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PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

The Proposed EU Regulation on Parenthood: A critical Overview of the Rules on Jurisdiction

*Ilaria Queirolo**

1. The background and aims of the Commission's proposal

The Commission's 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[1] is one of the most recent pieces of the EU's jigsaw in the construction of an EU judicial space in which the free movement of persons, access to justice and the full respect of fundamental rights are ensured[2]. More in detail, and for the first time, the proposal seeks to foster certainty of law and the foreseeability of conflict of laws rules *lato sensu* in parenthood matters. Aims which are methodologically coherent and consistent both with other EU law instruments of private international law and with international treaties for the protection of human rights that, in the field of free movement of personal and family *status*, dwell on delicate questions which can hardly be dealt with in a purely 'neutral' way[3]. The Commission's proposal follows, and aims to implement, the political statement by Ursula von der Leyen, arguing that '*If you are parent in a country, you are parent in every country*'[4].

The proposal, dated 7 December 2022, has to be contextualised within a legal framework devoted to the relationships between parents and children that is becoming increasingly complex and structured[5]. The coordina-

* *Full professor of International Law, University of Genoa (IT).*

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1 COM(2022) 695 def (hereinafter also "the proposal"), on which see *ex multis* S. ARMELLINI, B. BAREL, *La proposta di regolamento europeo in materia di filiazione e il problema del riconoscimento dello* status filiationis *in situazioni transfrontaliere*, in *Papers di diritto europeo*, 2023, p. 1; M.C. BARUFFI, *La proposta di Regolamento UE sulla filiazione: un superamento dei diritti derivanti dalla libera circolazione*, in *Famiglia e diritto*, 2023, p. 535; L. VÁLKOVÁ, *The Commission Proposal for a Regulation on the Recognition of Parenthood and Other Legislative Trends Affecting Legal Parenthood*, in *Rivista di diritto internazionale privato e processuale*, 2022, p. 854; S. DE VIDO, *Il riconoscimento delle decisioni in materia di filiazione nella proposta di Regolamento del Consiglio del 2022: oltre Pancharevo verso un ordine pubblico "rafforzato" dell'Unione europea*, in *Eurojus*, 2023, p. 35; E.M. MAGRONE, *Un nuovo tassello verso il mutuo riconoscimento delle situazioni familiari: la proposta di regolamento UE in materia di filiazione*, in *Studi sull'integrazione europea*, 2023, p. 101; A. TRYFONIDOU, *Cross-Border Legal Recognition of Parenthood in the EU*, Brussels, 2023, available online.

2 See the Explanatory memorandum, point 1, Context of the proposal, reasons for and objectives of the proposal.

3 See F. MARONGIU BUONAIUTI, *La continuità internazionale delle situazioni giuridiche e la tutela dei diritti umani di natura sostanziale: strumenti e limiti*, in *Diritti umani e diritto internazionale*, 2016, p. 49; F. SALERNO, *The Identity and Continuity of Personal Status in Contemporary Private International Law*, in *Recueil des Cours*, 395, 2019; G. BIAGIONI, *International Surrogacy and International Parentage: Hopes for a Global Solution*, in P. BEAUMONT, J. HOLLIDAY, *A Guide to Global Private International Law*, Oxford, 2022, p. 567; G. ROSSOLILLO, *Article 10 della risoluzione dell'*Institut de droit international *su* Human Rights and Private International Law: *la continuità degli status come garanzia del rispetto della vita privata e familiare*, in *Diritti umani e diritto internazionale*, 2022, p. 531.

4 Explanatory memorandum, point 1, Context of the proposal, reasons for and objectives of the proposal.

5 On which, for further references, see L. CARPANETO, F. PESCE, I. QUEIROLO, *La famiglia nell'azione della comunità e dell'Unione europea: la progressiva "erosione" della sovranità statale*, in L. CARPANETO, F. PESCE, I. QUEIROLO, *La "famiglia in movimento" nello spazio europeo di libertà e giustizia*, Torino, 2019, p. 24 ff.

tion of relevant legal sources on parenthood matters can be addressed under a dual focal lens: a first vertical one, as national rules have a residual scope of application in respect of international treaties and EU law (adopted in its field of competences of cross-border judicial cooperation), and a second horizontal one, as private international law rules concern both procedural aspects as well as connecting factors and applicable law. Additionally, both the influence of human rights law and EU fundamental freedoms enshrined in the treaties, namely the free movement of persons, become a tool to read, interpret and apply the future rules on parenthood[6]. What emerges is a multi-level and heterogeneous panorama, in which the practitioner is requested to disentangle and coordinate a multitude of rules and methods.

The Commission's proposal on parenthood has been adopted on the basis of Article 81(3) TFEU, requiring for private international law acts to be adopted in family matters, a special legislative procedure whereby unanimity has to be reached within the Council[7]. The fact remains, of course, that the Union has no material competences in family law, which evidently 'puts' the current proposal on parenthood at the 'crossroads', or at the 'borders', of the Union's competences and very near to those exclusively reserved for Member States. It is thus not surprising that the negative preliminary position adopted by some Member States may lead to the proposal being adopted under the rules of enhanced cooperation as the necessary unanimity within the Council may not be reached[8]. In this sense, it has to be remembered that the Union, while acting, has to respect fundamental rights, and the different legal traditions of Member States[9]. Also, judicial cooperation in civil matters is one of those fields where the Union and the Member State share their competences, meaning that EU intervention is subject to respect for the principle of subsidiarity (and that of proportionality). As is known, according to the principle of subsidiarity, the Union is only allowed to intervene if, and to the extent that, the goals of a proposed action may not be unilaterally attained by Member States in an adequate and satisfactory manner. For its own part, the principle of proportionality requires the Union to pursue its goals with the least possible 'interference' in terms both of the content of the proposal and of the nature of the act proposed. With respect to the proposed regulation on parenthood, Italy[10] and France[11] have already expressed a position in accordance to Protocol 2 of the Lisbon Treaty lamenting a violation of the principles of subsidiarity and proportionality[12].

2. Scope of application of the proposed regulation

The territorial scope of application of the proposed regulation as it stands in the version published in December 2022 should be the traditional one for regulations in the field of judicial cooperation in civil matters, *i.e.* all the Member States with Denmark and Ireland having a special *status* under Protocols 21 and 22. As is known, Denmark has never been party to such regulations, rather pursuing the path of international treaties with the Union for specific acts of interests, whilst to date Ireland has not expressed its interest in *opting in*[13]. Evidently, the geographical scope of application of the proposed instrument will much depend on whether this will, in the end, be applied under the general rules or under an enhanced cooperation mechanism, which will eventually 'erode' the number of 'Member States' for the purposes of the proposed instrument.

Always concerning the geographical scope of application, it should be noted that proposed Article 1 and proposed Article 3(3) make it clear that the instrument only covers the establishment of parenthood in a *Member State*. This means that the proposed instrument is not intended to be applicable if the recognition of a *status filiationis* is created in a third State. The same holds true for the 'free movement' of decisions: only decisions and instruments from Member States will fall within the scope of application of the special rules. To somewhat 'counterbalance' this, the proposed regulation does not introduce a factual or legal requirement of the parties, such as their nationality[14] or residence, as a

6 On the relevance of human rights in private international law, see P. KINSCH, *Recognition in the Forum of a Status Acquired Abroad - Private International Law and European Human Rights Law*, in K. BOELE-WOELKI, T. EINHORN, D. GIRSBERGER, S. SYMEONIDES (eds), *Convergence and Divergence in Private International Law - Liber Amicorum Kurt Siehr*, The Hague, 2010, p. 232; F. SALERNO, *Il vincolo al rispetto dei diritti dell'uomo nel sistema delle fonti del diritto internazionale privato*, in *Diritti umani e diritto internazionale*, 2014, p. 549; R. BARATTA, *Article 1 e 2 della risoluzione dell'Institut de Droit International su Human Rights and Private International Law: i diritti umani quali regole ordinanti del diritto internazionale privato*, in *Diritti umani e diritto internazionale*, 2022, p. 261.

7 Even though the Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure.

8 See Article 20 TEU and Article 326 TFEU ff. In the scholarship, see A. CANNONE, *Le cooperazioni rafforzate. Contributo allo studio dell'integrazione differenziata*, Bari, 2005.

9 Article 67(1) TFEU.

10 Senato della Repubblica Italiana, Commissione politiche europee, risoluzione del 14 marzo 2023, available *online*.

11 Sénat de la République Française, Résolution Européenne Portant Avis Motivé, n° 84 (2022-2023), 22 mars 2023, available *online*.

12 Commenting both resolutions, G. BIAGIONI, *Malintesi e sottintesi rispetto alla proposta di regolamento UE in tema di filiazione*, in *SIDIBlog*, 3 April 2023.

13 L. CARPANETO, *Filiazione, circolazione degli status e diritto internazionale privato: la nuova proposta di regolamento UE e orizzonti di sviluppo*, in *Aldricus Blog*, 9 January 2023.

14 See Proposal, cit., Explanatory memorandum, point 1 ('*The proposal applies irrespective of the nationality of children and of the nationality of their parents. However, in line with existing Union instruments on civil matters (including family law) and commercial matters, the proposal only requires the recognition or acceptance of documents establishing or proving*

necessary element for the application of the regulation, albeit these remain heads of jurisdiction.

From the point of view of its material scope of application, the proposed regulation, introducing private international law rules for cross-border situations, is intended to be applicable to the establishment or termination of parenthood[15]. More in particular, the proposal seeks to introduce common rules on jurisdiction, applicable law, the recognition of decisions, and authentic instruments with binding effects (whilst having additional and separate rules for the 'acceptance' of authentic instruments having only evidentiary value), as well as a European certificate on parenthood.

Proposed Article 3 introduces a number of exclusions from the material scope of application of the proposed regulation; despite some topics theoretically being 'parenthood matters', the regulation is not intended to apply to matters such as the existence, validity or recognition of a marriage or of a relationship deemed to have comparable effects; parental responsibility matters; legal capacity; emancipation; intercountry adoption; or maintenance obligations. Many of these exclusions are necessary to pursue the coordination of the proposed regulation with other instruments of EU law which are already applicable. Similarly, as stated in proposed recital 27, the instrument excludes its applicability to intercountry (rather than 'international', as can be read in the Italian version[16]) adoptions characterised by the different residences of the parties, as these are already governed by the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, to which all Member States are party. The coordination of such different instruments is supposed to ultimately fill some of the current gaps in the field. This means, that the proposed regulation is intended to apply to cross-border adoptions if the cross-border element is something other than the residence of the child and the parents being in different States. For these adoptions, rules on jurisdiction, applicable law and free movement of decisions will be applicable.

Ratione personarum, the proposed regulation is intended to be applicable if a party wishes to establish or terminate a parental relationship with 'persons' – regardless of whether this person is a minor or not[17] – without any further requirement of nationality or habitual residence.

3. The rules on jurisdiction

Consistently with the other instruments of judicial cooperation in civil and commercial matters, the proposed regulation on parenthood also contains direct rules on jurisdiction[18] which are contained in Chapter II and which are to some extent coherent with methods and approaches already adopted in family and succession matters. Such instruments have thus 'inspired' a number of rules which, in the context of the proposed regulation on parenthood, do not present any significant novelty. This is the case for the proposed rules on examination as to jurisdiction and admissibility (proposed Articles 12, and 13), on *lis alibi pendens* (proposed Article 14), and the moment when a court is deemed to be 'seised' (proposed Article 11). Even proposed Article 15 largely corresponds to Article 21 Brussels II *ter* on the right of the child to express their views[19]. Brussels II *ter*[20] has also been a normative model for the proposed rules on incidental questions: proposed Article 10 provides that if parenthood matters arise as an incidental question within a given proceedings, 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 proposed regulation. However in such a case, the effects of the decision on parenthood will be limited to the proceedings for which that determination was made. In other words, if parenthood is addressed as an incidental question, the decision will not have *erga omnes* effects.

parenthood issued in a Member State, while the recognition or acceptance of documents establishing or proving parenthood issued in a third State will continue to be governed by national law').

15 See proposed regulation, Article 1. Proposed Article 4(3) provides that the term '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*'.

16 The Italian version of the proposed regulation speaks of 'international adoption (Article 3(2)(e)), and the French speaks of '*adoption internationale*', whereas the English version speaks of 'intercountry' adoption. The Italian version of recital 27 clarifies that an adoption is 'international' (*sic*!) when the child and the adoptive parent or parents have their habitual residence in different States.

17 Proposed Article 4 defines a 'child' as '*a person of any age whose parenthood is to be established, recognised or proved*'. The corresponding Italian version speaks of '*figlio*', translatable as 'son', a definition that, albeit gender-neutral intended, does not necessarily presuppose a given age of the person. Despite the choice of including minors and full-age within the definition of 'child', as parental contestations, for example, may be presented at any time in life, the driving *ratio* of the instrument seem to be that of protecting 'children'-minors and their bests interests.

18 The possibility, and the consequences, of adopting only indirect rules on jurisdiction for the purposes of recognition of decisions has been addressed by the EU Expert group on the recognition of parenthood between Member States during their 2nd and 3rd meeting held, respectively, on 30 June 2021 and 15 September 2021. In both occasions, as emerges from the minutes available online, the Expert group expressed a more favourable position on direct rules on jurisdiction.

19 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 (recast), in OJ L 178, 2.7.2019, p. 1, on which see U. MAGNUS, P. MANKOWSKI (eds), *Brussels II ter Regulation*, Köln, 2023, and C. GONZÁLEZ BEILFUSS, L. CARPANETO, T. KRUGER, I. PRETELLI, M. ŽUPAN, *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters: A Commentary on Regulation 2019/1111 (Brussels IIb)*, Cheltenham, 2023.

20 Cf, Brussels II *ter* Regulation, Article 16.

Proposed Article 6 enshrines the general rules on jurisdiction. The provision, as is drafted, only allocates jurisdiction between Member States and does not translate into rules on local venue as well. This stems quite clearly from its wording, which writes that "*jurisdiction shall lie with the courts of the Member State*". This means that the proper venue within Member States is still to be determined according to national rules of civil procedure.

The provision at hand contains a number of alternative heads of jurisdiction, as the disjunction 'or' shows, which are imperative, thus not derogable, and objective in nature, whose respect has to be verified by the court *ex officio*. All the different heads of jurisdiction are informed by the principle of proximity[21], which is traditionally understood in EU law as a way to ensure justice. However, to ensure justice, and access to justice, some alternatives to the 'closest court', that of habitual residence of the child, are also provided, thus striking a balance between competing interests. According to proposed Article 6, proceedings may either be started before the courts of the Member State: a) of the habitual residence of the child at the time the court is seised; b) of the nationality of the child at the time the court is seised; c) of the habitual residence of the respondent at the time the court is seised; d) of the habitual residence of either parent at the time the court is seised; e) of the nationality of either parent at the time the court is seised, or f) of the place of birth of the child.

It is also relevant to outline that, even though proposed Article 6 speaks of 'courts of the Member State', other competent authorities under domestic law may be considered as 'courts' for the purposes of proposed Article 6. On the one hand, proposed Article 4 defines 'courts' as '*an authority in a Member State that exercises judicial functions in matters of parenthood*', and proposed Article 5 provides that the proposed regulation is not intended to affect the competence of the authorities of the Member States to deal with parenthood matters.

The choice of the Commission to strongly rely on the habitual residence of the different parties as a head of jurisdiction is perfectly consistent with the general approach followed in private international law in family and succession matters[22]. *Mutatis mutandis*, the interpretation of such an element may take advantage of the case law already delivered by the Court of Justice of the European Union, which has highlighted, in particular with regard to the habitual residence of minors – which here becomes relevant as being the first head of jurisdiction under the proposal –, its factual and mobile character[23] that, according to proposed recital 39, is intended to give content to the more general principle of proximity[24]. The other heads of jurisdiction, alternative in nature to the first and without any hierarchical nature, are intended to ensure access of justice for children in a Member State.

Nonetheless, it must be observed that the alternative nature of the different heads of jurisdiction, which essentially offer the relevant plaintiff the possibility to choose the better placed court, paves the way for possible *forum shopping* or other 'strategies' not necessarily compatible with the aims of ensuring access to justice[25]. Despite the negative risks traditionally associated with *forum shopping* being possibly reduced by the contextual uniformization of conflict of laws rules[26], it may be ap-

21 Proposed regulation, recital 39.

22 See R. LAMONT, *Habitual Residence and Brussels II-bis: Developing Concepts for European Private International Law*, in *Journal of Private International Law*, 2007, p. 261; C. CAMPIGLIO, *Il foro della residenza abituale del coniuge nel regolamento (CE) n° 2201/2003: note a margine delle prime pronunce italiane*, in *Cuadernos de Derecho Transnacional*, 2010, p. 242.; E. DI NAPOLI, *"A place called home": il principio di territorialità e la localizzazione dei rapporti familiari nel diritto internazionale privato post-moderno*, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 899; J. RE, *Where Did They Live? Habitual Residence in the Succession Regulation*, in *Rivista di diritto internazionale privato e processuale*, 2018, p. 978; T. KRUGER, *Finding Habitual Residence*, in I. VIARENGO, F.C. VILLATA (eds), *Planning the Future of Cross-Border Families. A Path Through Coordination*, Oxford, 2020, p. 117; C. FOSSATI, *La residenza abituale nei regolamenti europei di diritto internazionale privato della famiglia alla luce della giurisprudenza della Corte di giustizia*, in *Rivista di diritto internazionale privato e processuale*, 2022, p. 283; G. BIAGIONI, *Giurisdizione in materia matrimoniale, residenza abituale dei coniugi e immunità degli agenti diplomatici*, in *Rivista di diritto internazionale*, 2023, p. 195.

23 Proposed recital 40 writes that '*In accordance with the case law of the Court of Justice, the child's place of habitual residence must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in the territory of a Member State, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that it reflects some degree of integration of the child into a social and family environment, which is the place which, in practice, is the centre of that child's life. Such factors include the duration, regularity, conditions and reasons for the child's stay on the territory of the Member State concerned and the child's nationality, with the relevant factors varying according to the age of the child concerned. They also include the place and conditions of the child's attendance at school, and the family and social relationships of the child in the Member State. The intention of the parents to settle with the child in a given Member State may also be taken into account where that intention is manifested by tangible steps, such as the purchase or lease of a residence in the Member State concerned. By contrast, the nationality of the person giving birth or the previous residence of this person in the Member State of the court seised is not relevant, whereas the fact that the child was born in that Member State and holds the nationality of that Member State is insufficient*'. In the case law, see ECJ 2 April 2009, *A*, case C-523/07; ECJ 9 October, 2014, *C*, case C-376/14 PPU; ECJ 8 June 2017, *OL v. PQ*, case C-111/17 PPU; ECJ 28 June 2018, *HR*, case C-512/17; ECJ 17 October 2018, *UD v. XB*, case C-393/18 PPU; ECJ 25 November 2021, *IB v. FA*, case C-289/20; ECJ 1 August 2022, *MPA v. LCDNMT*, case C-501/20.

24 Proposed recital 39 ('*To safeguard the child's interests, jurisdiction should be determined according to the criterion of proximity. Consequently, where possible jurisdiction should lie with the Member State of the habitual residence of the child. However, in order to facilitate the child's access to justice in a Member State, alternative jurisdiction should also be granted to the Member State of the nationality of the child, to the Member State of the habitual residence of the respondent (for example, the person in respect of whom the child claims parenthood), to the Member State of the habitual residence of any of the parents, to the Member State of the nationality of any of the parents or to the Member State of the child's birth*').

25 See already C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The European Commission's Parenthood Proposal: Comments of the Marburg Group*, in *IPRax*, 2023, p. 425, and L. VALKOVA, *The Commission Proposal for a Regulation on the Recognition of Parenthood*, cit., p. 888.

26 See proposed Articles 16 ff., on which see the contribution by F. PESCE, in this *journal*.

propriate for the EU lawgiver to reconsider the current choice and expressly address the issue.

The wide array of competent courts under the proposed rules, that is somewhat balancing the excluded role to party autonomy in forum selection, becomes even more significant if letters d) and e) of proposed Article 6 are taken into account. These establish the jurisdiction of the Member State of nationality *and* of habitual residence of either of the parents. An extensive interpretation of the term 'parent' contributed in further extending the number of possible competent Member States. According to proposed recital 24, '*The term 'parent' in this Regulation should be understood, as applicable, as referring to the legal parent, the intended parent, the person who claims to be a parent or the person in respect of whom the child claims parenthood*'. Moreover, always considering possible litigation tactics, a possible *forum* of habitual residence of nationality of one party is, in practical terms, open to every person who seeks to start proceedings. In other words, it is possible for one parent living in a given Member State to start proceedings before the courts of the Member State of the other parent even if this other parent is not a 'defendant' in technical terms – as a case for termination of parenthood may be[27]. To some extent, this 'proliferation' of fora may become of practical use if the proposed regulation is adopted under the enhanced cooperation procedure: if a parent is a national and habitually resident in a Member State that is not bound by the regulation, this party may still make use of it if one of the other parties is a national of – or habitually resident in – a Member State bound by the instrument (albeit the decision will have to be recognized in their non-bound Member State under domestic law).

The last head of jurisdiction provided for in proposed Article 6, that of the Member State of birth of the child, seems to be exorbitant in nature. Such an element does not necessarily express a significant connection of the courts of that Member State with the case if either party no longer has any relationship in and with that Member State. To avoid the heads of jurisdiction being exorbitant in nature, scholars have proposed introducing a time limit to the provision, so as to ensure that only proceedings started within a given period after birth may make use of this forum[28].

Should it not be possible to establish jurisdiction under proposed Article 6, jurisdiction is for the courts of the Member State where the child is physically present (proposed Article 7). Again, the rule is moulded on a similar provision on parental responsibility contained in the Brussels II regime)[29]. A provision which will be of particular relevance for minor refugees even if, as mentioned, the proposed regulation is intended to apply to children regardless of their age[30].

If no court has jurisdiction under proposed Articles 6 and 7, jurisdiction is established in each Member State according to domestic law (Article 8). Despite the possibility of determining jurisdiction according to domestic law, should no court in the Member States be competent, Article 9 of the proposal provides for a *forum necessitatis*. If proceedings cannot reasonably be brought or conducted or would be impossible in a third State, courts of a Member State which have a close connection to the case may, on an exceptional basis, rule on parenthood matters.

The coexistence of residual rules on jurisdiction and of a *forum necessitatis* represents an unusual choice for the proposed regulation on parenthood, which finds no parallel in other instruments of EU private international law[31]. If the regulation employs a rule on residual jurisdiction, the possibility of establishing jurisdiction under domestic exorbitant heads of jurisdiction strongly reduces the possibility of having recourse to a *forum necessitatis*. In this sense, such a last rule may be perceived to be excessive, albeit justifiable under the principle of access to justice.

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27 See C. Budzikiewicz, K. Duden, A. Dutta, T. Helms, C. Mayer, *The European Commission's Parenthood Proposal*, cit., p. 426.

28 C. Budzikiewicz, K. Duden, A. Dutta, T. Helms, C. Mayer, *The European Commission's Parenthood Proposal*, cit., p. 427.

29 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in OJ L 338, 23.12.2003, p. 1, Article 13, and Brussels II *ter*, cit., Article 11.

30 On the topic, see O. Lopes Pegna, *Minori migranti e tutela dello status filiationis*, in *EUROJUS*, 2020, p. 296.

31 L. Valkova, *The Commission Proposal for a Regulation on the Recognition of Parenthood*, cit., p. 890.