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NOTE

From: Presidency

To: Permanent Representatives Committee/Council

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

- Policy debate

I. BACKGROUND

1. By letter of 8 December 2022, the Commission transmitted a 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 (“the Proposal”).¹
2. The objectives of the Proposal are to ensure the continuity of parenthood in cross-border situations within the Union and, thereby, to protect all children irrespective of how they were conceived or born and irrespective of their type of family.

¹ ST 15837/22.

3. The legal basis of this Proposal is Article 81(3) of the Treaty on the Functioning of the European Union, which requires adoption by a special legislative procedure whereby the Council must act unanimously after consulting the European Parliament. As with other family law subjects, if unanimity cannot be achieved, the process of enhanced cooperation remains an option.
4. The European Parliament delivered its opinion on 14 December 2023.²
5. The European Data Protection Supervisor delivered its opinion on 26 January 2023.³
6. In application of Protocol (No 22) to the Treaties on the Position of Denmark, Denmark is not taking part in the adoption and application of the proposed Regulation.
7. Ireland has not made use of the possibility provided in Article 3 of Protocol (No 21) to the Treaties to take part in the adoption and application of the proposed Regulation. This is without prejudice to Article 4 of that Protocol, enabling Ireland to take part in the application of the proposed Regulation at any time after its adoption.
8. The Working Party on Civil Law Matters (Parenthood) began discussing the Proposal in December 2022. It soon became evident that discussion at technical level could not proceed without tackling the politically sensitive issue of surrogacy.
9. On 14 June 2024, the Belgian Presidency invited the Council of Ministers to provide guidance on how to deal with this issue. The Presidency proposed that a combination of (1) the public policy exception, (2) national overriding mandatory provisions, and (3) an alternative procedure under national law for the recognition of parenthood following surrogacy, could be a way forward to satisfy all Member States on this sensitive topic.

² [Texts adopted - Jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and creation of a European Certificate of Parenthood - Thursday, 14 December 2023 \(europa.eu\).](#)

³ ST 5770/23.

10. One delegation stated that those solutions were not sufficient, particularly concerning applicable law. Another delegation noted that national constitutional principles prohibited the recognition of parenthood based on foreign surrogacy arrangements. Two other delegations noted that, in addition to surrogacy, other issues would impede supporting the proposed Regulation. The remaining delegations expressed the hope that the solutions proposed by the Presidency would provide a basis for an acceptable compromise on this issue but noted that significant work remained to be done.
11. The Belgian Presidency concluded that the combination of the three proposed solutions could provide the way forward for almost all Member States, subject to further work at technical level.

II. STATE OF PLAY

12. Substantive progress has been achieved in Chapter I, although there are a few remaining questions regarding the articles that delineate the precise scope of this Regulation. There is now a convergence around a broad definition of court. The term ‘court’ will include not only judicial authorities but also administrative authorities that meet certain prescribed criteria and are vested by national law with competence to establish parenthood. With this broad definition of court, the Working Party was able to do away with the unclear distinction between authentic instruments with and without binding legal effects which was considered problematic in Chapter IV and V.
13. Instruments issued by administrative authorities that are defined as courts will be treated as court decisions and will be recognised as such in another Member State (Chapter IV), whereas other documents issued by other public authorities will be accepted in another Member State as authentic instruments (Chapter V). Thus, the Regulation will respect the technical differences in the legal systems of the Member States while ensuring that these differences will not impede the circulation of parenthood decisions or documents throughout the Union.

14. Some convergence has been achieved on the jurisdiction rules of Chapter II between those who support a long list of jurisdictional bases in order to facilitate access to justice and those who advocate for a short list in order to prevent forum shopping. Another disagreement is whether the list should be hierarchical or not. The latest draft of this chapter strives to find the optimal middle ground among these opposing viewpoints, but it is subject to scrutiny reservations by several delegations. More work and compromise are needed.
15. In Chapter III, which contains the rules on the applicable law, there is now a better understanding of the complexity of the questions that must be answered, as well as an agreement that the answers should depend on the time and method of establishment of parenthood. However, the answers proposed so far have not garnered sufficient support among delegations. For example, although there is agreement that the law of the state of the habitual residence of the child at the relevant time should apply in most cases, there are disagreements on which is the relevant time and on whether the application of that law should be subject to any exceptions. Even without the politically sensitive issues that are always in the background, this chapter remains the most challenging so far. It requires more work and compromise.
16. These political sensitivities also explain why the proposed rules on the public policy exception and overriding mandatory provisions, which are found in both Chapter III on applicable law and Chapter IV on judgment recognition, continue to be subject to scrutiny reservations by several delegations.
17. Of the remaining six chapters, the Working Party has discussed but has not settled on a few provisions in Chapters IV and V. Chapters VI to IX have only been examined once. In short, there is still a lot of ground to cover.

III. THE WAY FORWARD

18. Like the proverbial glass, which some people see as half full and other see as half empty, it is possible that some people may conclude that what has been achieved so far in this file amounts to sufficient progress and others that it is not nearly enough.
19. The Presidency respectfully submits that three-and-a-half years and more than thirty Working Party meetings since the Commission proposed this Regulation, the progress achieved through the combined efforts of seven Presidencies, the twenty-seven delegations, and the Commission is limited. Under these circumstances, it could be said that the glass is not even half full.
20. Whether it is to check the feasibility of reaching the required unanimity or to consider alternative solutions, if appropriate, it is important to first converge towards a more stable text that would gather the widest possible support. This proves difficult at the moment because of disagreements in the Working Party on several important issues. The Presidency is of the opinion that, two years after the only discussion at ministerial level on the file, it is time to seek ministerial guidance once again to identify more clearly the main positions and priorities and the way forward. The Working Party can continue working on the technical aspects of this file but, **if nothing changes, progress will continue to be slow**. The Presidency is confident that this discussion at ministerial level will give a clearer direction and a new impetus to discussions at Working Party level.

IV. QUESTIONS

21. Ministers are invited to express their views on the following questions:

- a) Without prejudice to the need to find adequate solutions on all aspects of the proposal, what would be the two most important elements for your delegation to be able to support a compromise text?
 - b) How can we achieve unanimity, and if that proves impossible, what is the proper way forward? How can we accelerate the pace of progress on this difficult file?
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