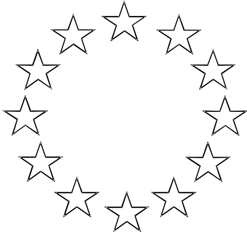

The European Legal Forum

Forum iuris communis Europae

1-2024
pp. 6 – 10
24th Year January-February 2024

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

The Law Applicable to Parenthood in the European Commission's Regulation Proposal

*Francesco Pesce**

1. The law applicable to parenthood between the *status quo* and the new EU Regulation's proposal

Chapter III of the proposed regulation is entirely devoted to conflict-of-laws in parenthood matters.

This is, as it is well known, a profile in respect of which there is no uniform private international law discipline to date, neither at the European Union level nor at the level of international conventions, so that the (only) necessary reference, in the legal system of each Member State, is represented by the relevant domestic conflict-of-law rules.

So, this is the normative context in which, should it be adopted[1], the new EU regulation proposed by the Commission[2] should intervene, through the introduction of a uniform conflict-of-laws discipline, fully setting aside domestic law rules[3].

In the general framework of the regulatory intervention envisaged by the European Union, departing from the approach adopted by previous EU regulations on private international law, the proposal on parenthood sets aside the traditional search for a *tendential* coincidence between *forum* and *ius*[4], opening the way to a possible differentiation between the national jurisdiction and the law governing the status[5]. This choice is based on the need to privilege, as far as possible, the establishment of the *status filii*[6]: having - predictably - ruled

* *Associate Professor in International Law at the University of Genoa.*

This contribution presents part of the research undertaken under the PRIN 2022 project "Fluidity in family structures - International and EU law challenges on parentage matters" (prot. n. 2022FR5NNJ), financed by the Ministry of University and Research of the Italian Republic and by the European Union - Next Generation EU.

Opinions are of the Author only.

1 Many uncertainties are connected with the future adoption of the regulation, with respect to which, if the so-called *enhanced cooperation* procedure will not be followed (a possibility that has already occurred, limited to instruments dedicated to civil judicial cooperation in family matters, for the approval of Regulation 1259/2010 - so-called *Rome III* - as well as 1103/2016 and 1104/2016), the special legislative procedure prescribed by Art. 81(3) for provisions impacting on family law must be activated, which requires a unanimous decision of the Council.

2 It should be recalled that the reference is to the proposal for a Council Regulation on jurisdiction, applicable law and the recognition of decisions and acceptance of authentic instruments in the matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final, published by the Commission on 7 December 2022.

3 This is the necessary corollary of the choice, made by the regulation in perfect line with the private international law instruments previously approved by the Union, to provide for its conflict-of-law rules to have a universal applicability (Art. 16 of the proposal).

4 Particularly illustrative, from this point of view, is the discipline of Regulation 4/2009 on maintenance obligations, where the creditor's habitual residence plays the dual role of a ground of jurisdiction (alternative, but undoubtedly the most widely used), under Article 3(b), and of a main connecting factor for the purposes of determining the applicable law, pursuant to Article 15 (*rectius*, to Article 3(1) of the Hague Protocol of 2007, to which the Regulation makes a specific *renvoi*).

5 See D. DANIELI, La proposta di regolamento UE sul riconoscimento della filiazione tra Stati membri: alla ricerca di un equilibrio tra esigenze di armonizzazione e divergenze nazionali, in SIDIBlog, 23 February 2023, § 2, www.sidiblog.org.

6 However, it must be borne in mind that the total or partial withdrawal of the parenthood and subsequent actions for disavowal of the parent-child legal relationship should also fall within the objective scope of the regulation: in the face of the generic reference to the concept of 'establishment' in Article 1, and the equivocal defining rule intended to clarify its scope under Article 4(3) (where the concept is extended to cases of establishment following an action for disavowal of the filiation, without specifying

out the role of party autonomy and the consequent *optio legis* in such a delicate matter (where submission to the will of the parties of the identification of the law governing the child's personal status was understandably considered inappropriate), the regulation opts for a cascade system of connecting factors in the context of which the first one coming to the fore is the unprecedented criterion of the *habitual residence of the person giving birth at the time of the birth*, whether or not it is the State of birth.

By this choice, the Commission aims in particular to ensure that it is relatively easy, in as many cases as possible, to determine the law applicable to the relationship[7]: a reference to the habitual residence of the newborn child, on the contrary, could have led to a great deal of uncertainty (we could think, more specifically, of the determination of that residence – a question, moreover, already addressed by the Court of Justice by way of preliminary rulings[8])[9].

In the (only, and indeed very rare) case in which it is not possible to determine the habitual residence of the mother at the time of the birth[10], the criterion of the child's State of birth subsequently comes into play.

It is thus evident that the connecting factor used as the main criterion in Article 17 of the draft regulation is completely absent from the (albeit broad) list of alternative grounds on which jurisdiction may be founded under Article 6[11]. It follows that, more often than not, the above-mentioned coincidence between the forum called upon to hear the case, on the one hand, and the law governing it, on the other, will not only not be pursued but will prove impossible to achieve: only if the main connecting factor fails to satisfy the conditions for its applicability will the courts of the child's State of birth, if seised, be entitled to apply the *lex fori* by virtue of the subsequent criterion set out in paragraph 1 of Article 17.

However, the conflict-of-laws rule under consideration is further characterised by the presence of an additional and subsidiary connecting factor that, while openly pursuing the traditional material objective represented by the *favor filiationis* in respect of both parents[12], also assumes, by reason of the renewed reference to the law of the state of birth, a particular 'favourable' value in relation to the establishment of the double filiation bond in the case of surrogacy.

Pursuant to para. 2 of the same Article, in fact,

"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."

At first sight, this safeguard clause, with the declared intent of favouring the establishment of the bond in respect of both members of the parental couple[13], introduces in a subsidiary way a *further (alternative) competition of connecting factors*, to be taken into consideration in the event that the (main or, alternatively, subsequent) criterion valued under para. 1 does not permit the establishment of parenthood vis-à-vis the second parent: in such a case, the law of either parent's nationality or that of the child's State of birth (which permits the establishment of the second family relationship) may apply without distinction.

In the context of the provision, the second element worthy of particular attention is represented by the fact that the connecting factor of the *child's state of birth* has once again been emphasised: through this route, the Commission aims to foster the establishment of the double parenthood bond also in those cases - first and foremost that of recourse to surrogacy - in which the national law of the (possibly not biological, but exclusively intentional) parent would not allow parenthood to be recognised as originally constituted at the time of birth, it being possible, if anything, to request and obtain at a later date the establishment of the family relationship between the second parent and the child[14]. Therefore, this objective is pursued by reference to the law of the same State in which the surrogacy is likely to have been performed and carried out: indeed, it is rea-

anything about an action for disavowal *ex se*), recital 33 in the preamble to the regulation clearly states that "[w]here relevant, this Regulation should also apply to the extinction or termination of parenthood".

[7] It has, however, been arguably observed that the criterion of the habitual residence of the woman who gives birth at the time of the birth only has a *raison d'être* in relation to the parenthood bond to be established at the time of the birth itself or within a short period of time after it: cf. on this point MARBURG GROUP, *Comments on the European 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*, 10 May 2023, https://www.marburg-group.de/, p. 34-35 (now also in *IPRax*, 2023, p. 425 ss.).

[8] This question had already been addressed by the Court of Justice, in connection with the application of Regulation 2201/2003 (the so-called "Brussels *IIa*"), in the well-known *Mercredi* case (CJEU, 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829).

[9] See recital No. 51 preamble to the articles of the proposal.

[10] Recital 51 itself refers for instance to the case of a "refugee or internationally displaced mother".

[11] On this point, see the observations of I. QUEIROLO in this *journal, p.1 ff.*

[12] The so-called *material considerations method* inspired, for example, the wording of Article 33 of the Italian PIL Act No. 218 of 1995, while in more recent years it seems to have been rather replaced by the *favor veritatis* principle (F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale. Vol. II. Statuto personale e diritti reali*, Milano, 2023, 6th ed., p. 226 ff.).

[13] On the equivocal wording of the rule, see MARBURG GROUP, *Comments on the European Commission's Proposal for a Council Regulation*, cit. p. 32-34.

[14] In particular through the *adoption* of the spouse's/partner's child.

sonable to assume that the legal system in which that procreative technique is admitted and regulated also provides for the possibility of founding a parenthood relationship between the child and (both) intended parents.

2. General issues of private international law in the proposal's conflict-of-laws rules

With a clause that does not arouse any surprise – nor does it deserve specific in-depth analysis, since it is nearly traditional in the private international law discipline of the European Union – Article 16 of the proposal clarifies the '*universal*' character of the conflict-of-laws rules at stake[15]. In this respect, it is necessary to bear in mind the corollary that necessarily follows from such an approach: since the law to which parenthood is to be subject under the regulation also applies if it belongs to a non-EU legal system, there will be no residual scope, in the Member States in respect of which the instrument is going to be binding, for the application of the domestic rules on the law governing parenthood.

Similarly, the choice to exclude the *renvoi*, i.e. the relevance of the private international law of the system whose law is made applicable to the parentage pursuant to the regulation (Article 21), is well established in the EU conflict-of-law, and is also found in the proposal.

Finally, the provision in Article 23 on States with more than one legal system does not depart as well from the established tradition of EU law instruments providing for uniform conflict-of-laws rules. In particular, consideration is given to the possible presence of sub-State territorial units, each with its own rules on parentage, within the country whose law is made applicable by the regulation: in that case, it is the domestic conflict-of-laws that determine the relevant territorial unit whose law is called upon to apply. Only in the absence of such national provisions – and it being understood that there is in any case no obligation to apply the regulation's rules to internal conflicts[16] – the references to the State of habitual residence of the woman giving birth, or to the State of the birth of the child, are to be understood as referring to the relevant and respective internal territorial unit.

3. The *favor* for the establishment of parenthood in the provisions regarding the scope of the applicable law, its modification, and the validity of the unilateral act intended to have legal effect on the establishment of parenthood

In the context of the provision of the proposal circumscribing the scope of the applicable law, in line with what is clarified in recital no. 33[17], it is specified that the law designated as applicable to the establishment of the parentage shall govern (i) the procedures for access to the establishment itself, but also for *contesting* the parentage; (ii) the binding legal effects and/or evidentiary effect of authentic instruments; (iii) the *legal standing* of persons in proceedings as well as the *time limits* for establishing or contesting parenthood (Art. 18)[18]. The latter aspect falling within the scope of the law governing the relationship has to be emphasised: the determination of the number of persons entitled to claim or to contest in court the parentage, as well as the (possible) time limit within which the action is admitted, are, in fact, decisive aspects of the proceedings on which the regulation intervenes.

On the contrary, the two rules devoted to the change of applicable law (Article 19) and the formal validity of the unilateral act of *establishment* of parentage (Article 20) are united by a markedly favourable attitude towards the *establishment of* parentage, made evident by the circumstance that both expressly avoid taking into consideration the hypothesis of *contestation of* parentage.

While, on the one hand, it is provided that any "subsequent change of applicable law shall not affect the parenthood already established" in a Member State according to the regulation[19] – thus admitting, on the *con-*

---

[15] Since, according to the protocols annexed to the Treaties, Denmark, as is known, is not an addressee of the rules adopted by the EU in the context of the 'area of freedom, security and justice'; whereas Ireland, on the contrary, enjoys the power to assess whether to submit itself, on a case-by-case basis, to the application of each individual regulatory instrument by exercising the option of so-called '*opting-in/opting-out*', it remains to be seen whether the proposal will give rise to a Council regulation (to be approved unanimously, in view of the undoubted impact on family relations) with effect for all 25 remaining countries or whether, on the other hand, given the (probable) impossibility of achieving unanimous consent, the path of establishing an enhanced cooperation, which has already been taken in the past, will be tried once again (see *amplius* footnote 1).

[16] Thus, expressly, Art. 23, para. 2, lit. *c*.

[17] The wording of Article 1 and of the defining provision in Article 4(3) does not appear to be entirely consistent with it, as there is no mention of the hypothesis of total or partial objection/revocation of the filiation as such: while Article 1 refers only to "the establishment of the filiation", Article 4 states that this concept must also include an establishment "following an action to contest a filiation that has already been established". Thus, the case of a challenge/revocation that does not imply a related finding as to the establishment of a new filiation bond seems to be excluded.

[18] At the same time, we might consider that "Article 18 on the scope of the applicable law is not exhaustive and, as is customary for such rules in other EU instruments, other matters could be included in scope without being explicitly mentioned" (EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW – GEDIP, *Observations on the Proposal for a Council Regulation in matters of Parenthood*, 2023, para. 12, https://gedip-egpil.eu/wp-content/uploads/2023/06/Observations-on-the-Proposal-for-a-Council-Regulation-in-matters-of-Parenthood.pdf).

[19] "To ensure legal certainty and the continuity of parenthood (...)", states recital 54 on this point. This may be the case, for instance, with regard to the parenthood established, with respect to the second parent, under the law of the State of nationality of one of the parents (according to Art. 17(2)): if one of the two parties changes his or her nationality, thereby introducing a possible reference to a different law from the one on the basis of which the lien was established, that circumstance cannot affect any subsequent challenge to it.

trary, that a change in the applicable law permitting for the first time the recognition of a previously unestablished parentage bond may instead be considered – on the other hand, it provides that a "unilateral legal act intended to have legal effect on the establishment of parenthood" must be considered valid if it satisfies the formal requirements of either the law applicable to the establishment of the parentage, or the law of the State in which the person doing the act has the habitual residence or, finally, the law of the State in which the act was done. The cumulation of criteria, aimed at maximising the chances that the act will be considered valid, is a clear sign of the *favour* for the establishment of filiation, obviously in the interest of the new born. As proof of this, it is further stated that such a unilateral act may be proved by any evidence admitted by the *lex fori* or by any of the laws referred to above, under which that act is formally valid, provided that the use of the evidence is not excluded before the court seized in accordance with the relevant procedural law (Art. 20(2)).

4. A new guise for the public policy exception

Following a well-established and long-standing tradition, the proposal admits that the application of the law designated by its conflict-of-law rules may be excluded where the consequences would be *manifestly incompatible* with the public policy of the forum (Article 22(2)); on the contrary, there is no space for the relief of the overriding mandatory provisions of the forum as a prior limitation to the operation of the uniform conflict-of-law rules[20].

If, therefore, the presence and functioning – i.e. the fact that it can be activated in a wholly exceptional manner and the fact that it determines a *concrete* examination of the consequences that would result from the application of the foreign law – of the public policy clause do not arouse particular astonishment, what is altogether peculiar, and unprecedented in the EU private international law[21] is the further limitation to the operation of public policy provided for by Article 22(2), according to which

"[p]aragraph 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."

At first sight, such a clarification might seem pleonastic, in consideration of the fact that the protection of fundamental rights, in general, and the Charter, in particular, represent an intrinsic and by now "taken for granted" limit, both to the legislative discretion of the European institutions and in the application of European Union law. But, at a second glance, one may speculate that the express reference to a principle of very wide scope and of a certain importance in matters of family status, such as that of non-discrimination, may have the consequence of rendering impossible in practice, or at least extremely rare, a legitimate invocation of the public policy exception as a limitation to the cross-border recognition of the *status filii*[22]. This could happen at least in the event that the "counter-limit" at stake is to be understood as capable of preventing any form of discrimination between minors linked to their conception and birth (thus precluding the possibility of raising the public policy barrier in the face of foreign laws that legitimise the establishment of parenthood downstream of recourse to forms of procreation that are not universally admitted, because they are sometimes considered to be in conflict with fundamental human values[23]), as should be concluded from the literal wording of Article 21 itself, which expressly includes "birth" among the grounds for unlawful discrimination that are listed by way of example[24].

The latter is, perhaps, the most critical and controversial profile of the proposal under consideration (togeth-

[20] See 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. 893; MARBURG GROUP, Comments on the European Commission's Proposal for a Council Regulation, cit., p. 45-46.

[21] The only precedents *prima facie* comparable to the proposal's choice, in fact, are the 2016 'twin' regulations on matrimonial property regimes (Regulation No. 1103) and the property consequences of registered partnerships (Regulation No. 1104), in the context of which there is a provision entitled 'Fundamental Rights' (Art. 38), which, however, only affects the operation of the grounds for non-recognition of foreign decisions. On the reasons why this provision cannot be compared to what we are dealing with, see O. FERACI, *I 'controimiti' al funzionamento dell'ordine pubblico nella proposta di regolamento europeo in materia di filiazione*, in *Rivista di diritto internazionale*, 2023, p. 788.

[22] On this point, please refer to the extensive considerations made by O. FERACI, *I 'controimiti' al funzionamento dell'ordine pubblico*, cit., p. 785 ff., who defines the one in question as a *heterodox and direct*, as well as *supranational and reinforced*, 'counterlimit' to the functioning of the public policy clause. See also M.C. BARUFFI, *La proposta di Regolamento UE sulla filiazione: un superamento dei diritti derivanti dalla libera circolazione*, in *Famiglia e diritto*, 2023, p. 544-545. Please also consider that the European Group of Private International Law, recognising a pivotal role to the single reference to the non-discrimination rule (although it seems to be introduced in a merely illustrative way), has stigmatised that it seems to be «too narrow, since fundamental rights must be considered as a whole and the various rights guaranteed in the Charter must be balanced» (EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW – GEDIP, *Observations on the Proposal for a Council Regulation in matters of Parenthood*, cit., para. 15).

[23] The reference is, of course, to surrogacy.

[24] Cf. also O. FERACI, *I 'controimiti' al funzionamento dell'ordine pubblico*, cit., p. 786 ff., for the identification of some systematic arguments in favour of the opposite restrictive view of the counterlimit. On this subject, see also 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. 119-124, who considers that the rule in question should be recognised as having the potential to promote, in the Italian legal system, the recognition of a full 'right to shared parenthood' in favour of same-sex couples, through the possibility of access to the "full" adoption.

er with the closely related profile of the relevance of public policy as a limitation to the recognition of foreign judgments), in relation to which the greatest uncertainties may arise as to the position of national legal systems and the consequent fate of the proposal.

Proof of the (unbridgeable?) distance between the institutions of the Union, that are independent of the governments of the Member States (the Commission, as promoter of the proposal, and the Parliament, called upon to participate in the legislative procedure, albeit merely in a consultative capacity), and the domestic political orientations, on the other hand, can be well represented by the opinions on the proposal that have emerged in the European Parliament and within some Parliaments, including the Italian one.

On the one hand the European Policy Commission (*Commissione politiche europee*) of the Italian Senate adopted, on 14 March 2023, a resolution[25] in which it referred to the possible incompatibility of the proposal with the principle of subsidiarity, highlighting in particular the risks of undue interference in the discretion of national legislators that could result from the creation of the European certificate of parenthood and the extreme restriction of the role that public policy can assume, specially, as a limitation on the recognition of foreign decisions[26] on the establishment of the parenthood relationship[27]. At the same time, other national legislators (first and foremost the French Senate[28]) have subsequently expressed themselves in more or less dubious terms as to the tenor of the provisions contained in the proposal[29]. On the other hand, the *draft report* on the proposal, published on 15 June 2023 by the EP Committee on Legal Affairs[30], while expressly taking into consideration the positions already expressed by the Italian Senate and the French Senate[31], states in the diametrically opposite direction, and that is evidenced by the invitation, addressed to the Commission, to amend the draft regulation *eliminating any reference to public policy* as a limit to the applicability of foreign law or to the recognition of decisions on parenthood.

The road towards a compromise solution seems, therefore, uphill.

---

25 https://www.senato.it/japp/bgt/showdoc/19/SommComm/0/1372280/index.html?part=doc_dc-allegato_a.

26 For a first comment on the Italian Senate resolution see G. Biagioni, *Malintesi e sottintesi rispetto alla proposta di regolamento UE in tema di filiazione*, in *SIDIBlog*, 3 April 2023, www.sidiblog.org.

27 For a first comment on the Italian Senate resolution see G. Biagioni, *Malintesi e sottintesi rispetto alla proposta di regolamento UE in tema di filiazione*, in *SIDIBlog*, 3 April 2023, www.sidiblog.org.

28 Resolution No. 84 of 22 March 2023, https://www.senat.fr/leg/tas22-084.html.

29 See https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0402(CNS)&l=en.

30 https://www.europarl.europa.eu/doceo/document/JURI-PR-749919_EN.html.

31 "- having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the French Senate and the Italian Senate, asserting that the draft legislative act does not comply with the principle of subsidiarity".