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#### NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
No. Cion doc.:	15837/22 + ADD1 + ADD2 + ADD3 + ADD4 + ADD5
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”).<sup>1</sup>

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<sup>1</sup> ST 15837/22.

2. The Proposal is based on 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.<sup>2</sup>
3. The European Parliament delivered its opinion on 14 December 2023.<sup>3</sup>
4. The European Data Protection Supervisor delivered its opinion on 26 January 2023.<sup>4</sup>
5. The Working Party on Civil Law Matters (Parenthood) has examined the Proposal in various meetings since the transmission of the Proposal by the Commission.
6. The question of surrogacy is one of the topics that has generated considerable discussion during Working Party meetings. It is necessary to address the question of surrogacy within the context of the Proposal in order to achieve the Proposal's objective of facilitating the recognition in a Member State of the parenthood established in another Member State concerning all children, irrespective of how they were conceived or born and irrespective of their type of family. The Presidency is of the opinion that a policy debate on this important question is timely.

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<sup>2</sup> In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.  
In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of the Parenthood Regulation and is not bound by it or subject to its application.

<sup>3</sup> [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 \(europa.eu\).](#)

<sup>4</sup> ST 5770/23.

## II. ISSUE TO BE EXAMINED BY THE COUNCIL

7. It is recalled that the Proposal does not regulate nor prohibit surrogacy itself.<sup>5</sup> In accordance with the Treaties, each Member State is competent to decide how to establish parenthood in domestic cases and to decide whether to regulate or prohibit surrogacy in its territory. Some Member States have specific laws that allow and regulate surrogacy, while other Member States either prohibit surrogacy in their national law or have no regulatory framework for this matter.
8. This means, concerning surrogacy, that the Proposal covers the harmonisation of (i) the jurisdiction rules and the applicable law rules for the establishment of parenthood following surrogacy in cross-border situations in a Member State, and (ii) the recognition or acceptance of court decisions or authentic instruments on parenthood following surrogacy established in another Member State. The recognition in a Member State of parenthood following surrogacy established in a third State falls outside the scope of the Proposal<sup>6</sup> and remains subject to national law.
9. Discussions at technical level have raised many questions concerning both the establishment and the recognition of parenthood following surrogacy in cross-border cases within the context of the Proposal.
10. Regarding the *establishment* of parenthood, one of the main questions that arose in the discussions was that there could be a situation in which the authorities of a Member State would have to apply the law of another Member State or of a third State (due to the principle of universal application of the applicable law) following a surrogacy arrangement.

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<sup>5</sup> Recital 5 of the Proposal.

<sup>6</sup> Article 3(3) of the Proposal.

11. Where parenthood following surrogacy is established in a Member State, whether by applying the law of a Member State or by applying the law of a third State, the Proposal would require all other Member States to *recognise* automatically the parenthood of the child as regards the intended parent(s).
12. The Presidency is fully aware that the examination of the Proposal is still ongoing, in particular on the jurisdiction and applicable law rules. While other aspects still need to be further discussed in depth, surrogacy is one of the most sensitive aspects of the Proposal. In that context, the Presidency believes that political guidance on this matter would help the discussions at technical level. It finally recalls the principle that “nothing is agreed until everything is agreed”.

### **III. SUGGESTED WAY FORWARD**

13. The Presidency’s main objective is to find a solution for the questions raised by surrogacy cases in the context of the Proposal that could be acceptable to all Member States.
14. It results from discussions at technical level that several solutions are needed in order to address all of the questions raised by surrogacy in the context of the Proposal. The Presidency would therefore like to present to Ministers the following solutions which have been identified at technical level as a possible way forward. These solutions are: (a) the public policy exception, (b) the application of national overriding mandatory provisions and (c) the possibility to apply an alternative procedure under national law for the recognition of parenthood following surrogacy.

(a) *Public policy exception*

15. The public policy exception is a standard provision in EU private international law. Such a provision, which is to be interpreted strictly and restrictively, would allow Member States' courts and other competent authorities, for considerations of public interest to disregard a provision of foreign law when establishing parenthood or to refuse to recognise or accept a court decision or authentic instrument when, in a given case, it would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned.
16. It results from the discussions at technical level that addressing surrogacy through the possibility for a Member State to invoke the public policy exception when applying foreign law to establish parenthood following surrogacy or when refusing to recognise a court decision or accept of an authentic instrument on parenthood following surrogacy, would be the way forward that satisfies the largest number of Member States.
17. The possibility to invoke the public policy exception, in accordance with the case law of the Court of Justice and in accordance with the Charter of Fundamental Rights of the EU, provides a neutral and flexible solution. Public policy constitutes an objective means to reflect the political positioning of each Member State towards surrogacy. Moreover, the application of the public policy exception would leave room for possible developments in the Member States' public policy over time and would reduce the risks of possible discrimination against the child.
18. In this respect, it should be borne in mind that, in cases of surrogacy, should the public policy exception be invoked to refuse the recognition of parenthood as regards the intended parent(s), the case law of the European Court of Human Rights on the recognition of parenthood through surrogacy would still apply.<sup>7</sup>

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<sup>7</sup> *Mennesson v. France* (Application no. 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014), paragraphs 99-100; Advisory Opinion P16-2018-001 (Request no. P16-2018-001, Council of Europe: European Court of Human Rights, 10 April 2019); *D.B. and Others v. Switzerland* (Applications no. 58252/15 and 58817/15, Council of Europe: European Court of Human Rights, 22 November 2022), paragraphs 84-85.

19. The public policy exception already exists in the Proposal as regards both the establishment<sup>8</sup> and the recognition of parenthood.<sup>9</sup> Some Delegations consider the current text of the Proposal as regards public policy to be sufficient but, in a spirit of compromise, could accept a specific reference to public policy for cases involving surrogacy. There are divergent views as to whether such specific reference should be introduced in the operative part or whether only specific explanations in the preamble of the Proposal would be sufficient. Further work is needed at technical level on this question.

*(b) Article on national overriding mandatory provisions*

20. It emerged from the discussions at technical level that a solution solely based on the public policy exception would not sufficiently address the concerns of all Member States. For some Member States, another solution is needed to address situations in which parenthood must be established under a foreign applicable law governing surrogacy. The introduction of an article allowing a Member State to apply overriding mandatory provisions when establishing parenthood following surrogacy is deemed useful by certain Delegations. For other Member States, the solution based on the public policy exception would suffice, although they could support the introduction of such an article, in a spirit of compromise.
21. Overriding mandatory provisions are national provisions which are regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation. In the context of the Proposal, such provisions could relate, for instance, to the principle that ‘the mother is always certain’ (*mater semper certa est*) pursuant to which the person giving birth is always considered as the mother of the child.

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<sup>8</sup> Article 22 of the Proposal.

<sup>9</sup> Article 31(1)(a) and Article 39 of the Proposal.

22. Overriding mandatory provisions apply automatically to any situation falling within their scope, irrespective of the law that would otherwise be applicable pursuant to the Proposal. An article on the application of national overriding mandatory provisions was not included in the Proposal. Similar provisions, however, are present in EU Regulations on judicial cooperation in family law matters.
23. If an article allowing the application of national overriding mandatory provisions is introduced, it should be recalled that exceptions to the application of the applicable law designated by the Proposal should be interpreted strictly and restrictively in order to remain compatible with the general objective of the Proposal. This would be clarified in a Recital.

*(c) Alternative procedure under national law for the recognition of parenthood following surrogacy*

24. While an article on national overriding mandatory provisions would help some Member States when establishing parenthood following surrogacy, some Member States would need another solution for the recognition of parenthood following surrogacy. In a spirit of compromise, Member States could support the introduction of a possibility to apply an alternative procedure under national law for the recognition of parenthood following surrogacy.
25. This solution consists in the introduction of a provision that would allow Member States, under strict conditions and in compliance with the case law of the Court of Justice and of the European Court of Human Rights, to deviate from the principle of automatic recognition set out in the Proposal by applying an alternative procedure under national law for the recognition of parenthood following surrogacy.
26. The drafting and the scope of this solution would be further discussed at technical level.

#### **IV. CONCLUSION**

27. The Presidency fully acknowledges that surrogacy regulations and laws vary significantly between Member States. Due to these various approaches, addressing this topic within the context of the Proposal poses a complex but necessary task to achieve the Commission Proposal's objective of recognising the parenthood of all children, irrespective of how they were born or conceived and irrespective of their type of family.
28. Therefore, the Presidency considers that the proposed solutions consisting of the public policy exception, the inclusion of an article on national overriding mandatory provisions and the inclusion of the possibility to apply an alternative procedure under national law for the recognition of parenthood following surrogacy leave flexibility to Member States to safeguard their own national policy on surrogacy.
29. The Presidency considers that keeping situations involving surrogacy within the scope of the Proposal, while addressing the Member States' concerns through the proposed solutions, would help to protect the rights of all children.
30. For the above reasons, the Presidency would like to obtain political guidance from Ministers.

#### **V. QUESTION**

31. Ministers are invited to express their views on whether the public policy exception, the application of national overriding mandatory provisions and the possibility to apply an alternative procedure under national law for the recognition of parenthood following surrogacy could be the way forward to deal with the establishment and the recognition of parenthood following surrogacy in the context of the Proposal.

Further discussions on how to implement these solutions should continue to be held at technical level.