

Proposal for a Council Regulation on the Cross-Border Recognition of Parenthood

The Public Policy Exception proposed in cases of surrogacy by the Belgian Presidency continues to violate the national competencies of Member States

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1 Introduction

1. On 7 December 2022, the European Commission published the “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” (in short, the *Proposed Regulation on the cross-border recognition of parenthood* or the *Proposed Regulation*).¹
2. The *Proposal* concretises a specific objective that the European Union has continuously pursued and promoted in the past years, captured in the slogan, “If you are a parent in one country, you are a parent in every country.”²
3. However, EU Member States differ in the way they regulate marriage, family, and parenthood due to deeply rooted social, cultural, and political variations that accurately reflect the European motto: “united in diversity.”
4. According to the Explanatory Memorandum of the *Proposed Regulation*, the reason for the current difficulties with the cross-border recognition of parenthood is that the Member States have different substantive rules on establishing parenthood in domestic situations.³ Whilst national and substantive laws on parenthood, family and marriage form part of the national competence of each Member State,⁴ the Union can adopt measures concerning family law with cross-border implications pursuant to Article 81(3) of the TFEU.
5. Although these spheres of law fall within the national competence of Member States, Article 21 of the TFEU states that the respect for a Member State’s national

¹ European Commission, “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,” 7 December 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A695%3AFIN&qid=1670511556992>

² This is based on the slogan used by European Commission President Ursula von der Leyen in her 2020 State of the Union. State of the Union Address by President von der Leyen at the European Parliament Plenary, 16 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655.

³ Proposed Regulation, pp. 2-3.

⁴ See Article 4(2) of the TFEU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>. The fact that issues of family and marriage law fall within the competence of the national legal systems was confirmed by the European Court of Human Rights in the case of *Valdís Fjölnisdóttir and Others v. Iceland*, Appl. No. 71552/17, 18 May 2021, <http://hudoc.echr.coe.int/eng?i=001-209992>. This was a case where two women (from Iceland) adopted a child through a surrogacy agreement in the US. However, Iceland did not recognise parenthood through surrogacy agreements and did not recognise a parental relationship between the two women and the child. The European Court of Human Rights upheld the government’s decision stating that it fell within the national law to establish laws concerning family and marriage relationships.

identity under Article 4(2) and a Member State's public policy cannot serve as justification to refuse to recognise a parent-child relationship between children and their same-sex parents to exercise the rights the child derives from EU law.⁵

6. Although the *Proposed Regulation* maintains that there will be no interference with national law on family and marriage, the practical reality of this claim is not shown⁶ - also not concerning surrogacy.

2 Surrogacy

7. Surrogacy has been one of the most contentious issues concerning the *Proposed Regulation* and is one of the major reasons why unanimity in the Council of the European Union remains evasive.⁷
8. The original *Proposed Regulation* includes the "child not yet born" and children conceived through assisted reproductive technology and adopted⁸ (potentially via surrogacy agreements). In practice, this means that if, for example, the Netherlands recognises parenthood emanating from a surrogacy agreement established in Ukraine, such parenthood will be recognised throughout the EU. Therefore, *de facto*, all kinds of surrogacy will be allowed and justified, even in direct contradiction to the laws of some EU Member States which forbid surrogacy.
9. For this reason, the Belgian Presidency of the Council of the European Union⁹ has proposed specific amendments to address Member States' opposition to the threats posed to national competencies regarding surrogacy by the *Proposed Regulation*.

3 The flawed proposal of the Belgian Presidency – public policy exception

10. The Belgian Presidency proposes to amend paragraphs 56 and 75 of the original *Proposed Regulation*¹⁰ by including that:

[c]onsiderations of public interest should allow courts and other competent authorities establishing parenthood in the Member State to disregard...certain provisions of a foreign applicable law where...applying such provisions *would be manifestly incompatible with the public policy* of the Member State concerned. Surrogacy raises fundamental issues of a legal and ethical nature in some Member States. As a result, the policy and legal stance on this matter vary significantly between the Member States. Member States that consider, in a

⁵ Proposed Regulation, p. 4.

⁶ Proposed Regulation, p. 7.

⁷ For example, countries such as France, Sweden and Austria prohibit surrogacy.

⁸ Proposed Regulation, Art. 4, p. 13.

⁹ Belgian Presidency of the EU, 1 January to 30 June 2024, <https://belgian-presidency.consilium.europa.eu/>.

¹⁰ Council of the European Union, Belgian Presidency Revised text to the 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, 27 February 2024.

given case, *elements linked to surrogacy...as manifestly incompatible with their public policy...may disregard* such provisions, insofar as the Member State concerned *provides for other means to maintain the family tie* between the child born through surrogacy and the intended parent(s) (for example, adoption).¹¹

11. In other words, where a country does not legalise surrogacy, the public policy exception may be used to argue that a parental relationship cannot be recognised between the child and the non-biological but intended 'parent'.
12. However, the proposed amendments of the Belgian Presidency qualify this (paragraphs 18, 56 and 75) by the case law and advisory opinion¹² of the European Court of Human Rights stating that the Member State should nevertheless provide for a mechanism for the recognition in law of the parent-child relationship with the non-biological intended 'parent' (for example through the adoption of the child).
13. In essence, therefore, the public policy exception may be used initially but will, in consequence, not protect the national competencies of Member States concerning family and marriage.
14. Even with the public policy exception applied to cases of surrogacy, the recognition of parenthood established abroad in contradiction to the national laws of the host State would continue to create a grave conflict of norms and an ongoing erosion of Member States' competence on related matters. The Member State will still eventually be forced to legally provide for and accept the creation of a parent-child relationship through surrogacy, albeit not immediately.
15. The European Commission and the European Parliament have both expressed the will that the proposed regulation would defend the best interests of the child, as enshrined in the UN Convention on the Rights of the Child. However, the *Proposed Regulation* is not in the "best interest of the child" as it continues to place the child (and surrogate mother) in the position of being subjects of a contract. Multiple cases have emerged of babies abandoned when they did not meet the expectations of those who commissioned them (due to disability, race etc.).¹³ This violates the child's intrinsic worth, human dignity, and fundamental rights, which is contrary to the Convention on the Rights of the Child.¹⁴

¹¹ Emphasis added.

¹² *Mennesson v. France*, App. No. 65192/11, 26 June 2014, paragraphs 99-100; Advisory Opinion P16-2018-001, Request no. P16-2018-001, Council of Europe: European Court of Human Rights, 10 April 2019 and *D.B. and Others v. Switzerland*, Apps. No. 58252/15 and 58817/15, 22 November 2022, paragraphs 84-85.

¹³ Samantha Hawley, "Ukraine's commercial surrogacy industry leaves a trail of disasters", ABC News, <https://www.abc.net.au/news/2019-08-20/ukraines-commercial-surrogacy-industry-leaves-disaster/11417388>; Lindsay de Freitas, "Couple left 'devastated' after surrogate baby is born with 'Asian' features", News24, <https://www.news24.com/you/parenting/couple-left-devastated-after-surrogate-baby-is-born-with-asian-features-20190822>;

Jennifer Lahl and Matthew Epinette, *Breeders: A Subclass of women?* Center for Bioethics and Culture, 2014); Kishwar Desai, "India's surrogate mothers are risking their lives", *The Guardian* (5 June 2012), <https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>.

¹⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.

16. A public policy exception that eventually becomes obsolete, as it has the inevitable consequence of nevertheless enforcing a surrogacy agreement, will not change this fact, nor will it protect the national competencies of Member States regarding marriage and family.

4 Conclusion and recommendations

17. The EU Council will meet in its Justice and Home Affairs Council formation on 14 June 2024¹⁵ to discuss the amendments proposed by the Belgian Presidency. It will be the first time the *Proposed Regulation* will be discussed at the ministerial level.

18. The amendments proposed by the Belgian Presidency will not protect Member States' national competencies concerning family and marriage.

19. Furthermore, the detrimental positions of children and surrogate mothers remain unchanged.

20. Member States are therefore encouraged to vote against the *Proposed Regulation*.

¹⁵ Council of the European Union, Justice and Home Affairs Council, 13-14 June 2024, <https://www.consilium.europa.eu/media/ilohk2xi/cm03141fr24.pdf>.