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PROPOSAL FOR THE REGULATION IN MATTERS OF PARENTHOOD: A CRITICAL OVERVIEW OF JURISDICTIONAL AND CONFLICT-OF-LAWS RULES

PRIEKŠLIKUMS REGULAI VECĀKU STĀVOKĻA JAUTĀJUMOS: KRITISKS JURISDIKCIJAS UN KOLĪZIJU NORMU PĀRSKATS

Key words: parenthood, jurisdiction, conflict of laws, adoption, surrogacy, same-sex couple parenthood

Atslēgvārdi: vecāku stāvoklis, jurisdikcija, kolīziju normas, adopcija, surogācija, viendzimuma pāru vecāku stāvoklis

Summary

In 2022, the European Commission (EC) 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. Its main objective is to ensure that same-sex couples receive recognition of parenthood. The article offers a concise critical overview of the two aspects of this Proposal – jurisdictional and conflict-of-laws rules. In particular, the author observes that the Proposal suffers from the mismatch between its particular focus on rainbow families and a much broader scope. While its rules are advantageous for surrogacy arrangements and rainbow families, the authors of the Proposal have seemingly forgotten that according to its scope, the Proposal covers certain forms of adoption and paternity disputes that may arise years after the child's birth. Jurisdictional rules and conflict-of-laws rules found in the Proposal are less suitable for these types of "parenthood matters". Nonetheless, overall, even if these technical deficiencies were to be solved, the Proposal's future seems grim as it takes a definitive stance on the divisive issues of same-sex parenthood and surrogacy arrangements.

Kopsavilkums

2022. gadā Eiropas Komisija (EK) publicēja priekšlikumu Padomes regulai par jurisdikciju, piemērojamiem tiesību aktiem, nolēmumu atzīšanu un publisku aktu akceptēšanu vecāku stāvokļa lietās un par Eiropas vecāku stāvokļa apliecības izveidi. Tās galvenais mērķis ir nodrošināt, ka vecāku statuss tiek atzīts arī viendzimuma pāriem. Rakstā sniegts īss kritisks pārskats par diviem šā priekšlikuma aspektiem – jurisdikcijas un kolīziju normām. Jo īpaši autors norāda, ka priekšlikumā ir saskatāma neatbilstība starp tā īpašo koncentrēšanos uz varavīksnes ģimenēm un plašo tvērumu. Lai gan priekšlikuma noteikumi ir izdevīgi ģimenēm, kas vēlas izmantot surogāciju, un varavīksnes ģimenēm, priekšlikuma autori, šķiet, ir aizmirsuši, ka, ņemot vērā priekšlikuma tvērumu, tas attieksies uz dažāda veida adopcijas un paternitātes strīdiem, kas var rasties vairākus gadus pēc bērna piedzimšanas. Priekšlikumā ietvertās jurisdikcijas un kolīziju normas ir mazāk piemērotas šāda veida "vecāku stāvokļa lietām". Tomēr kopumā, pat ja šie tehniskie trūkumi tiktu novērsti, priekšlikuma nākotne šķiet drūma, jo tajā ir pausta viennozīmīga nostāja pretrunīgajos jautājumos par vecāku stāvokli viendzimuma pāros un surogācijas gadījumos.

Introduction

Since the moment the European Union (EU) acquired the competence to legislate on issues of private international law (PIL), the European Commission (EC) has actively exercised that competence. As a result, in 2023, it can be observed that the entire branches of PIL are covered by EU rules. For instance, the law of obligations is almost entirely covered by the Brussels Ibis Regulation (jurisdiction and recognition and enforcement of decisions) and Rome I and Rome II Regulations (conflict of laws). PIL rules have been likewise unified in areas of law of succession (Succession Regulation) and maintenance (Maintenance Regulation).

However, the most problematic area for the EU PIL is international family law.[1] Foremostly, because Article 81(3) of the Treaty on the Functioning of the European Union states that, in order to adopt PIL rules concerning family law, it is necessary to achieve unanimity within the Council of the European Union.[2] This throws the EU legislator back to the traditional international law principle – no binding rules without everyone consenting.

This requirement is a serious obstacle to the development of the EU PIL concerning family law. Only a fraction of family law PIL is unified within the EU. Most specifically, Brussels IIter Regulation unifies rules on jurisdiction

[1] Fulchiron H. La proposition de règlement européen sur la filiation: coup de maître ou coup d'épée dans l'eau? Journal du droit international, N°4, 2023, p. 1172.

[2] Cf., Beilfuss C. G., Pretelli I. Recognition of Status Filiationis Within the EU and Beyond: The Proposal for a European Regulation on Filiation Matters – Overview and Analysis. Yearbook of Private International Law, Vol. 24, 2022/2023, p. 279. The unanimity does not include Denmark, since it is not bound by instruments covered by Art. 81 of the Treaty on the Functioning of the European Union. Similarly, it does not include Ireland, unless Ireland uses its opt-in right to participate in the adoption and application of the instrument. In that case, its vote counts. See further: Tryfonidou A. Cross-Border Recognition of Parenthood in the EU: Comments on the Commission proposal of 7 December. ERA Forum, Vol. 24, 2023, pp. 159–160.

and recognition and enforcement of decisions for legal separation or marriage annulment and parental responsibility. Three other family law instruments are not binding on all EU Member States but were adopted within the framework of enhanced cooperation by those states that were willing to do so. Pursuant to Art. 20 of the Treaty on European Union, a legal instrument can be adopted using the framework of enhanced cooperation if at least nine Member States are willing to be bound by that legal instrument. Currently, three family law instruments have been adopted using this framework: the Rome III Regulation (conflict-of-laws rules for divorce and legal separation)[3], Regulation 2016/110 containing PIL rules for matrimonial property regime, and Regulation 2016/1104 containing PIL rules for the property consequences of registered partnerships.[4]

This leads to a paradox: the EU has abstained from adopting PIL rules for areas of law to which other areas of law, already covered by EU PIL (e.g., succession, maintenance, divorce, and matrimonial property) are subordinated – conclusion and validity of marriage and parenthood.[5] The reason for the inability to achieve unanimity within the Council is plain and simple – both institutions are deeply rooted in the fabric of society.[6] It is at this level that the societies in Europe are not homogenous.[7] For instance, while for some EU Member States, the so-called "rainbow families" (same-sex families) are a symbol of their development, for others – a sign of an imminent decay of traditional values. Moreover, this is not the only divisive question. Similarly controversial is the question of surrogate parenthood.[8]

Nevertheless, the president of the EC Ursula von der Leyen has stated: "If you are a parent in one country, you are a parent in all countries."[9] Building on that idea, the EC developed the Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition of Decisions and Acceptance of Authentic Instruments in Relation to Parenthood and the Creation of a European Certificate of Parenthood (Proposal).[10] The Proposal is not yet adopted as a Regulation in the EU. It has four main parts: 1) jurisdictional rules; 2) conflict-of-laws rules; 3) rules on recognition of parenthood created in other Member States; 4) rules on

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[3] Carneloup S. (ed.). The Rome III Regulation. A Commentary on the Law Applicable to Divorce and Legal Separation. Cheltenham: Edward Elgar Publishing Limited, 2020, pp. 9–10.

[4] Viarengo I., Franzina P. (eds). The EU Regulations on the Property Regimes of International Couples. A Commentary. Cheltenham: Edward Elgar Publishing Limited, 2020, p. 1.

[5] Fulchiron H. 2023, p. 1172.

[6] Ibid.

[7] Ibid., p. 1173.

[8] Ibid.

[9] Von der Leyen U. State of the Union 2020. Annual address by the President of the European Commission. Available: https://state-of-the-union.ec.europa.eu/state-union-2020_en [viewed 16.04.2024.].

[10] COM (2022) 695 final. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0695 [viewed: 07.04.2024.].

the functioning of the European Certificate of Parenthood.[11] Due to the limited size of the paper, the author will focus only on the first two parts of the Proposal – jurisdictional and conflict-of-laws rules.

1. A few general observations

When reading the Proposal, it becomes obvious that the Proposal has been tailored for a very specific situation – the establishment of parenthood by rainbow families.[12] The Proposal is meant to fill in the gap that has emerged after the V.M.A. judgment rendered by the CJEU in 2021.[13] Therein, the CJEU required a Member State to recognize the parenthood established in another Member State, even if in that latter Member State the child had two mothers – the biological mother and her same-sex spouse. However, understanding the sensitivity and divisiveness of the topic, the Court showed much restraint. It did not impose upon Member States an obligation to recognize parenthood for all purposes, e.g., succession, maintenance obligations, family name, etc. The CJEU limited the recognition to EU law on free movement. In other words, for the purposes of movement within the EU, such parenthood had to be recognized.

The Proposal is aimed at filling that gap and achieving full recognition of parenthood. More specifically, it is aimed at helping rainbow families – most notably, unions between two women, even if the language of the Proposal is extremely neutral and does not mention same-sex couple parenthood or surrogacy.[14] However, its narrow focus on rainbow families creates certain problems. The V.M.A. fact-pattern deals with the so-called "*fait accompli*" situation.[15] Two persons of the same sex live together as a family. If both are women, then most likely one of them becomes a biological mother of a child using a sperm donor. Immediately after the child is born, the other spouse or partner wants to secure parenthood over the child. However, not all cases of parenthood are alike. In some of them, it is impossible to talk about the "*fait accompli*" situation – for instance, an adoption of a child who for a longer time has been placed in a state institution (i.e., foster care).

The scope of the Proposal is not limited to a V.M.A.-type scenario for rainbow families but applies to almost all situations when parenthood has to be established or is contested. True, the Proposal does not apply to "intercountry adoptions" where the child and the adoptive parent or parents have their habitual residence

[11] Legendre R. Éclairages sur... À propos de la proposition de Règlement européen en matière de filiation. Revue critique de droit international privé, 2023 (electronic version), para. 2.

[12] Beilfuss C. G., Pretelli I. 2022/2023, pp. 276–277.

[13] CJEU judgement of 14 December 2021 in C490/20 V.M.A. v Stolichna obshtina, rayon 'Pancharevo'.

[14] Fulchiron H. 2023, p. 1175; Beilfuss C. G., Pretelli I. 2022/2023, p. 279.

[15] Cf., Beilfuss C. G. La proposition de Règlement européen en matière de filiation: analyse liminaire. RTD Eur. 2023 (electronic version), Section II (A).

in different states.[16] The purpose of this exclusion "is explained by the desire not to contribute to the circumvention of the rules of said Convention, which was designed to respect the rights of the child and avoid abusive practices."[17] However, this means that other forms of international adoption are covered.[18] For instance, the adoption of a child by the adoptive parent(s) having a different nationality.[19] Similarly, the Proposal concerns contesting parenthood (or, more typically, paternity), for instance, to avoid payment of maintenance. In both situations, the legal issue in question might occur months or years after the birth of the child. This should leave a mark on the jurisdictional rules; however, the EC has focused on the rainbow family scenario, failing to create special rules for these situations.

2. Overview of jurisdictional rules

As stated above, in this article the author focuses on two parts of the Proposal: jurisdictional rules and conflict-of-laws rules. Concerning the first category, it is important to mention that they would apply to any institution exercising judicial function (Art. 4(4)).

The core jurisdictional rules are provided in Art. 6, which seems inspired by Art. 3 of the Brussels IIter Regulation, offering multiple alternative fora.[20] These fora do not establish any hierarchy,[21] which some scholars see as a shortcoming.[22] In particular, because Recital 39 underlines: "[…] where possible jurisdiction should lie with the Member State of the habitual residence of the child." The same Recital continues with an indication that alternative fora are made available "in order to facilitate the child's access to justice". However, one could pose a legitimate question of how a child's access to justice is facilitated if a person considered to be the father may initiate proceedings contesting paternity in the state of his own nationality.

Art. 6 offers a potpourri of jurisdictional grounds: the habitual residence of the child; the nationality of the child; the habitual residence of the respondent; the habitual residence of either parent or the nationality of either parent. All these connecting factors must be present at the moment when the court is seized.[23] Art. 6 also contains one connecting factor that is not linked to the moment when the proceedings are commenced: the place of the birth of the child. Obviously,

16 Beilfuss C. G., Pretelli I. 2022/2023, pp. 290–291.

17 Ibid., p. 291.

18 Ibid.

19 Ibid.

20 Oldenburger M. Europäische Elternschaft – Ist eine Harmonisierung möglich? NZFam 2023, S. 634.

21 Legendre R. 2023 (electronic version), para. 3.

22 Cf., Beilfuss C. G., Pretelli I. 2022/2023, p. 294.

23 As expressly stated in Art. 6.

in practice, the existence of multiple alternative fora does not mean multiple litigation; this risk is curtailed by the *lis pendens* rules (Art. 14).

The large number of connecting factors is based on a desire of the EC to ensure that the child and the person claiming the parenthood could be able to find the convenient forum to establish the parenthood.[24] At first glance, it does not seem particularly relevant since all fora would be subject to the same conflict-of-laws rules. However, firstly, at least *prima facie*, Art. 17 leaves some discretion to courts in case the main conflict-of-laws rule establishes parenthood of only one person.[25] Secondly, Recital 30 specifies that each Member State court should apply its own conflict-of-laws rules to preliminary questions, such as "the existence, validity or recognition of a marriage or a relationship deemed by the law applicable to it as having comparable effects" to the degree this is not affected by EU rights of free movement. For instance, due to the diversity of national conflict-of-laws rules, different fora might have divergent views on whether same-sex marriage is valid, while the validity of the marriage might be a precondition for granting the status of a parent under the applicable law. The lack of unified conflict-of-laws rules for these preliminary questions has been characterized as a shortcoming of the Proposal.[26] Meanwhile, the introduction of unified conflict-of-laws rules for preliminary questions would have been just another nail in the coffin of the Proposal – intruding into the delicate issue of validity of marriages and partnerships. Thirdly, each state has its principle of public policy that may block the application of a specific foreign rule under the Proposal (Art. 22). For example, if there is a risk that a judge in one Member State would not apply *lex causae* rule that recognizes parenthood created via a contract with a biological mother, based on its public policy, then the intended parent might prefer to choose a friendlier forum.

At the same time, the catalogue approach of Art. 6 can be criticized. For instance, let us imagine a ten-year-old child and a person who wants to adopt him/her, and has the nationality of another Member State. It seems that under the Proposal, any Member State mentioned in Art. 6 will be able to decide on the requirements for adoption and then also assess contestation of adoption, for example, by a biological parent. The problem seems that only the Member State where the child and the potential adoptive parent reside is closely related to the legal situation. The state of birth of the child might have hardly any interest in the child, to the same as the state of nationality of the potential parent. Moreover, in all cases where it is possible, the Proposal mandates Member States to allow children below the age of 18 to express their views (Art. 15). The physical distance between different Member States might be an obstacle for the child to do so. Moreover, the existence of such a catalogue inevitably means that most of

[24] Fulchiron H. 2023, p. 1177.

[25] Discussed in Section 5 of this Article.

[26] Beilfuss C. G., Pretelli I. 2022/2023, p. 290.

these courts will apply foreign law – reducing certainty in outcome and making dispute resolution more expensive.[27]

Jurisdictional grounds are not exhausted by Art. 6. Art. 7 provides a subsidiary ground for jurisdiction. In case when it is impossible to establish jurisdiction of any Member State under Art. 6, "the courts of the Member State where the child is present shall have jurisdiction." It seems that, in some cases, most notably, involving adoption longer time after birth, this connecting factor should have been the initial and the unique one, to ensure that the Member State that is best aware of the child's actual conditions is in charge of the adoption.

Art. 8 states: "[w]here no court of a Member State has jurisdiction pursuant to Arts 6 or 7, jurisdiction shall be determined, in each Member State, by the laws of that Member State." The problem with this provision is that it seems rather difficult to imagine those situations when the broad list of jurisdictions under Arts 6–7 would fail to establish jurisdiction.[28] Finally, under Art. 9, a Member State court can hear the case also in those cases when it does not have jurisdiction pursuant to Arts 6–8, but proceedings cannot be reasonably brought in a third state with which the dispute is closely connected; while the dispute must also have a sufficient connection with the Member State in question.

3. Overview of conflict-of-laws rules

Proposal contains a set of conflict-of-laws rules that must answer the question which law will determine whether a person is a parent of a child. The purpose of the unified conflict-of-laws rules is to minimize the risk of contradictory decisions.[29] These conflict-of-laws rules are found in Art. 17.

Art. 17(1) is the central conflict-of-laws rule that applies "both to the establishment of filiation by operation of law at the time of birth, and to adoptions, voluntary acknowledgments of parenthood and disputes concerning parentage that may arise during a person's life."[30] Pursuant to that rule, the status of a parent is determined by the law of the state of the habitual residence of the person giving birth at the time of birth, in other words, the habitual residence of a biological mother. Scholars observe that such a connecting factor might be unique.[31] Art. 17(1) also provides a subsidiary rule – "where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child."

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27 Cf., Oldenburger M. 2023, S. 634.

28 Beilfuss C. G., Pretelli I. 2022/2023, p. 295.

29 Luku H. Free Movement, Children's Rights and National Identity in the EU Parenthood Proposal. Yearbook of Private International Law, Vol. 24, 2022/2023, p. 350.

30 Beilfuss C. G., Pretelli I. 2022/2023, p. 296.

31 Ibid., p. 297.

These rules have a few interesting characteristics. Firstly, the EC has seemingly chosen connecting factors that are particularly beneficial to surrogacy arrangements.[32] A woman, who agrees to give birth, will usually live in the state where such an arrangement is valid.[33] Thus, the status of the parent will be granted to the intended parent(s). Secondly, Art. 17(1) grants certain discretion to the biological mother in changing the habitual residence prior to or during the pregnancy, hence, to change the applicable law.[34] For instance, in the situation of a married rainbow couple consisting of two women, the spouse that is pregnant can, before or during the pregnancy period, move to a state that attributes the parenthood not to the donor of the sperm, but rather to her spouse. While some worry that this opens the door to abuse of law (*fraude à la loi*),[35] most likely the EC does not regard this situation to be undesirable, since it favours the establishment of same-sex couple parenthood.

In the author's opinion, this situation should be regarded from the child's and family's perspective. The author supports the idea that in the scenario of dual motherhood, there is nothing condemnable in the fact that the biological mother exercises her right to free movement within the EU (or even going to a third state) to benefit from a legal regime that will ensure that a *de facto* family is also treated as a legal family.

Thirdly, the broad scope of the Proposal affects the assessment of its principal conflict-of-laws rules. The habitual residence of a mother or the place of birth of a child might be appropriate connecting factors for same-sex couples, where the other spouse (partner) would claim parenthood immediately after the birth of a child. Less clear is its suitability in other instances. For example, when a paternity claim is brought years after the birth of the child,[36] or when the issue in question is an adoption of a child for years residing in a state that was not the state of habitual residence of his/her biological mother during the birth, or his/her state of birth.

Art. 17(2) of the Proposal contains two additional conflict-of-laws rules. Art. 17(2) provides that "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." These additional rules are aimed at dual motherhood cases – in most cases, the applicable law, determined via Art. 17(1), will attribute the motherhood to the biological mother according to the rule *mater semper certa est*.[37] However, the attribution of the parenthood to the other mother will be subject to the general rules of Art. 17(1) and alternative rules in

[32] Beilfuss C. G., Pretelli I. 2022/2023, p. 297.
[33] Ibid.
[34] Ibid.
[35] E.g., Ibid.
[36] Ibid.
[37] Ibid.

Art. 17(2). Thus, the attribution of parenthood to the second parent (mother) will also be possible based on the nationality of the first parent (biological mother), the second parent, or the place of birth. The final connecting factor is irrelevant if the subsidiary connecting factor has already been employed under Art. 17(1).

Currently, Art. 17(2) is inadequately drafted. It does not require Member States to apply these additional connecting factors but rather states that they "may" do so.[38] On the one hand, this seems to be a strange retreat from the EC position of strongly favouring rainbow family parenthood. It poses a question: why not impose these conflict-of-laws rules on national courts if their objective is to benefit rainbow families? On the other hand, the dispositive nature of Art. 17(2) undermines the transparency and predictability of conflict-of-laws rules in the Proposal.[39] In fact, it undermines the idea that parenthood should be established in the same manner in all Member States.

States that oppose same-sex couple parenthood or surrogacy arrangements seem to be able to curtail the effects of applying foreign law, employing the public policy exemption of Art. 22(1). The provision stipulates that "the application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum." However, application of Art. 22(1) is restricted by Art. 22(2) stating that the public policy exemption may be used only "in observance of the fundamental rights and principles laid down in the Charter, in particular Art. 21 thereof on the right to non-discrimination." The primary intention behind this restriction is rather obvious – to prevent the application of the public policy exemption if the forum wants to oppose rainbow family parenthood. Such an opposition will fall under the rubric of discrimination based on sex or sexual orientation – prohibited by Art. 21 of the Charter of Fundamental Rights of the EU. In other words, the EC wants to cut all the paths of retreat for the Member States when the rainbow family parenthood is at stake.

Similarly, the Member States that would like to avoid acceptance of the parenthood of the intended parents in case of surrogacy might want to use Art. 21(1) to neutralize *lex causae* embracing such parenthood. However, here again, the use of public policy exemption may be curtailed by Art. 24(2) of the Charter stating that "[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."[40] Although, all in all, it seems that Art. 21(2) of the Proposal with its reference to the Charter is more advantageous to rainbow families as Art. 21 of the Charter is more straightforward than Art. 24(2).

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[38] Beilfuss C. G., Pretelli I. 2022/2023, p. 298.

[39] Recital 50 of the Proposal states "This Regulation should provide legal certainty and predictability by providing common rules on the law applicable to the establishment of parenthood in cross-border situations. […]".

[40] See Legendre R. 2023 (electronic version), para. 4.

4. The future of the proposal

The idea that a parent in one state is a parent everywhere seems laudable. One could even wonder how, in a modern society, it could be otherwise. How could a child have different parents in different states? Yet, this is the reality, and it needs to be amended. Meanwhile, the prospects of the Proposal are not that sunny. It is caught between the rock and the hard place. In this article, the author has pointed out a few weak points of the Proposal's jurisdictional and conflict-of-laws rules. There are certainly others. Many of them are technical and arise from the narrow focus of the Proposal that does not fit well with its very broad scope of application. However, the major problems are political. Many Eastern European Member States desperately try to oppose same-sex marriage, partnership, and, of course, parenthood by same-sex couples.[41] They will feel threatened, as the Proposal does a lot to "outlaw" their approach. The Western Member States often are appalled by surrogacy arrangements, as they seem to commercialize childbearing, might be seen as abusive to surrogate mothers, and contradict the rights of the child to know his/her biological parent(s) and preserve a legal connection with such biological parent(s).[42] Being attacked from two directions, it is not that easy to see a positive fate for the Proposal.[43]

In principle, there are three routes. Firstly, the Proposal does not stand the legislative challenge and does not get adopted.[44] Rather, it remains in a drawer until such time as the Member States are ready for it – but the risk remains that it will stay there for decades.

Secondly, the selected few Member States could use the enhanced cooperation framework and adopt the Proposal among themselves, giving other Member States an opportunity to join later. This option is not impossible but carries its own challenges. On the one hand, as the author has indicated, there are two major division lines: same-sex couple parenthood and surrogacy. Mostly each of them is problematic for different groups of Member States. Hence, the Member States that do not oppose to same-sex relations, in principle, and could be more enthusiastic about the Proposal, might yet be resistant to adopt it due to its permissive effects on surrogacy. Thus, it is not clear whether a sufficient number of Member States would be willing to adopt the Proposal. On the other hand, the enhanced cooperation framework somewhat betrays the very idea behind the Proposal – a parent in one Member State is a parent everywhere. For instance, if only the Member States that in general do not see much of a problem with rainbow family parenthood, adopt the Proposal, then the elephant in the room with recognition of such parenthood in other Member States would remain. Nonetheless, this might be the best option; the Proposal would start to function, and one could hope that other Member States

41 Cf., Beilfuss C. G., Pretelli I. 2022/2023, p. 279.

42 Cf., Ibid.

43 Tryfonidou A. 2023, p. 160.

44 Ibid., pp. 160–161.

join gradually. Nevertheless, in the author's opinion, even for the purposes of enhanced cooperation, the provisions of the Proposal must be critically reviewed and often improved. The more successful and efficient will be its provisions, the higher the chance of attracting other Member States in future.

Thirdly, the Proposal could be amended and watered down during the legislative process to achieve a compromise acceptable to all Member States.[45] This might be a technically good solution – having a unified system of PIL that, nevertheless, is flexible enough to accept different ideologies among the Member States. However, the main objective of the Proposal might be betrayed. Most likely, a parent in one Member State will still risk remaining a parent therein and not elsewhere.

Conclusions

1. The Proposal is a bold attempt by the EC to ensure greater protection for rainbow families in matters of parenthood. For this reason, Art. 6 of the Proposal offers multiple competent fora to deal with parenthood matters without providing any hierarchy between them. The multitude of alternatives is aimed, foremostly, at rainbow families, allowing them to choose the Member State that is the most favourable to same-sex parenthood. However, the scope of the Proposal extends beyond rainbow families, and multiple alternatives of Art. 6 might be ill-suited for other types of parenthood matters like adoptions or parenthood disputes taking place years after the child's birth.
2. The principal conflict-of-laws rules are clearly favourable to surrogacy arrangements, while Art. 17(2) adds additional conflict-of-laws rules that can be used to favour parenthood in rainbow families. However, Art. 17(2) is drafted ambiguously due to its dispositive language. Such a deficiency should be improved during the legislative process.
3. However, the grand problems of the Proposal are its biases. The Proposal supports rainbow families and surrogacy. Its conflict-of-laws rules are particularly supportive of surrogacy. However, while the interaction between its conflict-of-laws rules and the restriction of the public policy exception helps rainbow families, it necessarily creates antagonism between the EC and the Member States – between those who support surrogacy but oppose same-sex couple parenthood and those who oppose surrogacy. As a result, the future of the Proposal is unclear. Still, the very existence of its text can be a basis for a discussion on how to unify PIL rules in matters of parenthood. If this Proposal does not succeed, hopefully, there will be a better one with a higher chance of success.

[45] Tryfonidou A. 2023, pp. 160–161.

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Court practice

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