

Cross-Border Legal Recognition of Parenthood in the EU ¹

ABSTRACT

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Petitions, has as its aim to analyse the Commission's proposal for a Regulation on the recognition of parenthood in the EU. The study examines the problem of non-recognition of parenthood between Member States and its causes, the current legal framework and the (partial) solutions it offers to this problem, the background of the Commission proposal, and its text. It also provides a critical assessment of the proposed Regulation and issues policy recommendations for its improvement.

This study examines the **Commission's proposal for a Regulation on the cross-border recognition of parenthood in the EU**, whose aim is to facilitate the recognition of parenthood within the EU by harmonising the private international rules of Member States with regard to the establishment and recognition of parenthood in cross-border situations.

The problem of non-recognition of parenthood in the EU arises from the existence of **different substantive family law rules** concerning parenthood in the Member States combined with the fact that each Member State has **different private international law rules for the establishment and recognition of parenthood in cross-border situations**. Member States also have **different private international law rules** with regard to the **recognition of parenthood already established abroad and, thus, some Member States will automatically recognise such parenthood, whereas others will not**.

Currently, EU law does not provide a wholesome solution to the problem of non-recognition of parenthood. In her State of the Union address in September 2020, the Commission President stated that 'if you are parent in one country, you are parent in every country' and declared that she would push for mutual recognition of family relations in the EU. Work on the proposed Regulation began soon after, in February 2021, and the proposal was adopted on 7 December 2022.

The proposed Regulation makes provision for:

- the adoption of common rules for the determination of the courts of the Member States that have **jurisdiction** in matters related to the establishment of parenthood in cross-border situations;
- the adoption of common rules for the determination of the **applicable law** to the establishment of parenthood in cross-border situations;
- a **mutual recognition** obligation of parenthood established in a Member State;
- the creation of a **European Certificate of Parenthood**, which can be issued by the Member State where parenthood was established and can be used to prove parenthood in all other Member States.

¹ Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/746632/IPOL_STU\(2023\)746632_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/746632/IPOL_STU(2023)746632_EN.pdf)



The proposed Regulation is a very positive step towards a comprehensive EU solution to the problem of non-recognition of parenthood in the EU, in situations presenting a cross-border element. It will **enhance legal certainty and will save time and costs, both for families** whose situation presents a cross-border element but also for the judicial and administrative **authorities** of Member States involved in the procedures for the establishment and recognition of parenthood. Legal certainty and predictability will be further enhanced through the introduction of the European Certificate of Parenthood. The proposed Regulation has at its core the aim of **protecting the rights of the child** and this is reflected, inter alia, in the fact that it is an inclusive, child-focused, instrument which covers the situation – and thus protects the rights – of *every child* whose parenthood has been established in a Member State. If it comes into force it will solve many of the problems and difficulties encountered by families in a cross-border context.

Nonetheless, there are a number of **gaps in protection** that will persist even if the proposed Regulation will enter into force: the instrument will **not apply to Denmark** and it is **not clear if Ireland will exercise its opt-in** to be bound by it; it has a **limited territorial scope** in that it excludes all situations where parenthood is established in a third country; it includes **no safeguards for protecting the child's right to know its origins**; and it includes a **public policy exception** which may be abused by the Member States in order to avoid their obligations under the instrument. Nonetheless, the **biggest challenge** will be to ensure that the proposal will, indeed, come into force: obtaining the **unanimous approval** of the proposal by all Member States in the Council – as is required by the legal basis chosen (Article 81(3) TFEU) – is bound to be an uphill struggle and, in the end, may prove impossible.

Accordingly, as a response to the above gaps and challenges, the study makes the following **recommendations** regarding the proposal:

- (1) the **Commission should issue guidelines** on the proposed Regulation's application and enforcement. These guidelines should be issued in simple language in order to make the instrument more accessible to families and generally to the public with no special legal knowledge.
- (2) national judges, civil servants, and legal practitioners should receive **training** in order to be able to interpret and apply the proposed Regulation uniformly.
- (3) whenever there will be doubt as regards the interpretation of a provision of the proposed Regulation, national judges should use the **preliminary ruling mechanism to obtain an authoritative interpretation of it from the CJEU**, which will be uniformly applicable in all Member States.
- (4) **EU institutions should not amend the instrument in order to exclude surrogate-born children from its scope.** This is for two reasons. First, given that the aim of the proposed Regulation is to protect and respect the fundamental rights and best interests of children, it would be difficult to justify the exclusion from its protection of surrogate-born children, which **would amount to discrimination based on birth contrary to Article 21 of the Charter**. Second, as ECHR signatory States, all **EU Member States are already required by ECtHR case-law to recognise**, in certain circumstances, **the parenthood of surrogate-born children established in another country**.
- (5) The Commission and the Member States need to work together in order to persuade **Ireland to opt-in** to the adoption and application of the measure and to accept to be bound by it.
- (6) A **provision should be added** to the proposed Regulation that will state that in all procedures concerning the establishment and recognition of parenthood which fall within the scope of application of this instrument, the **right of the child to know its origins** should, as far as possible, be **protected**.
- (7) The Commission as guardian of the Treaties must ensure that the **public policy exception** laid down in the proposed Regulation is **interpreted restrictively** and that the **Member States** are allowed to **rely on it exceptionally** and only when there is a genuine danger to public policy and when this is proportionate and does not amount to a violation of fundamental rights and does not contradict the

best interests of the child. The **above requirements should also be noted by the Commission in the guidelines** that it should issue as per Recommendation 1.

- (8) **The Commission should consider extending the territorial scope of application of the proposed Regulation to situations where parenthood was established in a third State**, for two reasons. First, given that the aim of the proposed Regulation is to protect and respect the fundamental rights and best interests of children, it will be difficult to justify the exclusion from its protection of *some* children, namely, children who happened to have been born in a third State where their parenthood was established, as **such an exclusion amounts to discrimination based on birth contrary to Article 21 of the Charter**. Second, as ECHR signatory States, all **EU Member States are already required by Article 8 ECHR as interpreted by the ECtHR in its case-law to recognise the parenthood of (surrogate-born and adopted) children as this was established in any country (including in a third country)**.
- (9) Due to the requirement of unanimity in the Council laid down in the legal basis chosen by the Commission, EU institutions need to work hard in **convincing all Member States to approve in the Council the proposal (at least) as it is**.

In addition to the above recommendations, the following recommendations are made in order to enhance the cross-border recognition of parenthood under the **current legal framework**:

- (10) If **Bulgaria** continues to fail to comply with the CJEU judgment in *V.M.A.*, **the Commission should take enforcement action** against that Member State under Article 258 TFEU. The Commission should also examine whether the **other 26 Member States** comply with the judgment and take enforcement action against any that do not.
- (11) The Commission should issue a **Communication** clarifying that in situations that fall within the scope of EU law, all Member States must **ensure the continuity, in law, of the filiation** of a child – whether this was established in a Member State or a third country – at least in all the circumstances where, according to ECtHR case-law, this is required under the **ECHR**.

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External Author:

Alina TRYFONIDOU, Professor of European Law, Neapolis University Pafos (Cyprus)

Research Administrator responsible: Ottavio MARZOCCHI

Editorial assistant: Sybille PECSTEEN de BUYTSWERVE

Contact: poldep-citizens@europarl.europa.eu

This document is available on the internet at: www.europarl.europa.eu/supporting-analyses

PE 746.632

IP/C/PETI/IC/2022-092

Print ISBN 978-92-848-0686-7 | doi: 10.2861/236968 | QA-03-23-197-EN-C

PDF ISBN 978-92-848-0699-7 | doi: 10.2861/885505 | QA-03-23-197-EN-N