child's rights deriving from European Union law. We propose to assess the possibility to delete this provision. This observation is also relevant for Articles 37(4), 45(4) and 52(k) of the Proposal, which contain similar provisions.
9. Article 31(3) of the Proposal provides for an obligation in all cases to give the opportunity to express views not only to a person below the age of 18 years, but also to a person over the age of 18 years. We believe that this provision on hearing the opinion of an adult is excessive in substance, considering that a person with legal capacity may decide whether or not to participate in judicial proceedings relating to the exercise of his or her rights. We propose to delete the respective provision in this paragraph, while at the same time extending paragraph 1(c) of the same Article. The aim would be to cover also adult children and other persons whose rights and legitimate interests have been decided in the court decision, without giving them the opportunity to be heard. This observation is also relevant for Article 39(1)(b) and (3) of the Proposal.
10. In the interests of consistency and uniform application of the Proposal across Member States, we propose to add provisions on cases of stay of proceedings in Section 2 of Chapter IV of the Proposal (similarly to Article 63 of the Brussels IIb Regulation).
11. Section 3 of Chapter IV of the Proposal, which governs authentic instruments with binding legal effect, does not make it clear whether the Proposal applies to authentic documents and certificates in electronic format (e.g. as discussed in Article 8(1) of 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 the presentation of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (hereinafter referred to as "Regulation (EU) 2016/1191")), as well as whether the attestation can be issued together with authentic copies of authentic instruments.
12. We propose to include provision clarifying that the certificate referred to in Article 37, which is attached to authentic instruments, has no independent legal effect (for example, as regards the use of multilingual forms in Regulation (EU) 2016/1191).
13. In our view, the wording in Article 43(1) of the Proposal stating that "An applicant who, in the Member State of origin, has benefited from complete or partial legal aid" is too broad, as it could be interpreted as requiring MS to ensure the provision of legal aid only taking into account the fact that a person has benefited from legal aid previously in any matter. Legal aid should be linked to a specific issue of parenthood and/or with the eligibility of a person to receive legal aid at the time of the application according to national rules. Furthermore, it should be noted that sufficient and effective rules on legal aid are established by the Directive 2003/8/EC.

HUNGARY

Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood

Working document of the Hungarian Delegation

By document No. CM 3770/23 the Presidency invited Delegations to send written comments and drafting suggestions on Chapters I to IV of the Proposal. Seizing this opportunity the Hungarian Delegation provides the following comments and suggestions.

To Article 1

“This Regulation lays down common rules on jurisdiction and applicable law for the establishment **and termination** 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.”

Explanation

This proposed addition aims to clarify in the text, instead of solely in the preamble, that the scope of the Regulation extends not only to establishment of parenthood but its termination as well.

To Article 2

~~“1. — 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 recognise a document establishing a parent-child relationship issued by the authorities of another Member State for the purposes of rights derived from Union law.”~~

~~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.”

Explanation

One of the requirements a legislative act must meet is that it must be clearly understood by its recipients. However the content of paragraph 1 is uncertain. Even experts negotiating the Proposal cannot clearly identify what it means in practice, thus it is doubtful that the recipients would understand this provision. The case law of the Court of Justice applies independently of this provision, which would not bring any further clarification.

To Article 3

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“4. Member States may, by notification to the Commission, exclude the application of this Regulation in their territory to parenthoods which are contrary to their national identity, inherent in their fundamental political and constitutional structures.”

Explanation

During the negotiations on the Proposal it has become evident that a number of Member States had serious doubts about acceptance of certain situations relating to establishment of parenthood. The reason for such reticence is that the parental statuses concerned, which were established abroad, are contrary to domestic rules reflecting national identity and/or having a value of fundamental principle. In the context of the Proposal the traditional public policy exception cannot be applied, or at least there are doubts that it could be applied in such situations. As a result, a number of Member States could be in a position that they would not be able accept the Proposal if they had the obligation to recognise situations which are directly contradictory to their national rules of principal value.

The affected situations concern a narrower range of children, but it must not be forgotten that the Regulation would in practice be mostly applied to children whose situation does not raise any sensitivity in the context of constitutional law and national identity. Thinking of them, it is important that the Proposal can still be accepted. To this end, we propose that Member States that cannot recognize certain statuses due to their national rules of fundamental importance could exclude the application of the Regulation in their territory for these cases. We note that, although in a different way, Article 13 of the Rome III Regulation also assured Member States that they would not have to apply that Regulation to a legal institution that is not recognized in their domestic law. Based on our proposal, the Regulation would not apply only to the statuses affected by the declaration in the Member States that made a declaration, it would be applied in all other respects in all Member States thus the situation of the overwhelming majority of children would be covered.

Although we do not provide drafting suggestions in that regards, we underline that the exclusion of intercountry adoption and the interpretation of “domestic adoption” for the purposes of the Regulation requires further reflection. The 1993 Hague Convention does not cover adoptions when a child is adopted from a Member State to a third State which is not a Party to the Hague Convention, thus there is a gap. As to domestic adoption, in our view an adoption involving persons living in the same Member State but at least one of them having foreign citizenship is not purely domestic, and it triggers the application of rules of private international law. The Proposal reflects a different approach.

To Article 4

“For the purposes of this Regulation, the following definitions apply:

1. ‘parenthood’ means the parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents;
2. ‘child’ means a person of any age whose parenthood is to be established, recognised or proved;
3. ‘establishment of parenthood’ means the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously;

4. 'court' means ~~an authority in a Member State that exercises judicial functions in matters of parenthood~~ any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate:
- (a) may be made the subject of an appeal to or review by a judicial authority; and
 - (b) have a similar force and effect as a decision of a judicial authority on the same matter.
5. 'court decision' means a decision of a court of a Member State, including a decree, order or judgment, concerning matters of parenthood;
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 parenthood and the authenticity of which:
- (a) relates to the signature and the content of the instrument; and
 - (b) has been established by a public authority or other authority empowered for that purpose by the Member State of origin;
7. 'Member State of origin' means the Member State in which the court decision on parenthood has been given, the authentic instrument on parenthood has been formally drawn up or registered, or the European Certificate of Parenthood has been issued;
8. 'decentralised IT system' means an IT system as defined in point (4) of Article 2 of [the Digitalisation Regulation];
9. 'European electronic access point' means an interoperable access point as defined in point (5) of Article 2 of [the Digitalisation Regulation]”.

Explanation

In Hungary adoption is granted by guardianship authorities therefore it is necessary that their decisions, which can be subject to judicial review, be covered by the rules on recognition of decisions, instead of public documents. The wording of our proposal is based on the Brussels IIb Regulation.

To Article 6

“In matters relating to parenthood, jurisdiction shall lie with the courts of the Member State:

- (a) of the habitual residence of the child at the time the court is seised, or
- (b) of the nationality of the child at the time the court is seised, or
- (c) of the habitual residence of the respondent at the time the court is seised, ~~or~~
- ~~(d) of the habitual residence of either parent at the time the court is seised, or~~
- ~~(e) of the nationality of either parent at the time the court is seised, or~~
- ~~(f) of birth of the child.”~~

Explanation

Recital (39) refers to the criterion of proximity as decisive factor for the establishment of jurisdiction. On this basis, strictly point (a) is justified. As for issues relating to the status of a natural person, nationality is still a relevant factor, therefore we also support point (b) as well. As a traditional ground of jurisdiction, as it provides a close connection between the litigation and the Member State, the respondent's habitual residence is also acceptable for us. As to points (d) and (e), especially given the wide scope of the term "parent" (e.g. intended parents) would potentially result in too many Member States having jurisdiction even when they do not have a close link to the child. If point (f) does not coincide with any Member State covered by points (a) to (c), possibly the place of birth has already a too remote connection with the actual situation of the child, therefore we do not think it is necessary.

To Article 8

“Article 8 **Residual jurisdiction**

~~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.~~

Explanation

We are not against this provision, however it is difficult to see any other reasonable connecting factor than those listed in all other Articles on jurisdiction that could be added in the national law.

To Article 14

“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.”

Explanation

Proceedings in relation to the status of the same the child can be pending between different parties in different Member States (for example, under the Hungarian law if the mother initiates the proceedings to establish paternity of the father, she must do it against the father - and in certain situations the child as well-, but if it is father who initiates the procedure, he must do so against the child). However, as those proceedings concern the parenthood of the same child and both decisions have erga omnes effect, it is necessary to prevent parallel proceedings even if the parties are not the same.

To Article 17

“2. **When establishment of parenthood takes place before birth, the law applicable shall be the law of the State of the habitual residence of the person giving birth at the time of establishment of parenthood. ~~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.~~**”

Explanation

We have doubts that the application of different laws to different parents of the same child could work properly in practice therefore we would prefer the deletion of paragraph 2 of the Proposal. On the other hand, based on the discussions in the Working Party, we agree that the Proposal does not give adequate answer to situations when the parenthood is established before the birth of the child. This mainly happens in practice when the paternity is recognised by the father before the birth. Thus a rule completing paragraph 1 is necessary which could be based on the same concept as the main rule with the time aspect being adapted to the specific situation.

As to the draft presented in working document No. 8848/2023 we still prefer the Commission proposal as a starting point. We are of the opinion that paragraph 2 of that version (application of lex fori) goes against the objective of the Proposal. We do not see the need for a separate Article on contestation.

To Article 18

“The law designated by this Regulation as the law applicable to the establishment of parenthood shall govern, in particular:

- (a) the procedures to establish or contest parenthood;
- ~~(b) the binding legal effect and/or the evidentiary effects of authentic instruments;~~
- (b) the standing of persons in proceedings involving the establishment or contestation of parenthood;
- (c) any time limits to establish or contest parenthood.”

Explanation

On the proper application of rules of private international law, the law applicable designated by the Proposal only refers to substantial law, therefore the list in this Article can only extend to issues that are governed by substantial law. In the Hungarian law legal effects of documents are determined by procedural law therefore we cannot accept point (b) in the list. It is difficult for us to understand how the legal effect of a Hungarian document could be determined by a foreign substantial law.

To Article 22

- ~~1. The application of a provision of the law of any State specified by this Regulation may be refused only if 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.”~~

Explanation

Application of the Charter is mandatory when applying the Regulation therefore there is no need to have any reference thereto.

To Article 24

- “3. Where the recognition of a court decision is raised as an incidental question before a court or other authority of a Member State, that court or authority may determine that issue.”

Explanation

In practice recognition of foreign decisions on parenthood is in most cases not raised before a court, but other authorities, such as civil status registries, guardianship authorities, notaries. Therefore those authorities also need to be able to examine recognition for the purposes of their procedures.

To Article 29

~~“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.”~~

Explanation

This deletion is proposed on the basis of the argument already described in relation to Article 2.

To Article 31

“1. The recognition of a court decision shall be refused:

...

- (d) if and to the extent that it is irreconcilable with an **earlier later** court decision relating to parenthood given in the Member State in which recognition is invoked;
- (e) if and to the extent that it is irreconcilable with an **earlier later** court decision relating to parenthood given in another Member State **or a third State** provided that the later court decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked;
- (f) **in case of a decision on adoption, the court of the Member State which made the decision had no jurisdiction to decide the case pursuant to the law of the Member State in the territory of which recognition of the decision is sought.**

~~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.~~

~~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.”~~

Explanation

As regards points (d) and (e) of paragraph 1, the solution applied in the Brussels IIb Regulation is not appropriate in the context of this Proposal, as it is not about the settlement of dynamic legal relationships regarding parental responsibility. While it is justified to ensure the priority of the later decision regarding parental responsibility, since it can be assumed that it better takes into account the current situation of the child, regarding the more static parental status, the *res iudicata* effect of the earlier decision must be rather ensured. In addition, attention must also be paid to the fact that in the event of a conflict between decisions taken on a different subject (e.g. establishing paternity and adoption), temporality may be taken into account differently, and other aspects may also arise (for example, an already authorized adoption is not affected if a person's paternity is later established, unless the adoptive father thereby becomes a biological father).

In point e), decisions taken in a third state and already recognized must also entail the refusal of recognition, as it would also breach the *res iudicata* effect with regard to them, and could also constitute a violation of the international obligations of the Member States towards third states.

Given that the Proposal does not establish jurisdictional rules for adoption, but the rules on recognition are also applicable to decisions made in such a matter, it is a concern for us that jurisdictional control is not ensured in any way, for this reason we propose to insert a rule on such control in point (f).

In relation to paragraph 2, see the argument regarding Article 22.

In paragraph 3, we cannot accept the lack of a hearing as a reason for refusal, even if the obligation according to Article 15 remains, because in this context the failure to hear the child does not mean the same degree of harm as in procedures involving parental responsibility. The lack of hearing would be most detrimental in adoption cases where the child's view could have a real impact of the outcome of the case, but Article 15 does not apply to adoption as things stand now, and in other cases the child's view does not really have an impact of outcome, due to the nature of the cases.



Malta's Comments on Chapters I to IV of the Commission proposal on Parenthood (ST15837/22) and the proposed redrafted Articles 6 and 17 of the proposal in the Discussion Paper (ST8488/23)

Following the meeting of the Working Party on Civil Law Matters (Parenthood) held on 21-22 June 2023, below please find Malta's comments, as follows:

General Comments

In general, Malta welcomes the *Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*. Malta agrees with its general objectives, that is:

1. To strengthen the protection of the fundamental rights and other rights of children in cross-border situations;
2. To provide legal certainty and predictability about the rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood; and
3. To reduce the legal costs and burdens for families and the Member States' judicial systems in connection with legal proceedings for the recognition of parenthood in another Member State.

Malta particularly supports this proposal since it would, inter alia, facilitate freedom of movement in the EU for Maltese rainbow families.

It is important to note that Malta still holds a general scrutiny reservation on the entire proposal, since national internal consultations are ongoing; and as such, the following comments are non-exhaustive, and are being made without prejudice to Malta's final position.

Chapters I – IV

- **Article 4 (Definitions)**

The difference between authentic instruments with binding legal effect and authentic instruments with no binding legal effect is an important one in view of the differences between the two types of instruments as set out in Chapters IV and V of the proposal. Thus, this distinction should be clarified. Malta suggests including a **definition of 'binding legal effect' in Article 4**. From the discussions during the Working Party meetings, Malta understands that 'authentic instruments with no binding legal effect' would cover those instruments which would provide evidence of parenthood but that such



parenthood as indicated in that instrument could still be challenged in front of a Court (as is generally the case with birth certificates). Thus, if what was meant by authentic instruments with binding legal effect is that the content of such instrument can't be challenged as such in court; or for example, if what we mean is that authentic instruments with binding legal effects are very similar at national level to court decisions, then this should be clarified in the operative part of the text. Although the text in Recital 59 is useful, Malta believes that such recital is not enough to differentiate between the two types of authentic instruments.

- **Article 6 (General Jurisdiction)**

Malta understands the rationale behind the list in Article 6. As currently proposed, the jurisdictional rules apply indirectly for the recognition of authentic instruments with binding legal effect or for the recognition of purely national court decisions establishing parenthood in another Member State. Having such a long list is thus favourable since it would make it easier for parenthood established domestically to meet one of the grounds established in Article 6, thereby facilitating recognition in another Member State. Regarding the Presidency's suggested redraft of Article 6 as set out in document ST8488/23, Malta could be flexible with the deletion of point (d) in Article 6 but cautions against restricting this list too much.

- **Article 17 (Applicable Law)**

The key question for Malta on Chapter III (Applicable Law) is whether the applicable law rules would also apply for authorities issuing authentic instruments with no binding legal effect. From discussions held so far, Malta understands that this would be the case. **It will be very challenging for the Maltese Public Registry (which is the authority responsible for issuing birth certificates) to apply another law besides Maltese law.** Under Maltese law, the Public Registry only has to register the birth of children born in Malta (and the law applicable is the law of the State of Birth – Maltese law). Maltese citizens born abroad can also be registered in the Maltese Public register. When Maltese citizens are born abroad, generally they would have a birth certificate issued from the country of birth, and if there isn't already a Maltese birth entry for that child in the Maltese public registry, parenthood as established in the foreign Act, would not be questioned as such. In such case, once the foreign act has been authenticated by the Public Registry, the local procedures which take place only aim at transposing the foreign act into a local act of civil status. Thus, the Maltese Public Registry has never been in a situation where it had to apply a foreign law.

Unlike courts, the Public Registry officials do not have the required expertise or know-how of applying different laws for the purposes of recording the parents of the child in the Birth Certificate (parenthood as established by operation of the law). A substantial number of local births registered in the Maltese Public Registry have a cross-border element (1 parent non-Maltese / both parents non-Maltese). Thus, if the Public Registry is forced to employ a foreign law for the purposes of establishing parenthood in birth certificates, the workload and challenges of the Public Registry will increase significantly. This will lead to a longer and more complex procedure for registering the birth of a child.



If the Registry would not be sure of a case, then it might be obliged to ask the parents to seek redress before the courts and this would complicate matters and would certainly be counterproductive to one of the objectives of this proposed Regulation (reducing the burdens for families).

It is important that the chosen applicable law is **easily identifiable**. Having the habitual residence criterion as a general rule might also be problematic for the Registry as the officers would first need to establish that habitual residence and this would add to the complexity of the matter for the Registrars. Moreover, it is important that the connecting factor for the applicable law is a **static** one and not a dynamic one (since the status of being a parent should not depend on dynamic connecting factors).

Malta thanks the Presidency for its efforts to try to address such concerns in its redraft of Article 17 as set out in document ST8488/23. However, unfortunately, that redraft does not cater for our concerns. **Malta suggests that Article 17(1) is amended in a way that it provides at least a choice and one of the options would be the law of the State of Birth.** However, Malta understands that having alternative general rules for the applicable law might not be desirable. For this reason, Malta took note of one of the suggestions floated in previous Working Party meetings – i.e. **to have the applicable law be the *lex fori***. Malta notes that having the *lex fori* (the law of the State of the authorities establishing parenthood) could solve such concerns. Thus, Malta suggests that Article 17(1) is redrafted to provide as follows: *‘The law applicable to the establishment of parenthood shall be the law of the forum’*. Paragraph 2 of Article 17 as drafted in ST8488/23 would then be deleted and the corrective mechanism in paragraph 3 could possibly be rethought or reinforced (if deemed necessary). On the argument that the *lex fori* leads to forum shopping, Malta agrees with the Commission that this argument does not hold water when speaking of fundamental rights. Furthermore, the *lex fori* is the applicable law chosen under the 1996 Hague Convention (see Article 15 of that Convention) and this is also relevant for the Brussels IIB Regulation (see recital 92 of Council Regulation (EU) 2019/1111). Malta acknowledges that the 1996 Hague Convention does not deal with parenthood but notes that the topic of parental responsibility is closely linked to the topic of parenthood. Thus, Malta advocates to adopt a similar approach for the parenthood proposal. Nevertheless, Malta remains open to further discussions and to finding other alternative solutions which might also cater for the abovementioned concerns.

- **Article 17a (Applicable law to the contestation of parenthood** – as proposed in the Presidency’s document ST8488/23)

Malta believes that there is no need for a separate Article 17a on the contestation of parenthood since ‘*contestation*’ is already covered by the definition of ‘*establishment of parenthood*’ in Article 4(3) of the proposal. The same applicable law rules should apply both for the establishment and the contestation of parenthood. If it is not clear enough that ‘*establishment*’ also covers ‘*contestation*’, then this could be further clarified in Article 4 (definitions).



- **Article 18 (Scope of the Applicable Law)**

Malta has strong reservations about Article 18, particularly on points (a) and (b). The applicable law should only deal with substantive issues of parenthood (and not procedural rules). Thus, point (a) should be amended accordingly. Regarding point (b), this seems to infer that for example birth certificates issued in one Member State would have different effects depending on the applicable law in a particular case. Malta has serious misgivings about the practical effect of point (b) and calls for its deletion.

- **Article 22 (Public Policy)**

Malta supports the political intention behind this provision, particularly paragraph 2 of Article 22. It is important to ensure that the public policy refusal ground does not lead to discrimination of children coming from rainbow families.

Comments and suggestions of the Netherlands on the Chapters I to IV of the proposal for a Parenthood Regulation and the proposed redrafted Articles 6 and 17 in the Discussion Paper

General comments

To start with the Netherlands (NL) is supportive of the core elements and the goal of the proposal. The NL supports the aim of the proposal to create broad recognition of parenthood within the European Union. If parenthood is established in one Member State, the relationship of the child and its parents should be recognised in the other Member States. Moreover, it is crucial for the NL that the proposed Regulation applies to the parenthood of the child, irrespective of the conditions under which the child is conceived or born and irrespective of the family the child belongs to (in line with the Commission's proposal, p. 3). The Regulation should, according to the NL, apply to recognition of the parenthood of children in same-sex families. The rights of parents and children in cross-border situations without discrimination is key to the NL.

As in the NL a proposal for surrogacy is submitted to the national parliament, it is important for the NL that parenthood after legal surrogacy (implicitly or explicitly) falls under the scope of the Regulation, more specifically under the rules of recognition (Chapter IV and V). Under the proposed legal framework parenthood in relation to children born out of surrogacy will be established in a Dutch court decision and will be in conformity with several conditions to ensure surrogacy does not lead to abuse of procedures. The NL would like to stress that the proposed bill does not aim to stimulate surrogacy but creates a legal path for safe surrogacy with several safeguards in the procedure. For instance, the surrogacy should be notified before a Dutch court, before the conception takes place, so that there are no questions on parenthood during the pregnancy or after birth.

The NL would like to underline that it is still in favour of a simpler instrument. In the current proposal the rules on jurisdiction are wide, to facilitate the access to a judge in a legal system that will facilitate parenthood. The applicable law rules are subject to limited public policy exceptions, but provide for a *de facto* public policy exception for the supplementary grounds to establish parenthood of the second parent. This illustrates the tension between the object of protecting parenthood in all forms and the aim to sufficiently respect the sovereignty of member states. The possibility to regulate only the recognition of parenthood, without the legal complications of rules on jurisdiction and applicable law could avoid many complications.

The NL is still examining the new proposal and its possible effects. As consultations with, among others, stakeholders are ongoing our position is still evolving and might be subject to change. Therefore, the NL has a general scrutiny reservation.

Chapter I – Subject matter, scope and definitions

Article 3, paragraph 3

Regarding Article 3, paragraph 3 the NL wonders whether the situation in which the national court or competent authority re-establishes parenthood in an EU Member State based (partly) on an authentic instrument or court decision from a third state, falls under the scope of the Regulation. If a new Dutch birth certificate has been drawn up, how

would one differentiate between facts in the birth certificate that are of Dutch origin and of facts of third states in the following cases?

Example 1: a child born from a mother in the UK whilst the Dutch father has acknowledged his parenthood in the NL. If the family moves to the NL, it would be possible to have a Dutch birth certificate drawn up in the NL. Would that birth certificate circulate under the Regulation? Or only for the part regarding the Dutch acknowledgement of parenthood?

Example 2: a child with a birth certificate that is not recognized in the NL because the birth mother is not registered on the certificate (some jurisdictions draw up new birth certificates rather than registering changes to the original certificate. This can result in a birth certificate without a birth mother mentioned for instance in cases of a parental order after surrogacy). A Dutch court can order a Dutch birth certificate to be drawn up, registering the birth mother. Would that birth certificate circulate? And if the Dutch court decision also contains an adoption order, would that part of the birth certificate circulate?

Chapter II – Jurisdiction

Article 8

The NL wonders whether it is necessary to refer to the legal systems of the Member States in Article 7 and 8, considering the *forum necessitatis* provided for in Art. 9? In the view of the NL Article 8 could be deleted to have a universal scope of application (in line with the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations).

Specific comments on the proposed redrafted Article 6 in the Discussion Paper:

The NL has doubts about deleting jurisdiction ground (d). There seemed to be little debate about this ground in the council working party, although it will often overlap with grounds (a) and (c).

In order to promote the establishment of parenthood of the 'second' parent, the connecting factors for jurisdiction in article 6 (e) and (f) align with the connecting factors for the applicable law in article 17 paragraph 3. However, whereas Article 17 paragraph 3 only applies to the establishment of parenthood of the second parent, the aforementioned jurisdiction grounds apply to the establishment of parenthood in general. Would it be an option to further align these articles by making a distinction between general jurisdiction grounds and specific jurisdiction grounds regarding the establishment of parenthood of the second parent?

Chapter III – Applicable law

Article 17

Regarding the connecting factors for the applicable law, the NL is of the opinion that the habitual residence of the person giving birth is problematic. Establishment of parenthood can take place a long time after the date of birth. In those cases, it would be better to connect with the current habitual residence in line with the principle of proximity, rather than at the time of birth.

The Commission proposal adopts a general approach, with a one-size-fits-all conflict rule covering all parenthood cases. The proposed redrafted Article 17 in the discussion paper distinguishes between the establishment and the contestation of parenthood. The NL, following the recommendations of the Staatscommissie voor Internationaal Privaatrecht (the advisory body to the Dutch government on issues of private international law), would be in favour of a more differentiated approach by including specific conflict rules for parenthood after surrogacy, for the acknowledgement of a child (also governing the issue of whether or not the mother and the child should consent), and for pre-natal establishment of parenthood.

Article 18

The NL wonders how Article 18(b) relates to Article 37, paragraph 2(b) and Article 45, paragraph 1. If the law of the Member State of origin is decisive for the binding or evidentiary effects of authentic instruments, how does that relate to the fact that the binding legal effect and/or evidentiary effects are governed by the law applicable to the establishment of parenthood (as referred to in Article 17)? The NL would be in favour of applying the law of the Member State of origin, i.e. where the authentic instrument has been formally drawn up or registered.

Specific comments and suggestions on the proposed redrafted Articles 17 and 17a in the Discussion Paper:

Redrafted article 17, paragraph 1

The NL welcomes the change of the main connecting factor to the habitual residence of the child. Moreover, the NL agrees that the reference point should be the moment when parenthood is established.

The NL notes that the current proposal does not seem to take into account prenatal establishment of parenthood. A possible solution would be to include 'before or at the time of birth'.

Judicial proceedings may take a long time to complete. The NL would suggest to clarify what is considered the 'relevant moment': is this the moment proceedings are instituted or the moment the court actually decides on the matter?

Redrafted Article 17, paragraph 2

The NL commends the effort to formulate a solution in view of the concerns expressed by some of the member states relating to the application of the law of third states, especially in relation to surrogacy.

The NL wonders why the choice was made for application of the lex fori. The lex fori will not be the most closely connected law in all circumstances. Moreover, opting for the lex fori may lead to forum shopping. Why not use the habitual residence of the other parent as connecting factor?

The scope of this provision is rather broad: it also applies to situations where there are no apparent objections to applying a third state's law. The NL suggests a reformulation: the law of the forum *may* apply, instead of *shall* apply.

Redrafted Article 17, paragraph 3

To the NL, the establishment of parenthood irrespective of the child's type of family is of paramount importance. This also appears the aim of Article 17(3). The Netherlands generally agrees with this provision, but there are some concerns.

The NL is not convinced that the application or non-application of a given law can be subjected to the discretion of a national authority. The NL thinks the discretionary power should rest with the courts or the parents.

To the NL, it is unclear what criteria are used to decide on the application or non-application of a given law. There is a risk of discrimination based on the child's type of family, although that is not allowed under the Charter of Fundamental Rights of the European Union. The NL notes that this provision (and the same goes for Article 17, paragraph 2 in the Commission proposal) appears to be at odds with paragraph 2 of Article 22 (public policy exception), stating that Article 21 of the Charter on the right non-discrimination must be observed.

Inserted Article 17a

The NL agrees with the proposal to adopt a special conflict rule concerning the contestation of parenthood.

In the view of the NL, the contestation of parenthood should be governed by the same law as the establishment of parenthood. However, proposed Articles 17 paragraph 2 and 17a paragraph 2 do not fully match and can lead to different outcomes. The NL suggests the following conflict rule: "The law applicable to the establishment of parenthood pursuant to Article 17, also applies to the contestation of parenthood." This way, there is no need for a separate article; the contestation of parenthood is included in Article 17.

Chapter IV – Recognition

Article 31

Regarding the grounds for refusal of recognition, the NL suggests including discretion to refuse recognition of a court's decision, by using the formulation 'can be refused' rather than 'shall be refused' as to give room for a more permissive regime of recognition.

For the NL the reference to 'later court decision' in Article 31(d) and (e) is problematic. The provisions imply the possibility of overriding a court decision with a later court decision. In the view of NL, this could create legal uncertainty and raises questions in view of res judicata and the complete system of legal remedies. Moreover, the rationale of these provisions is unclear: a later court decision based on new facts (such as the contestation of parenthood) should not be considered irreconcilable – within the meaning of this provision – with a previous decision based on different facts. The NL suggests deleting 'later'.

AUSTRIA

Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM[2022] 695 final)

Comments of the Republic of Austria on Chapters I to III

1. Austria welcomes the objective of the Commission's proposal in principle. However, there are serious concerns about its specific content. For this reason, Austria has entered a scrutiny reservation on the entire proposal.
2. In principle, the proposal aims to make parenthood established in one Member State effective in all other Member States. Austria supports this fundamental goal in general.
3. However, the proposal requires a number of clarifications and partly goes beyond this regulatory objective.

4. Detailed observations on Chapters I to III of the draft:

- Article 3(2)(e):

According to the draft, the scope of application of the regulation shall not extend to intercountry adoptions. However, domestic adoptions are to be covered by the proposal.

The description of domestic adoptions in recital 26 of the proposal should be revised. It should not include cases where all parties to the proceedings are habitually resident in the same Member State but not all parties to the proceedings are nationals of that Member State. Such situations should be covered by the term "cross-border adoption", as these cases also require an examination under conflict of laws rules. However, the respective rules contained in Chapter III of the proposal, in particular Article 17, are not tailored to apply to adoptions.

- Art. 4(1):

According to recital 24, the Regulation is also applicable to children who have not yet been born. This raises several questions, such as whether a prenatal acknowledgement of fatherhood or parenthood falls within the scope of application of the regulation.

- Art. 4(3):

According to recital 33, the regulation should also apply to the extinction or termination of parenthood. These aspects should be included in the definition of “establishment of parenthood” in Art. 4(3).

- Art. 4(5):

The definition of the term “court decision” is too far reaching and includes any decision issued by a court of a Member State in matters concerning parenthood. These judicial decisions are to be recognised in another Member State according to Chapter IV of the proposal.

The current wording (“concerning parenthood”) implies that not only decisions from Member States’ courts establishing parenthood fall within the scope of the regulation, but also decisions on the recognition of decisions establishing parenthood emanating from Member States or even third states. This would mean that such decisions on the recognition of judicial decisions would also have to be recognised in all other Member States. In our view, recognition by Austrian courts of a mere recognition decision granted by another Member State would not be understood as "re-establishing" parenthood that has already been established abroad. In such a recognition decision, completely different questions are dealt with and decided by the court than in decisions establishing parenthood.

In our view, the proposal merely seeks to regulate the recognition of parenthood established in another Member State. The recognition of mere recognition decisions goes beyond the regulatory objective of the proposal. Therefore a "recognition cascade" is to be avoided, at least as far as the recognition of decisions on parenthood from third countries is concerned, and should not be covered by the proposal.

It is therefore proposed, as a first step, to replace the term "a decision concerning matters of parenthood" by "a decision ... establishing parenthood".

- Art. 6 as amended by the Swedish Presidency:

The proposed deletion of letter d is supported. The proposed letter e also seems excessive and could be deleted from the proposal.

The regulation should focus on the child's perspective and the best interests of the child. Therefore, situations are to be avoided where, for example, a presumptive father can file an application in order to determine paternity with the court in his home state, to which the child may not have any connection at all. The child would then be forced to participate in court proceedings that might take place far away from his or her habitual residence. Moreover, such far-reaching rules on international jurisdiction entail a great risk of parallel proceedings in several Member States, which should at any rate be avoided.

- Art. 10:

This article requires further analysis and discussion as to its meaning and scope. It must be borne in mind that a decision on parenthood concerns the legal status of a person. In general, divergent decisions by different authorities in legal status matters are to be avoided.

Example: Maintenance proceedings are pending between the father and his daughter before a court in a Member State. The daughter files a motion for child support against her father. International jurisdiction for these proceedings is determined by 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. In these proceedings, the father disputes paternity. The question that arises now is which court is entitled to decide on the question of fatherhood.

If the court conducting the main proceedings (in our example: maintenance proceedings) may also decide on the preliminary question of parenthood (as currently provided for in Art. 10 of the proposal), the following questions should be resolved:

Does European Union law require an autonomous international jurisdiction for the preliminary matter to be granted to the court which has international jurisdiction for the main proceedings? If this is the case, Art. 10 of the proposal is useful.

Does EU law permit the establishment of a different international jurisdiction for the assessment of the preliminary question if rules on international jurisdiction regarding the main proceedings already exist under Union law? If this is not the case, Art. 10 would be incompatible with existing EU law.

- Art. 17 in the version of the Swedish Presidency:

Austria raises an explicit scrutiny reservation on Art. 17 of the proposal, which is the central conflict of laws rule of the proposal on applicable law.

Regarding paragraph 1: The connecting factor in Article 17 in the version of the Swedish Presidency is "the habitual residence of the child at the time when parenthood is established". According to the proposed second sentence of the provision, at the time of the birth of the child, the habitual residence of the person giving birth is deemed to be that of the child.

According to this provision the applicable law changes when the child's habitual residence changes. However, as has been outlined before, the application of different laws in legal status matters, such as the filiation of a child, is problematic and should thus be avoided. Moreover, such a "convertible statute" is contradictory to Art. 19 of the proposal. The proposed "convertible statute" may lead to a situation where, at the time of the birth of the child, their parentage is determined according to the law of the habitual residence of the person giving birth. If the child subsequently moves with their mother to another (member) state and the child's father then disputes paternity, this question would have to be resolved according to the law of the state of the child's current habitual residence. However, the application of this law may yield a different result in determining paternity than the law of the state of the child's birth. The child could lose – in retrospect – their legal father as established in accordance with the law of the state of their birth. Such legal uncertainty is not desirable and should be avoided at all cost.

Furthermore, it is not clear what is meant by the half-sentence "where the habitual residence of the person giving birth at the time of birth cannot be determined". Does it only refer to so-called "foundlings" (i.e. children who have been abandoned or left without any known parents) or is it intended to cover other situations as well, and if so, which ones?

Regarding paragraph 2: The provision as proposed by the Swedish presidency is intended to prevent the application of the law of third countries in matters of parenthood and strictly excludes its applicability. This effort is to be understood against the background of the highly controversial question on the applicability of the proposal to parenthood from surrogacy.

Austria understands the objective of the proposal, but cannot support it for reasons of principle. It is in line with the usual standards and principles of private international law that, in general, different legal orders are to be treated equally. This principle, which is also enshrined in EU law instruments containing provisions on applicable law (see Art. 16 of this proposal on universal application), should be adhered to and should not be abandoned.

Regarding paragraph 3: The wording of this paragraph is unclear. It focuses on cases where the applicable law results in the establishment of parenthood as regards only one parent. In practice, however, it is highly unlikely that the "law of a state/Member State" leads to the establishment of only one parent (an exemption may be found in certain legal systems with respect to nonmarital children).

However, if this provision is meant to apply in situations where the law of a Member State does not accept same-sex parenthood, this should be clearly expressed in the text of the regulation. Even in this case, however, the current wording of para. 3 would not guarantee that one of the legal systems mentioned allows same-sex parenthood. Moreover, it remains unclear which of the two alternative and subsidiary connecting factors is to be used by the respective competent court and whether a court is obliged to do so (cf "may apply").

- Article 17a in the version of the Swedish Presidency:

A separate provision on "contestation" is not necessary, as the connecting factor in Art. 17a is equivalent to the connecting factor in Art. 17. The element of "contestation" could thus be added to Art. 17.

- Art. 18 and 20:

Austria opposes the reference to procedural matters in Art. 18 and Art. 20 para. 2 (such as "procedures to establish or contest parenthood"; "binding legal effect and/or the evidentiary effects of authentic instruments"; "the standing of persons in proceedings involving the establishment or contestation of parenthood"; "proven by any mode of proof recognized by the law of the forum"). Under no circumstances should the regulation oblige courts to apply foreign rules on civil procedure. We therefore suggest deleting these provisions or modifying their wording. Regarding Art. 20(2), it is unclear why this provision was included in the proposal at all. Proving the legal act of establishing parenthood does not seem to pose, at least to our knowledge, a practical problem.

Art. 20(1) regulates the question of the formal validity of unilateral legal acts (i.e. "declarations"), it is not clear to us why this provision should not also extend to bilateral legal acts.

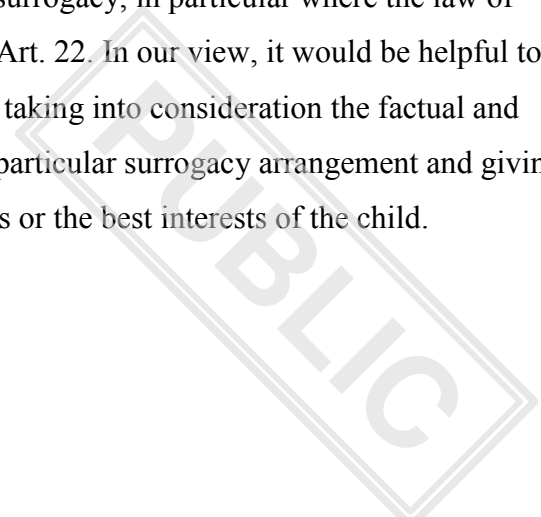
- Art. 22:

The connecting factor chosen in Art. 17 of the Commission's original proposal is particularly problematic for Austria because it also covers parenthood from surrogacy. Due to the conflict of laws rule in Art. 17 and the principle of universal application (Art. 16), the law of third countries is also applicable to surrogacy arrangements.

Previous discussions in the Council Working Party have shown that parenthood from surrogacy is a sensitive issue for many Member States because only few jurisdictions allow it. The Austrian federal government has committed itself to maintaining the ban on surrogacy and taking measures against its commercialization in its current government program.

It will therefore be necessary to take sufficient account of the concerns of many Member States about surrogacy, for example by introducing the possibility for Member States' courts to review individual cases of parenthood from surrogacy before recognising it. According to the current wording of Art. 22 of the proposal, the public policy ground for refusal does not seem to be applicable in the context of parenthood from surrogacy.

The applicability of the public policy clause to cases of surrogacy, in particular where the law of third states is pertinent, should be expressly foreseen in Art. 22. In our view, it would be helpful to define explicit criteria for an examination in this regard, taking into consideration the factual and legal circumstances and the individual background of a particular surrogacy arrangement and giving due regard to fundamental issues, such as women's rights or the best interests of the child.



18 September 2023

Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (ST 15837/22)

Comments from the Finnish delegation on Chapters I to IV and the proposed redrafted Articles 6 and 17 of the proposal (ST 8488/23)

The Presidency has asked delegations to send their written comments to Chapters I to IV of the Proposals and the redrafted Articles 6 and 17 proposed by the previous Presidency. The following remarks focus on issues of major importance. In many questions, it is too early to comment the details. At the time of writing these comments, Articles 40-43 have not been subject to first reading as yet. Therefore, the following remarks do not preclude any further comments our delegation may wish to make at a later stage during the negotiations.

General

The proposal for a regulation on parenthood is an important and useful tool for fully implementing the rights of the child and for effectively recognising the relationship between the child and the parent in cross-border situations. Finland supports creating uniform rules of private international law on parenthood in the European Union. This will facilitate the position of citizens moving from one Member State to another.

Chapter I – Subject matter, scope and definitions (Articles 1-5)

Unborn and stillborn children

According to Article 3, the proposed Regulation applies to civil matters of parenthood in cross-border situations. It does not apply e.g. to the legal capacity of natural persons (Art. 3.2.(c)) or the legal requirements for the recording of parenthood (Art. 3.2.(i)). Under Article 4.1, 'parenthood' means the parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents. According to Article 4.2, 'child' means a *person* of any age whose parenthood is to be established, recognised or proved [italics added].

According to the information Finland received from the Commission as a response to its written inquiry in 20 April 2023, the scope of application of the proposed Regulation does, however, include the establishment and recognition of the legal status of unborn children. This position is reflected in paragraphs 24 and 34 of the proposed recitals and it was later confirmed during the discussions held in the Working Party. According to the response from the Commission, this should not raise concern amongst the Member States, as the proposal does not cover the *effects* of parenthood, but only the *legal status* of the child [italics added]. According to the Commission, the effects of parenthood include the 1) conditions for the parenthood to have effects under national law, 2) the time at which the parenthood has effects under national law, and 3) the rights and obligations of the child and the parents derived from parenthood under national law.

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Although the Commission's reply 20 April 2023 addresses and alleviates some of the practical concerns Finland has expressed, the main principal issue remains unaltered. As Finland has explained in its written question to the Commission, an unborn child is not considered 'a person' under Finnish law. This view is supported by the preparatory works of the Finnish Constitution and academic literature on the same topic. Therefore, although some pre-emptive legal measures are possible even in Finland (e.g. acknowledgment before birth), these measures do not have any legal consequences, unless the child is born alive, as an unborn child cannot have any rights or duties under Finnish law. Neither can we give those rights or duties to unborn children in another EU Member State, or even recognise the full legal status of such a child, unless the child was born alive at a later stage.

This fundamental aspect is also reflected at the international level, for example in the case law of the European Court of Human Rights (e.g. *Vo v. France* 8.7.2004, para 85) and the European Group of Ethics in Science and New Technologies at the European Commission (Commission's statement to the same case, para 40). In fact, we are not aware of any international instrument on children's rights, which would extend its scope of application to unborn children in an equal fashion to live born children. In light of the foregoing, the Finnish view is that the scope of application of the proposed EU instrument should not cover unborn and stillborn children, and this should be clearly reflected in the text (Articles and Recitals) of the Regulation.

International and domestic adoptions

With regard to adoption decisions, Finland agrees with the current proposal, according to which the Regulation should not affect the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Article 66.3). The Hague Convention on Intercountry Adoptions defines international adoptions by focusing on the changing of the habitual residence of the child due to the adoption (Article 2.1). The nationality of the child or of the prospective parents does not have a central role. We have learned during the discussions in the Working Party from the Commission that although domestic adoptions, which do not have a cross-border element, are left outside the scope of the application, the interpretation of a cross-border element with regard to the proposed Regulation does not follow the definition of the Hague Convention and even nationality plays a central role when determining whether the adoption has a cross-border element and therefore comes within the scope of the Regulation.

The use of different connecting factors in different international instruments is prone to create confusion on which legal instrument to apply in a specific case. Although Finland does not have a concrete suggestion on how this confusion should be alleviated, we are concerned about how blurred the scope of application of the proposed Regulation currently is with regard to domestic and cross-border adoptions. Although we agree that there should not be an overlap between the Hague Convention and the proposed Regulation, nationality may in some cases – for example in cases of dual nationality – bring an otherwise domestic adoption case under the Regulation even in cases where the parties themselves have not anticipated it. At the same time, it is important to remember that there may be intercountry adoptions that are not covered by the Hague Adoption Convention, and which deserve international protection.

Definition of a court

As stated in the discussions, Finland considers it necessary that because almost all (99 %) cases on parenthood in Finland are handled by administrative bodies, the definition of a court (Article 4.4) should be broadened to include also administrative decisions with a binding legal effect in addition to actual courts exercising judicial functions. This could be achieved, for example, by changing the wording of 'judicial functions' into 'legal functions', or by developing a particular standard for those decisions, which could be equalled as courts. The last mentioned method was successfully applied in the Succession Regulation, Article 3.2.

Although the decisions of administrative bodies could, in theory, be recognised as authentic instruments with binding legal effect in another EU country according to the present proposition, Chapters 2 and 3 on jurisdiction and applicable law would not be directly applied to administrative bodies, if the proposal stands as it is. However, according to Article 35 of the proposal, one condition for their recognition as authentic instruments with binding legal effect is that jurisdiction has been assumed in a Member State under Chapter II. In other words, Chapter II would nevertheless have to be applied, but indirectly. In the discussions of the Working Party, the division between binding and non-binding authentic instruments has been criticised and some have sought to abolish the division. It is therefore unclear, whether administrative decisions could, in the end, qualify even as authentic instruments with binding legal effect. Finland could agree to the abolishment of the division between binding and non-binding authentic instruments, if those Finnish administrative decisions, which establish parenthood with a binding legal effect, would be equalled to court decisions instead.

If Finnish administrative bodies would not have the competence to make decisions in cross-border parenthood cases or they would not be recognised in another EU country without a special procedure, the application of the Regulation in cross-border situations would unnecessarily burden the already crowded Finnish courts with cross-border parenthood cases. At present, The Finnish Digital and Population Data Services Agency regularly handles cross-border cases and it also applies foreign law, if the habitual residence of the mother of the child is somewhere else than in Finland. The present rules on jurisdiction in Finland in cross-border cases do not make a distinction between administrative bodies and courts, and the introduction of such a distinction would not be considered as an improvement in Finland.

Chapter II – Jurisdiction (Articles 6-15)

Article 6 (including the redrafted version of Article 6)

As stated in the Working Party discussions, Finland considers both the present and the redrafted version of Article 6 as giving too many parallel alternatives for general jurisdiction. A wide variety of parallel alternatives for jurisdiction is likely to prolong court proceedings, increase litigation costs and enable the plaintiff to choose a court from which they predict a favourable outcome (*forum-shopping*). In this light, we welcome the deletion of subparagraph d) proposed by the Swedish presidency according to the redrafted version of Article 6. The alternatives for competent courts should, however, be reduced even further or at least different alternatives should be grouped in such a way that some alternatives could only be used, if it was not possible to use the more central ones, such as the habitual residence of the child or the habitual residence of the respondent (subparagraphs a) and c)). Birth place of the child (subparagraph f)) could be used, if the habitual residence of the child cannot be determined (e.g. the child is a refugee or very little time has passed from the birth and the habitual residence of the child cannot, therefore, be determined as yet).

Finland also questions the use of nationality as a basis for jurisdiction (subparagraphs b) and e)) as in recent years, there has been a tendency in the EU regulation to replace nationality as a connecting factor with habitual residence. If the use of nationality is considered necessary for example with regard to cases where the applicable law results only in the establishment of one parent (see Article 17.2), its use should be limited to these cases only and not to all cases. The use of nationality as a connecting factor should therefore be clearly a secondary connecting link to habitual residence. We are aware that some Member States prefer the use of nationality as a connecting factor because of its proximity to parenthood. It is true that there is a close connection. However, nationality is usually determined by who the child's parents are, not vice versa. As in many causal connections, the result cannot determine the starting point, but the starting point often determines the result. Therefore, Finland is not convinced by the argument that nationality should in this Regulation be given any better position than in the previous Regulations agreed by the Council in the family law area.

Article 15 (Right of children to express their views)

According to Article 15, when exercising their jurisdiction under this Regulation, the courts of the Member States shall, in accordance with national law and national procedure, provide children below the age of 18 years whose parenthood is to be established and who are capable of forming their own views, with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body. According to paragraph 2, the court shall then give due weight to the views of the children in accordance with their age and maturity.

In the discussions of the Working Party, two very different opinions were expressed with regard to this Article. Some promoted for the keeping this Article and others criticised it being copied from Brussels IIb Regulation without giving due weight to the material differences between the matters of parenthood on the one hand and the matters of parental responsibility on the other. First mentioned matters are usually resolved by genetic descent and DNA-evidence, whereas the second group of matters are usually resolved by suitability evaluations, agreements and overall consideration of the best interests of child.

Finland considers the right of children to express their views in all matters concerning them as an important legal principle. However, we are not convinced that it should be applied in all cases of determination of parenthood, where the views of the parties are not relevant. Especially, as most parenthood cases in courts are not actually resolved by the evaluation of suitability or by the best interests of child, but by presenting DNA-evidence on genetic descent, we are not convinced that the right of children to express their views should be given the same status in the Regulation on Parenthood than in the Regulation on Parental Responsibility. However, as we proposed earlier, if this Article is to be kept, its application should be restricted to those cases of parenthood, where the evaluation of the best interests of the child is necessary. The formulation would then, for example, be as follows:

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

Chapter III – Applicable law (Articles 16-23)*General observation on the interconnectivity between the rules on jurisdiction and the rules on applicable law*

Like many other Member States, Finland is of the opinion that one of the overall aims of this Regulation should be that courts should have the opportunity to apply the law of the forum in as many cases as possible. The best option to reach this goal is to draft the rules of jurisdiction and the rules of applicable law in such a way that they both point to the same Member State. If this is achieved, the courts would automatically apply their own law. This is also reflected in our comments to Article 6, where we strongly suggest the limitation of the alternative basis for jurisdiction.

*Article 17 (including the redrafted versions of Article 17 and 17 a)**Paragraph 1*

Finland regards the redrafted version of Article 17.1 as an improvement to the original proposal. The new version takes better into account the different circumstances of the child. Although in most cases

the establishment of parenthood is completed in the early childhood, where the child's habitual residence in most cases coincides with the habitual residence of the birth mother, sometimes the establishment of parenthood is delayed to later life, in which case the habitual residence of the child itself is the most central connection to the child. Habitual residence of the child, combined with the specification in subparagraph 2 of paragraph 1, is therefore a good option, which takes into account of both types of cases.

We also remain open for a solution that takes even better account of the different methods of establishing parenthood, such as legal presumptions, voluntary acknowledgement and court proceedings.

Paragraph 2

In most cases, it is the best option for all parties concerned that the court or the administrative body may apply their own law. Paragraph 2 seems to be an attempt to achieve this goal with regard to third states. If we have interpreted its purpose correctly, it is particularly aimed to address the sensitive issue of international surrogacy taking place outside the EU area, but involving intended parents who are EU nationals. Without a specific provision such as paragraph 2, the applicable law would be determined, by reason of Art. 17.1, subparagraph 2, by the person giving birth in a third state. If the aim of the paragraph is to address international surrogacy arrangements, it is not evident from the text of the paragraph. Without such qualification, it would be applied to all cases, where applicable law is the law of a third state. Although Finland is in favour of the application of the law of the forum in general, we are currently uncertain whether paragraph 2 would go too far, if it is not clearly directed to surrogacy arrangements.

Paragraph 3

According to the UN Convention on the Rights of the Child (Art. 7), the child has a right to know his (both) parents. Therefore, Finland supports the overall aim of paragraph 3, which is to ensure that two parents can be established to the child. However, the provisions on applicable law cannot include many parallel alternatives or be unclear. After the child has been born, the matter of parenthood is not a matter of an agreement or of a choice. Following the same line, there should not be an element of choice in the determination of applicable law. We would therefore suggest that there is a clear cascade of alternatives, where one alternative follows the other only, if it cannot provide the child with both parents.

Paragraph 3 also does not take into account the situation that the application of *lex fori* by paragraph 2 would result into the establishment of only one parent. This should be corrected.

Proposed Article 17 a

We are pleased to get a clarification by way of Article 17a that contestation of parenthood has also been taken into consideration. However, we are not certain that a separate article is required for this. If there is a separate Article, it should include all the same elements as establishment of parenthood, including the possibility to contest parenthood established in situations referred to in Article 17.3. Further thought and discussions are also required to address the issue of whether the law applied to contestation should follow the same law that was applied to establishment of parenthood, or whether the law can change according to the changes in the habitual residence of the child.

Article 18

The application of foreign law in a different legal environment can sometimes be challenging, but the application of the procedures of a foreign legal system can sometimes be impossible. This view was

also reflected in the overall discussions of the Working Party. Therefore, Finland welcomes the suggestion of the Commission to redraft Article 18, subparagraph a, in such a way that procedural elements would no longer be included into the scope of the applicable law. To our recollection, the Commission suggested that subparagraph a) was redrafted as follows: “the procedures *conditions* to establish or contest parenthood.”

Article 19

If we have understood correctly, as the result of application of Article 19, the change in the applicable law – for example due to the child moving into another country - would not result into a change in his or her parenthood status, if it had already been established by legal presumption, acknowledgement or via court proceedings. However, as sometimes, e.g. in cases where DNA-samples have to be used for the determination and there is a delay in retrieving the samples, the process of establishing the parenthood may take a considerable amount of time. For the benefit of such time consuming cases, when the child may even move to another country during the course of the proceedings, it would be preferable to have a clear rule on the exact point in time, which is relevant to the determination of the applicable law. It would not be preferable, if the applicable law changes during the course of the process of establishing parenthood. It may be that the suitable point of time is connected, for example, to the initiation of the proceedings.

Chapter IV – Recognition (Articles 24-43)

Article 31

Paragraph 1

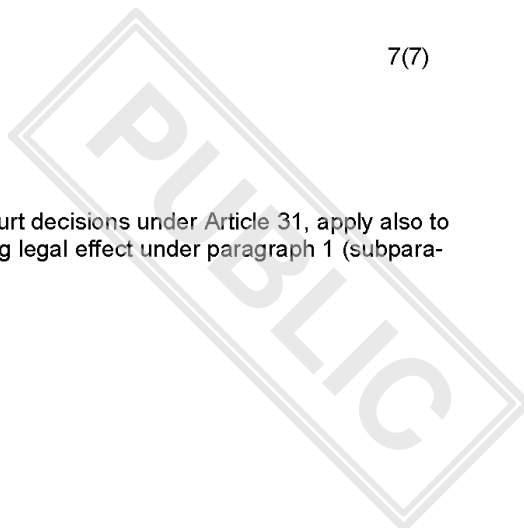
Finland supports the aim of the Regulation that parenthood established in one Member State is recognised in another Member State without a separate procedure. In order to maximise this objective, the grounds for refusal of recognition must be strictly circumscribed. However, the grounds must take into account the fact that decisions on parenthood are decisions with legal force, which means that a later decision in the same matter does not replace the earlier one, nor should it constitute grounds for refusing its recognition (see in particular, paragraph 1, subparagraphs d) and e)). The special characteristics of parenthood issues should be taken into account in other respects, too.

Paragraph 3

Finland considers it an important principle to give children the opportunity to be heard in all matters related to them. This is particularly important in situations where decisions are made on the basis of the best interests of the child, as children themselves, in consideration of their age and maturity, are the best experts to evaluate their own interests. However, as we have heard in the negotiations, matters in parenthood are mostly determined by other factors than the best interests of the child. Most matters on parenthood are determined by legal presumptions and unilateral acknowledgements of paternity by the biological father and not by the best interests of the child. In courts, most parenthood issues are determined by DNA-evidence, not by asking which of the candidates is most suitable for paternity or whether indeed any of the parties involved are motivated or generally up for the task of parenthood. Under these circumstances, the views of the child, when they do not have any relevance to the outcome of the procedure, are given an exaggerated position in the proposed Regulation. According to Article 31.3, the recognition of a court decision on parenthood may be refused, if it was given without children having been given an opportunity to express their views. Again, the situation in cases of determining biological and legal parenthood is very different to matters of determining parental responsibility or adoption and this should be appropriately reflected in the Regulation, also with regard to Article 31.3.

Article 39

The same comments, which were made with regard to court decisions under Article 31, apply also to authentic instruments establishing parenthood with binding legal effect under paragraph 1 (subparagraphs c) and d)) and paragraph 3 of Article 39.



Comments by the Swedish Delegation, 18. September 2023

With reference to the invitation by the Presidency to send written comments and drafting suggestions on the Chapters I to IV in the Commission proposal (ST 15837/22) and the proposed redrafted Articles 6 and 17 of the proposal in the discussion paper (ST 8488/23), please find below the comments by the Swedish Delegation.

General comments

The Swedish delegation supports the aim to strengthen the rights of all children and families in the EU and shares the view that there is a need for common PIL rules on parenthood. We thus welcome the proposal for an EU-regulation on international aspects of parenthood.

It is important to ensure that a regulation does not lead to discrimination based on gender or sexual orientation.

The proposal contains several complex issues that will require more detailed scrutiny and consideration, such as the possible consequences regarding surrogacy arrangements and the rights of the child to know its origin. The Swedish delegation has a general scrutiny reservation to the entire text.

Chapter I

Article 2

In our view, the second sentence of the first paragraph is more for the recitals than for the body of the text.

Article 3.1

We would value more clarity regarding whether – and in that case to what extent – adoption is included in the scope of the regulation.

In recital 25, domestic adoption is set as an example of a situation without cross-border elements that falls outside the scope of the regulation. However, there are domestic adoptions – as defined in recital 26 – *with* cross-border elements, for example stepchild adoptions when the parent giving the child up for adoption has habitual residence in another state than the child and his or her adoptive parent. Both domestic and intercountry adoptions are proceedings that require assessment and considerations of their own character. The liberal grounds for jurisdiction in the regulation appear ill-suited for decisions on adoption. It is, as an example, not clear whether the applicable law would apply also to determine the character of the adoption (i.e. full or simple adoption).

We would be in favour of excluding all aspects of *adoption, other than the recognition of parenthood resulting from an adoption*, from scope.

If certain aspects of adoption were to be included in the regulation, we would suggest clarifications in the text that the provisions of the regulation shall not in any way affect the 1993 Hague Convention on intercountry adoption.

Article 3.3

We appreciate the Commission's aim to find a balance between different views and interests with regards to parenthood from third states. However, we are not convinced it will be possible to uphold the proposed limitation regarding parenthood established in third countries in practice. Article 3.3 might not be enough for this purpose since also applicable law rules are often of relevance when matters of parenthood for children born abroad is brought before Swedish authorities. The proposal would thus benefit from more clarity regarding the interplay between this proposed provision and the principle of universality expressed in Article 16.

[An example from Swedish PIL rules: There are situations when foreign rules on parenthood are directly applicable for Swedish authorities. A person who is or has been married to the person who gave birth to the child shall be considered the child's parent if such presumption applies according to the law in the state of the child's habitual residence at birth, or, under certain conditions, in a state where the child became a citizen at birth.

Another example, parenthood in a cross-border situation where a child is born abroad may under certain conditions be established (not "re-established") in Sweden, either through a court action or via an acknowledgement of parenthood before Swedish authorities.]

Chapter II

Article 6 (rev.)

We are open to further discussions on whether all the grounds for jurisdiction are necessary and appropriate in all situations.

Article 15

This Article expresses an important principle. However, we are not convinced that such a provision is appropriate in this regulation, taking into account that adoption proceedings should, in our view, be excluded from the scope of the regulation.

Since parenthood is typically based on biological, genetic or legal circumstances where the views of the child are superfluous, we are not fully convinced whether it is in line with the child's best interest to hear him or her on the matter.

If this provision is kept in the text, we can see benefits in redrafting it in a way that leaves a wider margin of appreciation for example in cases where the hearing of the child could be regarded as superfluous. We also look forward to further discussions on whether the connecting ground for refusal in Article 31.3 is ideal.

Chapter III

Article 17 (rev.)

Firstly, we would like to share a reflection of a more principal character. There are different ways of establishing parenthood and we believe this is the case according to each Member State's national law. One might for example compare parenthood established at birth in accordance with the principle of *mater semper certa est* and the legal presumption of parenthood for the spouse on the one hand, with court proceedings on for example contestation of parenthood on the other hand. However, the proposal suggests one general, main rule for the applicable law, that is to be applied to all different ways of establishing parenthood. It's a "one size fits all". In our view, this approach provides a technical challenge. We would be open to discuss the option of instead having different provisions for these different legal roads to establishment.

Otherwise, we would generally be in favour of a clear and consistent rule on applicable law for parenthood established by operation of law at the time of birth of the child. While regarding establishment of parenthood by other means, such as acknowledgements before an administrative authority or court decisions, which typically require an administrative or legal action after the birth of the child, we can see the benefits of a rule giving priority to the law of the state where the parenthood is to have its primary effect. Normally this would coincide with the law of a state to which the child has a close connection at the time when the parenthood is to be established. Our underlying reasoning is that in our experience, the establishment after the birth of a child cannot always be done in close connection to the birth, for example if the other parent is unknown or missing. The matter of establishing or contesting parenthood can also become relevant in migration cases when documentation or other available sources to prove a parenthood for a child born abroad are missing. Thus, the connecting link between the child and the state in which the child was born might in these cases have become very weak and lost its relevance.

If Article 17 a) on contestation of parenthood should remain, it might, in view of the discussions on the discussion paper, be redrafted so that it states as a main rule that *the law applicable shall be the law under which parenthood was established according to Art. 17.*

Article 18

Our understanding is that (a) and (c) are procedural law, as the text now stands. We are hesitant to deter from the general principle of applying *lex fori* regarding procedural matters. Regarding (a), we would thus prefer "conditions" over "procedures". At present, we do not

see a similar possible redraft to (c) and would therefore suggest this subparagraph to be deleted. To apply foreign law to national procedural matters would be challenging, especially as the applicable law is also to be applied by administrative authorities.

