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The European Certificate of Parenthood in the European Commission's Regulation Proposal: on the 'Legacy' of the European Certificate of Succession and Open Issues

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1. Introduction

In developing a Proposal for a Regulation on the recognition of parenthood between Member States[1], the European Commission has presented a complete instrument, which addresses all the main issues of private international law on the topic. Alongside the classic provisions dedicated to the distribution of jurisdiction, the applicable law and the recognition and enforcement of decisions and authentic instruments, the Proposal also provides for the introduction of a European Certificate of Parenthood (hereinafter, also "ECP"): the institute is modelled on the European Certificate of Succession ("ECS") provided by Regulation (EU) No. 650/2012[2], making some necessary adaptations in light of the different context and functions of the new instrument[3].

The ECP intends to contribute to the objective of facilitating the circulation of parent-child relationships in the European Union: however, as will be seen, it is an optional tool, which does not replace certificates and similar documents issued by national authorities in the Member States. As already observed by the legal literature, persons who are interested in obtaining recognition of a parent-child relationship in another Member State will be able to choose whether to request an ECP (where legitimized) or whether to present a judicial decision or an authentic instrument that complies with the requirements for circulation in the European Judicial Space[4]. Furthermore, some of the rules governing the ECP do not seem to have adequately considered the differences that exist between succession matters and family matters, at least as regards the interests and needs underlying the recognition of parenthood.

The introduction of a ECP is just one of the elements of the Proposal on which some Member States have expressed a certain reluctance. Overall, the legal and political obstacles surrounding the adoption of the Regulation are evident: there are doubts about the capacity of the Proposal to reach the necessary unanimity within the Council of the European Union, as provided for by Article 81(3) TFEU. In this context, there are the posi-

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1 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, COM(2022) 695 final. For an all-comprehensive analysis to the proposal by the legal literature, please refer to 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 ff.; 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 ff.; C. BUDZIKIEWICZ, K. DÜDEN, A. DUTTA, T. HELMS, C. MAYER, *The European Commission's Parenthood Proposal: Comments of the Marburg Group*, in *IPRax*, 2023, p. 425 ff.; 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 ff.; 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 ff.

2 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter, also the "Succession Regulation").

3 See the accompanying report to the proposal COM(2022) 695 final, p. 18.

4 L. VÁLKOVÁ, The Commission Proposal for a Regulation on the Recognition of Parenthood, cit., p. 895.

tions recently expressed by the Italian[5] and the French[6] Parliaments, both adopted in March 2023 pursuant to Protocol No. 2 to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality[7]. Both resolutions – whose positions must be carefully contextualized – evoked the possible opposition of the Proposal to the principle of subsidiarity and also expressed their opinion on the ECP, albeit from different profiles.

2. The European Certificate of Parenthood: connections and disconnections with the European Certificate of Succession

In introducing a European Certificate of Parenthood, the European Commission was evidently inspired by the aforementioned European Certificate of Succession[8]. This emerges clearly from the text of the Proposal, whose Chapter VI contains various provisions which recall, in their formulation, those contained in Regulation (EU) no. 650/2012 and dedicated to the ECS[9]. This connection between the two instruments would make it possible to take advantage of some solutions reached in the context of the ECS, also enshrined in the case law of the European Court of Justice, who may be useful in the resolution of interpretative issues concerning the ECP[10]. However, this hermeneutic operation may not be straightforward, in the light of the disconnections existing between the institutes under consideration.

Indeed, it should be noted that there are substantial differences in the objectives underlying the ECP and the ECS, which are naturally related to the subject matter of reference and the corresponding legal interests involved.

In particular, the ECS intends to facilitate the administration of *mortis causa* successions having transnational elements: it has the aim of allowing the heir, the legatee, the estate administrator or the executor of the will to exercise the rights and/or powers deriving from a specific succession. By presenting the Certificate to public authorities or private entities/individuals, the subjects listed above can assert their rights and/or powers abroad, in order to dispose of the hereditary assets[11]. For this purpose, the ECS is intended to be used in a Member State other than the issuing one[12]. Therefore, the instrument overcomes the difficulties deriving from the marked differences existing in substantial succession laws of the Member States, with particular reference to the proof of the quality of heir, of legatee or, in general, of the ownership of a qualified position in relation to a specific succession[13]. In fact, the differences in succession law imply that the recognition of a right obtained in one country may not automatically produce its effects in another country: all the instruments provided for by national laws have profoundly heterogeneous prerequisites, contents and effects, as equally heterogeneous are

5 Senato della Repubblica Italiana, Commissione politiche europee, resolution of 14 March 2023.

6 Sénat de la République Française, Résolution Européenne Portant Avis Motivé, n° 84 (2022-2023), 22 March 2023.

7 Both documents have been commented by G. BIAGIONI, Malintesi e sottintesi rispetto alla proposta di regolamento UE in tema di filiazione, in SIDIBlog, 3 April 2023.

8 On the European Certificate of Succession, see R. BARONE, Il certificato successorio europeo, in Notariato, 2013, p. 427 ff.; C. BENANTI, Il certificato successorio europeo: ragioni, disciplina e conseguenze della sua applicazione nell'ordinamento italiano – parte prima, in Nuova giurisprudenza civile commentata, 2014, p. 1 ff.; ID., Il certificato successorio europeo: ragioni, disciplina e conseguenze della sua applicazione nell'ordinamento italiano – parte seconda, ivi, p. 85 ff.; C.M. BIANCA, Certificato successorio europeo: il Notaio quale autorità di rilascio, in Vita notarile, 2015, p. 1 ff.; C.M. BIANCA, Certificato successorio europeo: il Notaio quale autorità di rilascio, in Vita notarile, 2015, p. 1 ff.; D. DAMASCELLI, Brevi note sull'efficacia probatoria del certificato successorio europeo riguardante la successione di un soggetto coniugato o legato da unione non matrimoniale, in Rivista di diritto internazionale privato e processuale, 2017, p. 67 ff.; A. DUTTA, The European Certificate of Succession: A New European Instrument between Procedural and Substantive Law, in International Journal of Procedural Law, 2015, p. 38 ff.; A. FOTSCHL, The Relationship of the European Certificate of Succession to National Certificates, in European Review of Private Law, 2010, p. 1259 ff.; A.M. GAROFALO, Il certificato successorio: un modello di successo?, in Rivista di diritto civile, 2021, p. 1170 ff.; E. GOOSSENS, A Model for the Use of the European Certificate of Succession for Property Registration, in European Review of Private Law, 2017, p. 523 ff.; F. MAOLI, Il certificato successorio europeo tra regolamento (UE) n. 650/2012 e diritto interno, Napoli, 2021; S. MARINO, L'uso di formulari standard nella cooperazione giudiziaria civile: il caso del certificato successorio europeo, in Cuadernos de derecho transnacional, 2020, p. 627 ff.; S. PATTI, Il certificato successorio europeo nell'ordinamento italiano, in Familia, 2016, p. 9 ff.; I. RIVA, Certificato successorio europeo: tutele e vicende acquisitive, Naples, 2017.

9 Article 62 ff. of Regulation (EU) No. 650/2012.

10 On the case law of the European Court of Justice on the Succession Regulation, see S. MARINO, Il regolamento (UE) 650/2012 sulle successioni internazionali nella prima giurisprudenza della Corte di Giustizia dell'Unione Europea, in Rivista di diritto internazionale, 2022, p. 119 ff.

11 There was a debate regarding the competence of the European Union to introduce a European Certificate of Succession on the legal basis of art. 81 TFEU: the legal literature raised some doubts on the inclusion of an instrument of this kind within the scope of the actions listed in Article 81(2) TFEU. To date, the prevailing theory is that Article 81 TFEU, in listing the measures that can be adopted to guarantee the proper functioning of the internal market, does not exhaustively establish the content of such measures, but only contemplates the objectives that must be pursued by the European lawmaker. It follows that the latter is not limited to the adoption of European conflict rules, but it is free in the choice of the instruments, to the extent that they respect the objectives established by the Treaties. On the topic A. DUTTA, *The European Certificate of Succession: A New European Instrument between Procedural and Substantive Law*, in *Int. Jour. Proc. Law*, 2015, p. 43 ff.; P. FRANZINA, *L'inserimento di norme materiali in misure legislative dell'Unione nel campo del diritto internazionale privato*, in *Rivista di diritto internazionale*, 2018, p. 559 ff.; E. GOOSSENS, *The Impact of the European Certificate of Succession on National Law: A Trojan Horse or Much Ado about Nothing?*, in J.M. SCHERPE, E. BARGELLI (a cura di), *The Interaction Between Family Law, Succession Law and Private International Law: Adapting to Change*, Cambridge, 2021, p. 157 ff.

12 Article 62(1) of the Regulation (EU) No. 650/2012.

13 See M. DI FABIO, *Le successioni nel diritto internazionale comparato*, in P. RESCIGNO (ed), *Trattato breve delle successioni e delle donazioni*, II, Padua, 2010, p. 797 ff.; L. GARB, J. WOOD (eds), International Succession, Oxford, 2015; M. REVILLARD, *L'introduction d'un certificat international d'héritier, cit.*, p. 523.

the ways in which such instruments are recognized and become operational abroad[14]. The result is a considerable burden in the management of successions, in terms of economic resources and time, as well as the possible creation of situations of legal uncertainty. Hence the need, felt by the European lawmaker, to introduce an ECS with uniform characteristics and effects in all Member States bound by Regulation (EU) no. 650/2012[15], in order to ensure the effective and rapid implementation of hereditary devolution procedures[16].

The European Certificate of Parenthood, for its part, is intended to be used by children or their legal representatives – the only subjects entitled to request its issuance – in a Member State other than the one in which it was issued[17]. Its purpose is essentially to facilitate the recognition of the parent-child relationship, being also foreseen that the ECP should constitute a suitable document for the registration of the parenthood in the relevant public register of a Member State[18]. The ECP is also optional in nature and is not intended to replace documents used for similar purposes and possibly provided for by national law[19]. It must be issued in the Member State where parenthood has been established[20] and whose courts hold jurisdiction according to the criteria established by the Proposal[21]. The issuing authority, designated by each Member State, may be a court (as defined in Article 4(4) of the Proposal) or "another authority which, under national law, has competence to deal with parenthood matters"[22]: it is therefore possible that some Member States decide to attribute this function to an administrative authority, such as the civil registrar, or to the notary.

The issuing authority must verify all information, declarations, documents and evidence received and will have to carry out the "necessary investigations" to this end, where this is permitted or required by its national law.

Indeed, it should be noted that the proposed Regulation seems to impose rather strict requirements for filing a request for an ECP. In particular, Article 49(3) lists all the information that shall be contained in the application, "to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified". Among this information, which should be supported by the relevant documents, there are "the elements on which the applicant founds parenthood, appending the original or a copy of the document(s) establishing parenthood with binding legal effect or providing evidence of the parenthood" (lit. e)), as well as "the contact details of the Member State's court that established parenthood, of the competent authority that issued an authentic instrument establishing parenthood with binding legal effect, or of the competent authority that issued an authentic instrument with no binding legal effect in the Member State of origin but with evidentiary effects in that Member State" (lit. f)).

Similar requirements are not to be found in the corresponding provisions of the Succession Regulation[23]: in particular, the applicant to an ECS shall only provide any element on which to establish the claimed rights to succession property, or the right to execute the will or to administer the estate of the deceased. This could mean that, as a general assumption, parenthood is uncontested only where it has been ascertained by a judicial decision or by an authentic instrument with binding legal effects or evidentiary effects. Therefore, one might wonder whether the issuing authority may refuse to issue an ECP in absence of this strong supporting evidence: on the contrary, the ECP will only bring proof of a status already recorded in a national document, thus failing to provide a real added value[24].

14 P. LAGARDE, Les principes de base du nouveau règlement européen sur les successions, in Rev. crit. dr. int. priv., 2012, p. 691 ff.; M. KOHLER, M. BUSCHBAUM, La "reconnaissance" des actes authentiques prevue pour les successions transfrontalières, in Rev. crit. dr. int. priv., 2010, p. 629 ff.; M. REVILLARD, L'introduction d'un certificat international d'héritier a la Pratique du Droit International Privé des Successions, in DEUTSCHES NOTARINSTITUT, Les successions internationals dans l'UE: perspectives pour une harmonization, Würzburg, 2004, p. 523 ff.; MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, 2010, p. 118, available online at http://www.europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf.

15 With the clarification that the Regulation (EU) No. 650/2012 binds all EU Member States with the exception of Denmark and Ireland, which must be considered "third states" with respect to the scope of application of the Regulation itself. On the topic F. Marongiu Buonaiuti, *The EU Succession Regulation and Third country Courts*, in *Jour. Priv. Int'L Law*, 2016, p. 545 ff.

16 Recital n. 67 of the Regulation (EU) No. 650/2012.

17 Articles 46(1), 47 and 49(1), of Proposal COM(2022) 695 final.

18 Article 53(3) of the Proposal COM(2022) 695 final, on which see *infra*, in this paragraph.

19 Article 46(2) and (3) of the Proposal COM(2022) 695 final.

20 In this regard, it is necessary to point out a discrepancy between the English version of the Proposal and the Italian translation. Article 48(1) of the Proposal establishes that "The Certificate shall be issued in the Member State in which parenthood was *established* and whose courts, as defined in Article 4(4), have jurisdiction under Article 6, Article 7 or Article 9 [emphasis added]". The Italian translation, for its part, reads: "The certificate is issued in the Member State in which the filiation was *established* […][emphasis added]".

21 Article 48(1) of the Proposal COM(2022) 695 final.

22 Article 48(2) of the Proposal COM(2022) 695 final.

23 See Article 65 of the Regulation (EU) No. 650/2012 ("Application for a Certificate").

24 This is the position adopted by GEDIP in its 33rd meeting held in Milan in September 2023: in its *Observations on the Proposal for a Council Regulation in matters of Parenthood*, adopted on 6 December 2023, available online at https://gedip-egpil.eu/, para. 18 ff., the Group considered that "[A]ccording to the proposal, the ECP serves as proof of the status of parenthood; it is established on the basis of a court decision, an authentic instrument with binding legal effect or an authentic instrument with no binding legal

Once the existence of the parent-child relationship has been established, on the basis of the applicable law recalled by the conflict of laws rules of the (future) Regulation, the ECP must be issued without undue delay. The only cases in which the issuing authority may refuse to issue the Certificate are indicated in Article 51 of the Proposal: they concern the hypothesis in which *i)* the elements to be certified are subject to dispute; or *ii)* the Certificate does not comply with a judicial decision regarding the same elements.

The decisions of the issuing authority can only be contested by the applicant, or by his or her legal representative[25]: hence, the issuance of the certificate may not be contested by other subjects, such as a public authority or one of the parents. On the other hand, at the request of anyone who demonstrates a legitimate interest, or *ex officio* (if provided for by national law), the issuing authority may modify or revoke the ECP where it has been ascertained some of its elements are not accurate[26]. In general, all decisions relating to the rectification, modification, revocation or suspension of the ECP can be contested by anyone holding a legitimate interest[27].

3. The validity of the European Certificate of Parenthood and its effects

In the light of the different objectives underlying the two institutes – the exercise of succession rights, on the one hand, and the recognition of parenthood, on the other hand – there is an important element of distinction between the ECP and the ECS. While the copies of the ECS (released to the applicant by the issuing authority) produce their effects for six months only, the validity of the copies of the ECP is not limited in time. The reason lies within the stability that should characterize parenthood, once established[28]. The unlimited validity of the ECP contributes to strengthening the usefulness of the instrument with respect to the real needs, of a basically permanent nature, which underlie the recognition of parent-child relationships across EU Member States[29].

On the other hand, the perpetual validity is strongly counterbalanced by the other characteristics of the instrument. Most of those traits are inherited from the ECS, but important distinctions should be made with reference to others. In addition to the aspects described above, it is necessary to focus on the effects of the ECP, which introduces a legal presumption of truthfulness regarding its content[30].

Firstly, with a formulation almost identical to that contained in Article 69 of the Regulation (EU) no. 650/2012, "The Certificate shall be presumed to demonstrate accurately elements which have been established under the law applicable to the establishment of parenthood. The person mentioned in the Certificate as the child of a particular parent or parents shall be presumed to have the status mentioned in the Certificate"[31]. In all likelihood, this constitutes a relative presumption[32], which may be contested through the modalities indicated by Article 55 of the Proposal, or by activating the redress procedure provided by Article 56. Furthermore, the existence of an ECP should not prevent the establishment of a judicial proceeding concerning the same circumstances[33]. In contrast to the discipline of the ECS, there are no provisions dedicated to the protection of third parties who, in good faith, have relied on the information certified in the document.

Secondly, the ECP constitutes a valid document for the recording of parenthood in the relevant register of a Member State[34]. This provision is similar to Article 69(5) of Regulation (EU) No. 650/2012, also in clarifying that the requirements for registration (such as the legal conditions, methods, necessary documentation)

effect. The ECP thus confirms an existing status, already established and registered in a national document issued by an authority of a Member State".

25 Article 56(1) of the Proposal COM(2022) 695 final.

26 Article 55(2) of the Proposal COM(2022) 695 final.

27 Article 56(2) of the Proposal COM(2022) 695 final.

28 As expressly stated in the accompanying report to the Proposal COM(2022) 695 final, p. 18.

29 This aspect was the subject of discussion within the work of the group of experts appointed by the European Commission to better evaluate the scope of a new legislative instrument on the topic of recognition of parenthood between EU Member States. See the minutes of the seventh group meeting of 22 February 2022, available online at *https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=42655&fromExpertGroups= 3765*.

30 These are the elements indicated in the Article 52 of the Proposal, according to which: "The Certificate shall contain the following information, as applicable: (a) the name, address and contact details of the Member State's issuing authority; (b) if different, the name, address and contact details of the Member State's court that established parenthood, of the competent authority that issued an authentic instrument establishing parenthood with binding legal effect, or of the competent authority that issued an authentic instrument with no binding legal effect in the Member State of origin but with evidentiary effects in that Member State; (c) the reference number of the file; (d) the date and place of issue; (e) the place and Member State where the parenthood of the child is registered; (f) details concerning the applicant: surname(s) (if applicable, surname(s) at birth), given name(s), sex, date and place of birth, nationality (if known), identification number (if applicable), address; (g) if applicable, details concerning the legal representative of the applicant: surname(s) (if applicable, surname(s) at birth), given name(s), address and representative capacity; (h) details concerning each parent: surname(s) (if applicable, surname(s) at birth), given name(s), date and place of birth, nationality, identification number (if applicable), address; (i) the elements on the basis of which the issuing authority considers itself competent to issue the Certificate; (j) the law applicable to the establishment of parenthood and the elements on the basis of which that law has been determined; (k) a statement informing Union citizens and their family members that the Certificate does not affect the rights that a child derives from Union law and that, for the exercise of such rights, proof of the parent-child relationship can be presented by any means; (l) signature and/or stamp of the issuing authority".

31 Article 53 of the Proposal COM(2022) 695 final.

32 C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The European Commission's Parenthood Proposal*, cit., p. 434.

33 On the point see *infra*, at paragraph 4.

34 Article 53(3) of the Proposal COM(2022) 695 final.

are governed by the law of the Member State in which the register is kept[35]. To overcome some uncertainties that have characterized the succession context[36], Recital No. 31 of the Proposal specifies that the ECP will be able to replace the national documents on parenthood with regard to the information contained therein, which will benefit from the legal presumption of accuracy. The use of a "functional equivalence" criterion is therefore explicit, and it requires an assessment of substantial compatibility between the documents requested by national law and the ECP[37]. Therefore, the interested party may only be obliged to present additional documents, but this evaluation shall be carried out on a case-by-case basis.

National law will also regulate the effects of the registration of parenthood in the civil status register, starting from its declarative or constitutive nature. As in succession matters, the *rationale* underlying this division of competences lies within the safeguarding of national prerogatives in the keeping and management of public registers, as well as in the need for a certain degree of uniformity of the legal effects stemming from the recording[38].

In this respect, it is worth emphasizing a peculiarity, which could be a source of internal contradictions within the future Regulation. The European Certificate of Parenthood will be able to constitute a suitable document for updating the civil status registers of the requested Member State (which will, in principle, be different from the Member State in which the Certificate has been issued). However, the Proposal does not seem to reserve a similar capacity for judicial decisions, at least the ones that are not *res judicata*: in fact, only the latter holds the capacity to serve as a basis for updating civil status records[39]. According to a first interpretation, an ECP may have stronger effects than a decision, even when the latter is still subject to appeal. This could induce interested parties to apply for an ECP precisely on the basis of the court decision, in order to circumvent the aforementioned limitation. On the other hand, it is equally true that the issuing authority could refuse to issue the ECP when the issue at hand is still potentially subject to judicial review, considering that the elements to be certified are "in dispute" within the meaning of Article 51 of the Proposal. In a situation of this kind, a cautious approach would certainly be to wait for the decision to become final before issuing the ECP.

4. The European Certificate of Parenthood and the (in)applicability of public policy

The positions recently expressed by the Italian *Senato* and the French *Sénat*, respectively on 14 March 2023 and 22 March 2023, were adopted pursuant to Protocol no. 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Lisbon[40]. Both resolutions are expressive of the reluctance of some Member States to bind themselves to an EU Regulation on the recognition of parenthood and are worthy of attention, also with reference the European Certificate of Parenthood[41].

In particular, the Resolution of the Italian Parliament focuses on public policy, as strategic institute of private international law, in the context of the Proposal: in particular, the Resolution highlighted i) the introduction of limits to the operativity of the public policy clause, to be applied only in exceptional circumstances, on a case-by-case basis and in compliance with fundamental rights; ii) the absence of public policy control against the European Certificate of Parenthood. The *Résolution* of the French Senate, for its part, contests the attribution to the European Commission of the power to modify, by delegated act, Annex V to the regulation containing the ECP model. However, it is appropriate to highlight fur-

35 Article 3(2)(i) of the Proposal COM(2022) 695 final.

36 On the topic E. GOOSSENS, A Model for the Use of the European Certificate of Succession for Property Registration, in European Review of Private Law, 2017, p. 523 ff.; I. OLARU, Effetti transfrontalieri del certificato successorio europeo (ECS): iscrizione degli eredi dall'estero nei Registri Patrimoniali Nazionali, in Familia, 2021, p. 175 ff.; I. RIVA, Certificato successorio europeo, cit., p. 153 ff.

37 With reference to the European Certificate of Succession, the same stance is taken by E. GOOSSENS, *A Model for the Use of the European Certificate of Succession*, cit., p. 549. Similarly P. WAUTELET, *Article 69,* in A. BONOMI, P. WAUTELET, *Le droit européen des successions: Commentaire du reglement n. 650/2012,* Brussels, 2013, p. 802.

38 In the context of the Succession Regulation, a further issue concerned the compatibility between the rights *in rem* provided in each national legal system and the safeguarding of the principle of *numerus clausus*. This had led the European lawmaker to exclude from the material scope of application of Regulation (EU) No. 650/2012 all issues relating to "the nature of real rights" (Article 1(2)(k)), as well as introducing the institute of adaptation referred to in Article 31. Parenthood, on the contrary, is generally foreseen with similar characteristics in all legal systems and concerns the relationship existing between parents and children.

39 Article 24(2) of the Proposal COM(2022) 695 final. On the recognition of decisions in the Proposal, see the contribution of S. DOMINELLI, *Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood under the Commission's 2022 Proposal*, in this Journal, p. 11 ff.

40 On the principle of subsidiarity in European Union law, see *ex multis* P. DE PASQUALE, Sharing is caring*: i primi trent'anni del principio di sussidiarietà nell'Unione europea*, in *Il diritto dell'Unione europea*, 2021, p. 432 ff.; S. MONTALDO, *Amici mai, odiarsi mai: il controllo sull'applicazione del principio di sussidiarietà alla luce della prassi della Commissione e della Corte di giustizia*, in *federalismi.it*, n. 13, 2016, p. 17; F. MUNARI, *Principi di sussidiarietà e proporzionalità*, in G. AMATO, E. MOAVERO MILANESI, G. PASQUINO, L. REICHLIN (eds), *Europa. Un'utopia in costruzione*, vol. I, Roma, 2018, p. 132 ff.; O. PORCHIA, *La sussidiarietà attraverso il riordino delle competenze? Il Trattato di riforma e la ripartizione delle competenze*, in *Studi sull'integrazione europea*, 2010, p. 631 ff.; L. CARPANETO, *Il diritto comunitario dei trasporti tra sussidiarietà e mercato: il caso del trasporto ferroviario*, Turin, 2009.

41 A similar position can be inferred from the opinion expressed by the Senate of the Parliament of the Czech Republic in its Resolution of 30th March 2023, available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_8112_2023_INIT. In the Resolution, the Senate requests the Government to "[…] advocate narrowing of the scope of the Regulation during the negotiations, so that surrogacy is excluded, and each Member State is allowed to refuse recognition of parenthood in cases where the cross-border element is applied intentionally in order to circumvent national legislation in the area of parenthood" (courtesy English translation enclosed in the opinion).

ther passages of the *Résolution,* when the automatic recognition of parenthood links deriving from surrogacy is criticized.

As already observed by authoritative doctrine[42], the position of the Italian Parliament is, on the one hand, difficult to reconcile with the traditional approach that the limit of public policy assumes in the context of EU judicial cooperation in civil matters[43]; on the other hand, the Resolution should be contextualized in the light of the nature and effects of the ECP, as the critics concerning the absence of a public policy check may conduce to unclear results.

With regard to the first of the above-mentioned issues, according to the provisional wording of the Proposal, national authorities should not make use of the public policy exception in such a way as to undermine the provisions of the Charter of Fundamental Rights of the European Union, starting with the prohibition of discrimination[44]. With a clarification which is not contained in the main text of the Regulation, but in its recitals, this would exclude the possibility of refusing the recognition of a parent-child relationship, for the sole reason that the parents belong to the same sex[45]. Therefore, a concept of international public policy emerges, which safeguards the prerogatives of the national legal system, but at the same time is subject to the boundaries imposed by EU law and Human Rights Law (and in particular by Article 21 of the EU Charter)[46].

Indeed, the provisions of the Proposal which suggest an "oriented" application of the public policy clause (albeit not without ambiguities) do not seem innovative, being in line with the traditional approach that characterizes the EU instruments of civil judicial cooperation. The Proposal's intention to overcome the public policy "barrier" that some Member States may have put in place, based on the sexual orientation of the parents or the technique used for the conception and/or birth of the child, is clear. What is not clear is whether the provisions of the future Regulation will merely assume a "pedagogical" role with respect to the way in which the international public policy limit operates, or whether they will introduce a real change in perspective[47]. If the European lawmaker does not succeed in questioning the traditional essence of the public policy limit, even if the Regulation were to be definitively approved, some Member States will probably continue to refuse the recognition of certain parent-child relationships, especially in cases where a consolidation of the latter has not occurred as a result of the passage of time.

Furthermore, it should be noted that human rights standards concerning the recognition of parenthood do not appear to be, at least for the moment, fully defined: on this point, it is sufficient to recall the case law of the European Court of Human Rights, which – while underlining with several decisions the primary consideration that must be given to the best interests of the child – has not yet taken a clear position regarding the recognition of parent-child relationships deriving from assisted procreation techniques or surrogate motherhood (also admitting alternative forms to the full recognition of the *status*)[48].

42 G. BIAGIONI, Malintesi e sottintesi rispetto alla proposta, cit.

43 On the topic N. BOSCHIERO, *L'ordine pubblico processuale comunitario ed "europeo"*, in P. DE CESARI, M. FRIGESSI DI RATTALMA (eds), *La tutela transnazionale del credito*, Turin, 2007, p. 163 ff.; D.G. RINOLDI, *L'ordine pubblico europeo*, Naples, 2008; G. CONTALDI, *Ordine pubblico*, in R. BARATTA (ed), *Diritto internazionale privato (dizionario)*, Milan, 2010, p. 273 ss.; C. CAMPIGLIO, *Identità culturale, diritti umani e diritto internazionale privato*, in *Rivista di diritto internazionale*, 2011, p. 1029 ff.; O. FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milan, 2012; F. SALERNO, *La costituzionalizzazione dell'ordine pubblico internazionale*, in *Rivista di diritto internazionale privato e processuale*, 2018, p. 259 ff.; P. FRANZINA, *The purpose and operation of the public policy defence as applied to punitive damages*, in S. BARIATTI, L. FUMAGALLI, Z. CRESPI REGHIZZI (eds), *Punitive Damages and Private International Law: State of the Art and Future Developments*, Padova, 2019, p. 43 ff.; F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, X ed., 2022, p. 302 ff.; G. ZARRA, *Imperativeness in Private International Law: A View from Europe*, The Hague, 2022, p. 112 ff. With specific reference to the circulation of parenthood arising from surrogacy or medically assisted procreation, see M.C. BARUFFI, *Maternità surrogata e interessi del minore*, in A. CAGNAZZO, F. PREITE (eds), *Il riconoscimento degli status familiari acquisiti all'estero*, Milano, 2017, p. 239 ff.; C. CAMPIGLIO, *Della tirannia del "*best interest of the child*". Nuove forme di genitorialità e ordine pubblico internazionale*, in *La nuova giurisprudenza civile commentata*, 2021, p. 1415 ff.; C. RAGNI, *Riconoscimento in Italia di adozioni omoparentali e ordine pubblico internazionale*, in *Rivista di diritto internazionale privato e processuale*, 2022, p. 43 ff.; S. TONOLO, *Lo* status filiationis *da maternità surrogata tra ordine pubblico e adattamento delle norme in tema di adozione*, in *GenIUS*, 2019, 2, p. 1 ff.

44 See the Article 22(2) of the Proposal COM(2022) 695 final, as well as the Articles 31 and 39 which establish the exhaustive list of reasons preventing the recognition, respectively, of decisions and public documents. On the topic S. DE VIDO, *The recognition of decisions on filiation in the proposed Council Regulation of 2022: beyond Pancharevo towards a "strengthened" public order of the European Union,* in *Eurojus,* 2023, p. 35 ff.

45 Recital n. 14 and 21 of the Proposal COM(2022) 695 final.

46 On this issue, within the political dialogue with the European Commission in the course of the legislative procedure, the Republic of Lithuania (Seimas, Committee of Human Rights, Decision of 22 March 2023, available at https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-695/ltsei) has also asked the latter to clarify the public policy limit, being not clear which specific cases of application of the clause would be considered incompatible with the right to non-discrimination laid down in Article 21 of the EU Charter.

47 This operation will not be without difficulties, as explained by O. FERACI, I "controlimiti" al funzionamento del limite dell'ordine pubblico nella proposta di regolamento europeo in materia di filiazione, in Rivista di diritto internazionale, 2023, p. 779 ff.

48 See in particular ECtHR, judgment of 26 June 2014, App. No. 65192/11, *Menneson v. France;* ECtHR, judgment of 26 June 2014, App. No. 65941/11, *Labassee v. France;* ECtHR, Grand Chamber, judgment of 24 January 2017, App. No. 25358/12, *Paradiso and Campanelli v. Italy;* ECtHR, Advisory Opinion of 10 April 2019, App. No. P16-2018-001, pursuant to Article 1 of Protocol No. 16 at the request of the French *Cour de cassation;* ECtHR, judgment of 16 July 2020, App. No. 11288/18, *D. v. France;* ECtHR, judgment of 18 May 2021, App. No. 71552/17, *Valdís Fjölnisdóttir and others v. Iceland;* ECtHR, judgment of 24 March 2022, App. No. 29775/18, *EC and others v. France;* ECtHR, judgment of 24 March 2022, rec. No. 30254/28, *AM v. Norway;* ECtHR, judgment of 7 April 2022, App. No. 13344/20, *AL v. France;* ECtHR, judgment of 22 November 2022, App. No. 58817/15 and 58252/15, *DB and others v. Switzerland;* ECtHR, judgment of 6 December 2022, App. No. 25212/21, *KK and others v. Denmark;*

In conclusion, the Proposal is not "neutral" in addressing some sensitive issues. At the same time, there are doubts about the ability of the new Regulation to impose, always and in any case, the recognition of any parent-child relationship established abroad. Each Member State retains its own specific sensitivity and a certain margin of appreciation in safeguarding the essential principles of its legal system. On the other hand, public policy has never been applied as a general clause in the field of civil judicial cooperation. This therefore excludes the risk of any automatism, as dreaded by the *Résolution* of 22 March 2023 of the Senate of the French Republic.

As regards the second question raised by the Italian *Senato* concerning the absence of a public policy control against the ECP, it should be underlined that the latter introduces a presumption of truthfulness of its content, certifying the establishment of parenthood according to the applicable law. The latter is identified according to the conflict rules envisaged by the Proposal[49]. However, as has already been clarified, the presumption of truthfulness is relative in nature: therefore, other than being limited to evidentiary purposes, the certificate is always challengeable before a jurisdictional authority. The same limitation is observed in cases where an application is made to register a parent-child relationship, on the basis of an ECP, in the civil status registers of a Member State. However, while it is always possible to challenge the Certificate, it is equally true that such challenges may be raised only and exclusively before the competent court under the common jurisdiction rules. It follows that, in order to challenge an ECP, it would be necessary to file an application before the courts of the issuing Member State. It will not, however, be possible to bring the matter before the courts of the State in which registration in public registers is required.

ECtHR, judgment of 23 June 2023, App. No. 47998/20 and 23142/21, *Nuti v. Italy and Dallabora and others v. Italy;* ECtHR, judgment of 23 June 2023, App. No. 10810/20, *Bonzano and others v. Italy*; ECtHR, judgment of 23 June 2023, App. No. 59054/19, *Modanese v. Italy.* On the subject, in the legal literature, see *ex multis* R. BARATTA, *Recognition of foreign personal and family status: a rights based perspective*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 413 ff.; M.C. BARUFFI, *Gli effetti della maternità surrogata al vaglio della Corte di cassazione italiana e di altre corti*, in *Rivista di diritto internazionale privato e processuale*, 2020, p. 290 ff.; A. DI BLASE, *Genitorialità della coppia omosessuale e riconoscimento della* status filiationis *nell'ordinamento italiano*, in *Rivista di diritto internazionale privato e processuale*, 2021, p. 821 ff.; P. FRANZINA, *Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad*, in *Diritti umani e diritto internazionale*, 2011, p. 609 ff.; F. PESCE, I. QUEIROLO, *La surrogazione di maternità tra diritto internazionale, dell'Unione europea e ordinamento interno (Panorama). Parte I: la surrogazione di maternità innanzi alla Corte di Strasburgo*, in *La Cittadinanza Europea*, 2021, p. 223 ff.; F. PESCE, *Gestazione per altri e discrezionalità nazionale "depotenziata" nella prospettiva della CEDU*, in F. PESCE (ed), *La surrogazione di maternità nel prisma del diritto*, Naples, 2022, p. 155 ff. On the case law of the EctHR see also O. FERACI, *Art. 14 della risoluzione dell'*Institut de Droit International *su* Human Rights and Private International Law*: la circolazione transfrontaliera del rapporto di filiazione,* in *Diritti umani e diritto internazionale,* 2022, p. 585 ff.

[49] On the analysis of the provisions on applicable law, please refer to F. PESCE, *The Law Applicable to Parenthood in the European Commission's Regulation Proposal*, in this Journal p. 6ff.

5. Conclusions: the potentialities of the European Certificate of Parenthood

In the context of the European Certificate of Parenthood, the doubts already expressed by the legal literature with regard to the European Certificate of Succession reappear[50]. Those and other issues are to be examined in the light of the subject matter considered: in particular, an absolute obligation to proceed with the registration of parenthood in civil status records, following the presentation of a ECP, would conflict with the relative nature of the presumption of truthfulness enjoyed by the information attested therein[51].

The first and perhaps most controversial issue concerns the requirements for issuing an ECP: as already observed, the issuance of the Certificate seems to require the presentation of a judicial decision, an authentic instrument with binding legal effects or an authentic instrument with evidentiary effects. Therefore, the added value of the ECP is not clear, at least when it is released on the basis of a decision or a binding authentic instrument. In the case of ECPs issued on the basis of an authentic instrument with mere evidentiary value (*i.e.* birth certificates, in most cases), the situation may be even more controversial. In fact, the ECP may be a vehicle to grant uniform effects to all non-binding authentic instruments existing in each national legal system, in open contradiction to what is provided for by Article 45(1) of the Proposal[52].

While it is desirable to guarantee the maximum effectiveness to the ECP, it is likewise not possible to exclude from the outset any possible dispute as to its content. At the same time, in the absence of a provision to that effect in the text of the Regulation, the application of the public policy exception does not seem feasible. Moreover, public policy introduces an assessment that is placed on a different level from the objections concerning the content of the ECP (i.e. the truthfulness of the certified elements). On the other hand, the absence of a public policy exception or other methods to prevent the effectiveness of the ECP in the requested Member State may lead to a controversial result: in fact, the ECP may have a greater 'strength' than a judicial decision, the recognition of which may be refused in the presence of the grounds listed in Article 31 of the draft Regulation (public policy included). In other words, the

[50] On this issue C. BUDZIKIEWICZ, *Article 69,* in AL CALVO CARAVACA, A. DAVÌ, H.-P. MANSEL (eds.), *The EU Succession Regulation – A Commentary,* Cambridge, 2016, p. 769 ff., at p. 789.

[51] C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The European Commission's Parenthood Proposal,* cit., p. 435.

[52] Article 45(1) of the Proposal COM(2022) 695 final: "An authentic instrument which has no binding legal effect in the Member State of origin shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State where it is presented". This issue has been raised by GEDIP, *Observations on the Proposal for a Council Regulation in matters of Parenthood*, cit., para. 20.

impossibility of challenging the ECP in the presence of well-founded doubts as to the violation of a fundamental principle of the Member State concerned would end up guaranteeing the Certificate a legal force that does not apply even to judicial decisions. The results are not negligible, since the ECP (unlike the ECS) holds no time limit on its validity.

If the future Regulation on the recognition of parenthood between Member States actually sees the light of day, the European Certificate of Parenthood could constitute a valid tool for families "on the move" in the EU Area of Freedom, Security and Justice[53]. In many cases, it will constitute a further instrument to facilitate the circulation of family *status,* precisely because of its suitability to replace national public documents and the uniformity of its effects. On the other hand, with respect to certain sensitive situations – first and foremost that of the recognition of a parent-child relationship in the presence of parents of the same sex and/or resulting from surrogacy or other alternative procreation techniques[54] – it is possible that the adoption of the Regulation will meet the firm opposition of some Member States, unless the legal text is rethought.

Indeed, irrespective of the approach that will be taken with respect to the above-mentioned cases, the ECP will be able to maintain its usefulness for the purpose of exercising the rights deriving from EU citizenship. In this regard, Article 2 of the Proposal specifies that "This Regulation shall not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, including Directive 2004/38/EC. In particular, this Regulation shall not affect the limitations relating to the use of public policy as a justification to refuse the recognition of parenthood where, under Union law on free movement, Member States are obliged to recognize a document establishing a parent-child relationship issued by the authorities of another Member State for the purposes of rights derived from Union law."

It follows that the Certificate may be useful for obtaining certain services from Member States that are functional to the right to free movement and/or family reunification, such as the issuing of an identity document by the country of citizenship. This is the controversial 'functional' recognition of parenthood construed by the EU Court of Justice in the now well-known *Pancharevo* ruling[55], limited to the rights and prerogatives deriving from EU citizenship, which could be significantly facilitated through the use of the ECP.

Notwithstanding the considerations set out above, reasonable doubts remain as to whether the Certificate would be capable of constituting an irrefutable assessment of the elements it contains. Given that the presumption of truthfulness is of a relative nature, it will always be possible to challenge the ECP before the appropriate instances, starting with the possibility, for anyone who demonstrates a legitimate interest, to request the issuing authority to amend or revoke the Certificate, if it has been ascertained that all or some of the information contained therein does not correspond to the truth. It is then presumable that, in controversial cases, the matter will have to be addressed in front of the competent judicial authority.

53 The expression is taken from L. CARPANETO, F. PESCE, I. QUEIROLO, *La "famiglia in movimento" nello spazio europeo di libertà e giustizia,* Turin, 2019.

54 The topic is well explored in the legal literature: see *ex multis* 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 ff.; C. Campiglio, *Lo stato di figlio nato da contratto internazionale di maternità*, in *Rivista di diritto internazionale privato e processuale*, 2009, p. 589 ff.; A. Di Blase, *Riconoscimento della filiazione da procreazione medicalmente assistita: problemi di diritto internazionale privato*, in *Rivista di diritto internazionale privato e processuale*, 2018, p. 839 ff.; C. Honorati, *Maternità surrogata, status familiari e ruolo del diritto internazionale privato*, in A. Di Stasi (ed), *Cittadinanza, cittadinanze e nuovi status: profili internazionalprivatistici ed europei e sviluppi* nazionali, Naples, 2018, p. 137 ff.; F. Marongiu Buonaiuti, *Il riconoscimento della filiazione derivante da maternità surrogata – ovvero fecondazione eterologa* sui generis *– e la riscrittura del limite dell'ordine pubblico da parte della Corte di Cassazione, o del diritto del minore ad avere due madri (e nessun padre)*, in E. Triggiani, F. Cherubini, I. Ingravallo, E. Nalin, R. Virzo (eds), *Dialoghi con U. Villani*, Bari, 2017, p. 1141 ff.; S. Tonolo, *Tecnologie riproduttive, progetti genitoriali e questioni di diritto internazionale privato concernenti lo* status filiationis, in *Quaderni di diritto e politica ecclesiastica*, 2021, p. 669 ff.; A. Vettorel, *International Surrogacy Arrangements: Recent Developments and Ongoing Problems*, in *Rivista di diritto internazionale privato e processuale*, 2015, p. 523 ff.

55 CJEU, judgment of 14 December 2021, case C-490/20, Pancharevo. The decision is commented by A. Tryfonidou, The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: a Critical View of the EC's VMA Ruling, in European Law Blog, 21 December 2021; M.C. Baruffi, Il riconoscimento della filiazione tra persone dello stesso sesso e la libera circolazione delle persone nell'Unione Europea, in Famiglia e diritto, 2022, p. 1098 ff.; O. Feraci, Il riconoscimento «funzionalmente orientato» dello status di un minore nato da due madri nello spazio giudiziario europeo: una lettura internazionalprivatistica della sentenza Pancharevo, in Rivista di diritto internazionale, 2022, p. 564 ff.; M. Grassi, Riconoscimento del rapporto di filiazione omogenitoriale e libertà di circolazione all'interno dell'Unione europea, in Rivista di diritto internazionale privato e processuale, 2022, p. 591 ff.; C. De Capitani, Rainbow families and the right to freedom of movement – the V.M.A. v Stolichna obshtina, rayon "Pancharevo" case, in EU Law Analysis, 11 January 2022; J. Meeusen, Functional Recognition of Same-sex Parenthood for the Benefit of Mobile Union Citizens – Brief Comments on the CJEU's Pancharevo Judgment, in EAPIL Blog, 3 February 2022; E. Gualco, Habemus Pancharevo – A new chapter of the EU citizenship fairy-tale, in BlogDUE, 22 March 2022; E. Di Napoli, G. Biagioni, O. Feraci, R. Calvigioni, P. Pasqualis, La circolazione dello status dei minori attraverso le «frontiere» d'Europa: intersezioni tra diritto dell'Unione e diritto internazionale privato alla luce della sentenza Pancharevo, in Papers di diritto europeo, 2023, p. 67 ff.