

Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695 final

Legal Memorandum¹

INTRODUCTION

Child Identity Protection (CHIP) thanks the European Law Institute (ELI) which has allowed CHIP, as an observer, to participate in meetings and give inputs regarding their position paper on the Private International Law on Filiation and the European Commission's Proposal COM/2022/695 final.

The background for this proposed legislation is that, in recent years, scientific and social developments have changed methods of establishing and recognising filiation. Today, same-sex couples, gamete donations, and surrogacy arrangements have changed the context of establishing a parent-child relationship. This relationship may be formalised through a birth certificate, which is the basis for giving rights and duties to both parents and children. In EU Member States, contexts and legislation differ and the filiation resulting from a birth certificate may not be valid in all other Member States.

To address these issues, the European Commission published a 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** ('the Regulation'). It results from the Commission's President von der Leyen's pledge to ensure that 'if you are a parent in one country, you are parent in every country'. The Regulation 'lays down common rules on jurisdiction and applicable law for the establishment of filiation in a Member State in cross-border situations; common rules for the recognition or, as the case may be, acceptance in a Member State of court decisions on filiation given, and authentic instruments on filiation drawn up or registered, in another Member State; and creates a European Certificate of Filiation' (art.1).

The ELI Project Team examined the rules of the proposed Regulation from four specific perspectives: children's, LGBTI persons' and women's fundamental rights, and the underlying EU primary law, especially concerning the free movement of citizens. This analysis is detailed in a report, the last version of which was presented on 18 November 2024 ('the report').

CHILD RIGHTS AT THE CENTRE

Following the meeting held on 18 November 2024, CHIP would like to provide the following inputs, focusing on the children's rights perspective, in particular the right to identity and to know their origins, as well as the right to not be sold as enshrined in the Convention on the Rights of the Child (CRC), the Optional Protocol on Sale and Sexual Exploitation (OPSC), and the 1993 Hague Intercountry Adoption Convention, with the various decisions of the ECtHR on Article 8 of the European Convention on Human Rights and other standards.² These human rights

¹ This memorandum was prepared by Laurence Bordier, with input from Christina Baglietto, Mia Dambach and Katarina Trimmings, for Child Identity Protection, a Swiss based international NGO: www.child-identity.org

² The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: **Convention on Human Rights and Biomedicine** (ETS No 164), <https://www.coe.int/en/web/bioethics/oviedo-convention>, see Preamble and art. 1 "Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine".

obligations have been clarified by various recommendations by the UN CRC Committee,³ the UN Special Rapporteur on the sale and sexual exploitation,⁴ the Verona Principles⁵, UNICEF/CHIP briefing note on surrogacy.⁶

CHILD RIGHTS CONCERNS

1. Right to identity and to know its origins

International standards provide clear identity rights for every child, in particular Articles 7 and 8 of the CRC. Identity rights include the right to be registered at birth and have proof of one's registration through a birth certificate. Identity rights also include having a nationality, a name and knowing one's family relations. Family relations include connections that arise as a result of this history, continuity or separation, encompassing birth parents, gamete donors, siblings, grandparents and others. In other words, each child has a right to know their origins.⁷

2. Positive inputs of the position paper

CHIP welcomes the fact that the report shifts the parent-centered approach to a child-centered one. The proposed change of wording reflects this shift: "filiation" replaces "parenthood". The European Certificate of Filiation is a document which "will enable a child to prove its identity and family ties and not a "patent" of parenthood for adults".⁸

CHIP also welcomes the fact that the child's right to identity is strongly expressed in the report, in many suggested changes:

- Recital 2 adds the reference to the children's rights to know their origins: "(...) It [the Regulation] aims to protect the fundamental rights and other rights of children in matters concerning their filiation in cross-border situations, including their right to know their origins, their right to an identity, to non-discrimination and to a private and family life, taking the best interests of the child as a primary consideration (...)". See also comment on proposed Article 15 below.
- **Jurisdiction:** The report's changes regarding jurisdiction prevent reproductive tourism, as the report favors proximity (the child's place of habitual residence or nationality) or, as potential alternatives, habitual residence or nationality of the putative parent. The place of the birth of the child comes last and the courts of the Member State where the child is present serve as the last resort (Articles 6 and 7). However, the residual jurisdiction rule in Article 8 is unnecessary and the provision should be removed. Considering the broad general jurisdiction under Article 6 (combined with the availability of *forum necessitatis* under Art. 9), including residual jurisdiction.

³ See e.g., U.N. Committee on the Rights of the Child, 'Concluding Observations on the Report Submitted by India Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', U.N. Doc. CRC/C/OPSC/IND/CO/1 (June 13, 2004); U.N. Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of the United States of America Submitted Under Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography', U.N. Doc. CRC/C/OPSC/USA/Co/2 (July 2, 2013); U.N. Committee on the Rights of the Child, 'Concluding Observations on the Combined 5th and 6th Periodic Reports of Georgia', U.N. Doc. CRC/C/GEO/CO/5-6 (June 25, 2004); U.N. Committee on the Rights of the Child, 'Concluding Observations on the Report Submitted by the Russian Federation Under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', U.N.Doc. CRC/C/OPSC/RUS/CO/1 (July 3, 2018); U.N. Committee on the Rights of the Child, 'Concluding Observations on the Combined 3rd and 4th Reports Submitted by the United States of America Under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', U.N.Doc. CRC/C/OPSC/USA/CO/3-4 (July 12, 2017); and U.N. Committee on the Rights of the Child, 'Concluding Observations on the Report Submitted by India Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', U.N.Doc. CRC/C/OPSC/IND/CO/1 (July 7, 2014).

⁴ Special Rapporteur on the Sale and Sexual Exploitation of Children, 'Thematic Report A/HRC/37/60, 15 January 2018', presented at the 37th session of the Human Rights Council [hereinafter '2018 SR Report'], <<https://www.ohchr.org/en/documents/thematic-reports/ahrc3760-report-special-rapporteur-sale-and-sexual-exploitation-children>>.

⁵ International Social Service, 'Principles for the Protection of the Rights of the Child Born Through Surrogacy', February 2021, <https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February2021.pdf>.

⁶ Child Identity Protection and UNICEF, 'Key Considerations: Children's Rights & Surrogacy, Briefing Note', February 2022, <<https://www.unicef.org/media/115331/file>>.

⁷ <<https://www.child-identity.org/international-law/>>

⁸ ELI draft, p.9.

- Proposed Article 15 “rights of children to know their origins”⁹ is a whole new article, aiming to guarantee the children’s right to know their origins, including in case of gamete donations. The proposition of this article is a considerable improvement as it refers explicitly to the right to identity and to know its origins
- **Applicable law:** The report suggest the that the law applicable to filiation shall be the law of the State of habitual residence of the child at the time of completion of the event giving rise to filiation or, where the habitual residence of the child cannot be determined, filiation shall be governed by the law of the State with which it is most closely connected (Article 17). Such recognition would not be very different from the obligations imposed on States by the ECtHR in the context of recognition of legal parenthood established in the country of birth in cross-border surrogacy case. CHIP agrees with the proposed deletion of para 2 as it is not very clear.
- **Recognition:** Article 23 is changed and provides that “1. In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons or different territorial units in respect of filiation matters, the internal conflict-of-laws rules of that State shall determine the system of law or set of rules or relevant territorial unit whose rules of law are to apply. 2. In the absence of such internal conflict-of-laws rules the system of law or the set of rules or law of the territorial unit with which the child has the closest connection shall apply”.
- A Paragraph 3 is added to Article 31 regarding the recognition of a Court decision “3. The recognition of a court decision in matters of filiation may be refused if it was given without consideration of children’s right to know their origins as part of their identity and as evidence that they have not been trafficked”. This addendum is essential as it refers to the right to know one’s origins and mentions trafficking, which refers to the possibility that a child may have been the object of a sale. This refusal should be extended to explicitly include provisions of what amounts to the sale of children in accordance with Article 2a OPSC, which is generally how commercial surrogacy arrangements are being executed.¹⁰
- **European certificate of filiation:** The suggestion of the report to establish a national unified register for certificates (Article 46ss), subject to national rules, certainly guarantees better children’s rights protection, as it allows for better preservation, supervision and access.
- Regarding the application for a certificate, proposed Article 49, Paragraph f provides that “the elements on which the applicant founds filiation, appending the original or a copy of the document(s) which ascertain or constitute filiation and, in this second case, the ECF electronic number associated with the documents which will enable the child to enjoy the right to know the child’s origins when the child comes of age or which will enable the child’s representative to obtain access to the child’s information before the child comes of age”. Here again, a specific reference to the rights to know one’s origins is clearly mentioned and should allow for the respect of the child’s right to identity.

3. Remaining issues and elements of concern

⁹ Article 15 - Right of children to know their origins

1. When exercising their jurisdiction under this Regulation, the courts of the Member States shall, in accordance with national law and procedure, provide children below the age of 18 years whose filiation is to be established, with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body.

2. The courts of the Member States exercising jurisdiction under this Regulation, and the authorities of the Member States drawing up a European Certificate of Filiation under this Regulation shall in accordance with national law and procedure, verify that children enjoy a genuine and effective opportunity to obtain information on their identity and origins and provide them with the necessary information to enjoy this fundamental right when they come of age, either directly or through a representative or an appropriate body.

3. The relevant information is kept in the centralised register in conformity with the rules governing privacy of information and respect the following standard procedure:

- the procedure for the traceability of gamete donors is subject to the law of the Member State in which the donation has taken place.
- the documents provided for the registration procedure by the clinic in charge of the procedure are scanned by the authority in charge of drawing the European Certificate of Filiation and recorded with a specific ECF electronic number by an authorised registrar.
- The authorized registrar verifies that the dossier sent by the clinic is complete before linking it to the electronic number.
- If the file is incomplete, unsigned or irregular, the authorised registrar sends the file back to the clinic to remedy the irregularity.
- The EIF number must allow the child coming of age of the child’s representative to obtain access to the information regarding the child’s biological ascent.

4. The present regulation does not prevent the registrars of ECF from including the name of the surrogate mother in the ECF when prescribed by the applicable law

¹⁰ See SR 2018 Report (supra note 4); David M. Smolin & Maud de Boer-Buquicchio, ‘Surrogacy, Intermediaries and the Sale of Children’, in K Trimmings, S Shakargy & C Achmad (eds.) Research Handbook on Surrogacy and the Law (Edward Elgar Publishing, 2024), p. 54; and California Family Code, §§ 7960-62.

The aim of the Regulation is to establish rules and a certificate in respect of the fundamental rights of the child.

CHIP does not welcome the suggestion to include intercountry adoption in the **scope** of the proposed Regulation (Article 3). Intercountry adoptions within the meaning of the 1993 Hague Adoption Convention should be excluded from the scope of the Parenthood Proposal (Art. 3(2)(e) PP), as the 1993 Convention contains important safeguards, which should not be removed by including such adoptions within the scope of the Regulation. However, there are also domestic adoptions with an international element, for example adoptions by expatriates, which could also be considered intercountry adoptions or cross-border cases. From the child rights perspective such adoptions should fall within the scope of the Regulation, in a subsidiary manner and only if they are not covered by the 1993 Convention.¹¹ Since adoptions in all Member States are always issued by courts, any cross-border effects of adoptions are based on the recognition of those court decisions. According to the proposed Regulation, the rules applicable to the recognition include a public policy exception in Art. 31(1)(a) PP, which would suffice as a safeguard against decisions from Member States which do not adequately take the best interests of the child into account. It would be useful for the Regulation to clarify this difference while making it clear that Hague adoptions are excluded from the scope of the Regulation.

CHIP supports the views expressed by Ms Velina Todorova of the UN Committee of the Rights of the Child on 18 November, including those such as:

- Footnote 87, which refers to the right to identity, should mention Article 7 of the CRC; and
- The suggested removal of the words “taking into account the child’s interests” from Article 31¹² (grounds for refusal of recognition) is arguable: the child’s best interests is a well-defined notion, which should be mentioned in the proposed Regulation.

Moreover, CHIP supports Ms Todorova’s opinion, which acknowledges that rules cannot be imposed on Member States. However, regarding the fundamental human rights of children – particularly the right to identity - the Committee holds strong opinions that have been communicated to the relevant States through its Concluding Observations. Since States are obligated to safeguard these rights, certain rules can indeed be imposed on them, in particular:

- Article 15 (right of children to know their origins) does not address anonymous births and baby boxes. The argument that certain rules cannot be imposed on countries is invalid, since all Member States have repeatedly received recommendations on the matter of anonymous births. Confidential births have been described as an alternative to anonymous births; these take place in hospitals, respecting the mother’s wish to give birth without her environment being informed, while preserving her identity information, which will later be accessible to her child.

CHIP is concerned with proposed Article 15, Paragraph 4, which mentions that “the present regulation does not prevent the registrars of ECF from including the name of the surrogate mother in the ECF when prescribed by the applicable law”. The argument that the name of the surrogate mother is always registered somewhere is insufficient to protect the child’s identity. Intermediaries, lawyers and medical clinics should have an obligation to make information about the surrogate mother available to the children, including details about the use of gametes. In some countries, the name of the surrogate mother is not registered, even in centralized databases, meaning that the child may never be able to access this information. The Regulation should ensure that the child will be able to access the surrogate mother’s name, and registration of this information in the certificate should be made compulsory. If the name is not registered, proof of how and where the information is accessible should be provided. Lack information about the surrogate mother should be a ground for refusal of the filiation. Additionally, there should be evidence of the surrogate mother’s consent, and it must be shown that this consent was not obtained in exchange for compensation.

¹¹HccH note on habitual residence, <https://assets.hcch.net/docs/12255707-4d23-4f90-a819-5e759d0d7245.pdf>

¹² Article 31 Grounds for refusal of recognition

1.The recognition of a court decision shall be refused:

(a)if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, **taking into account the child’s interests**; (...)

Furthermore, it can be argued that international surrogacy arrangements are inherently risky, because their commercial and cross-border dimensions amplify the risk of multiple rights violations. These violations often occur in arrangements facilitated by profit-seeking intermediaries, where the child may have been conceived through anonymous gamete donation, resulting in the loss of the child's identifying information. Typically, no best interests of the child determination are undertaken (cf. Verona Principles). Moreover, such arrangements can include instances where the child is effectively sold; the surrogate mother is denied autonomy over her health care decisions, and over granting consent to transfer parentage at any moment, including at the time of the child's birth, and the intending parent(s) are subject to exploitative practices.¹³

Such children are in need of additional protection, not less. It is therefore not in their interests to "fast-track" procedures which inherently require time to, among other things:

- collect and store all relevant information about the child's origins;
- ensure that necessary consents have been obtained;
- ensure that no payment or any other consideration has been made in exchange for the consent of the surrogate;
- ensure that no payment or any other consideration has been provided to intermediaries facilitating surrogacy arrangements, including the transfer of the child (legal and/or physical);
- impose sanctions on intermediaries providing services, including surrogacy, in States where such practices are explicitly prohibited.

Robust and safe legal parentage requires that all children's rights are protected. By prioritizing a child's right to legal parentage, accelerated procedures may inadvertently lead to less assurance that all the rights outlined in the CRC have been respected.

CONCLUSION

ELI has done great work to improve the children's right to identity, especially by including in the Regulation a new provision on the right to know their origins, mentioning the possibility of a child having been trafficked, and by preventing forum shopping and reproductive tourism. However, there are still some gaps that could prevent the child from knowing their origins. In particular, the Regulation must ensure that all information regarding a child's legal identity, including details on parent(s), donor(s) and surrogates, is registered and accessible. It must also ensure that any filiation certificate does not inadvertently facilitate and/or recognize situations where the sale of children has occurred.

¹³ See SR 2018 Report (supra note 4); David M. Smolin & Maud de Boer-Buquicchio, 'Surrogacy, Intermediaries and the Sale of Children', in K Trimmings, S Shakargy & C Achmad (eds.) Research Handbook on Surrogacy and the Law (Edward Elgar Publishing, 2024), p. 54; and California Family Code, §§ 7960-62.