

\_Position Paper, 29 January 2024

# The European Commission's proposal for a Council Regulation on Parenthood

Notaries are amongst the main legal advisers of citizens and their families in Europe. In many cases, they support and advise families over several generations and are included in the most challenging and far-reaching decisions. Given their highest legal expertise, their status as public officials and their obligation to impartiality, they enjoy immense trust and are highly valued by citizens. Notaries in Europe note an increasing number of multinational families and families that may reside in several countries throughout their life together. For this reason, the CNUE has been committed to exploring drawing up common approaches and best practices on family and inheritance law in order to facilitate life for families in cross-border situations.

On 7 December 2022, the European Commission adopted its proposal for a Council Regulation on the 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 "Parenthood Regulation").

While EU law already foresees that parenthood established in another Member State must be recognized for the purposes of the rights that a child has under EU law, the same is not the case as regards the rights that the same child has under national law. Against this background, parenthood established in one Member State may be denied effect in another Member State with negative consequences for the child regarding succession, maintenance and custody.

The Commission proposal's objective thus is threefold: first, it aims to provide legal certainty regarding the applicable rules for establishing parenthood in cross-border situations and via the recognition of parenthood that has been established in another Member State. Second, it looks to comprehensively protect fundamental and other rights of children throughout Europe. Third, the proposal is intended to reduce legal costs as well as the overall bureaucratic burden for families in cross-border situations.

The CNUE welcomes the European Commission's initiative to increase legal certainty for families in Europe. Because the proposal relates to an issue of high importance for citizens across Europe, it is essential that the regulation is effective in practice and respectful of the substantive law of the Member States. This is why the CNUE would like to point out – as way of a preliminary opinion while the analysis of the proposal is still ongoing – the following aspects for consideration:



## 1. Definition of the term “court”

The Parenthood Regulation should provide for a definition of the term “court” which is more in line with the definitions of this term in the context of other judicial cooperation instruments, in order to avoid discrepancies and misunderstandings and ensure the effectiveness of the Regulation in practice.

Article 4(4) of the Regulation defines the term “court” as “*an authority in a Member State that exercises judicial functions in matters of parenthood.*” This definition deviates from all other definitions of the term “court” in the context of judicial cooperation in civil and commercial matters. It should be aligned with the more coherent and precise definitions in the Succession Regulation, the Maintenance Regulation and the Regulation on Matrimonial Property Regimes.

## 2. Lex fori principle

Articles 18 et seq. of the Parenthood Regulation should be amended to ensure compliance with the lex fori principle according to which courts, notaries and authorities apply their own national procedural law even if foreign law is applicable in the matter. This is not only practical, but imperative, since procedural law is closely linked to the organization of the judiciary and administration and thus to sovereign powers of the Member States. The application of foreign procedural law would overburden courts, notaries or other authorities and lead to a great deal of legal uncertainty in administrative proceedings and proceedings of voluntary jurisdiction:

- The application of a foreign procedural law would overcomplicate national procedures and expose children and parents to the risk of denial of justice if procedures cannot be carried out at all or cannot be carried out in a reasonable time. An obligation to apply foreign procedural law would therefore be opposed to the aim of the Parenthood Regulation, which is to effectively protect the interests and rights of the child and parents.
- It should be made clear that not the applicable substantive law but the national law of the state of origin determines the legal effect and probative value of authentic instruments (Art. 18 lit. b) of the Parenthood Regulation).
- There should be no doubt as to the fact that only national procedural law can determine in which form evidence of a legal act can be produced in specific court or administrative proceedings (Article 20 (2) of the Parenthood Regulation). Any other provision would overburden courts and parties to the proceedings: in the context of the presentation of evidence, the court would have to determine whether the law of a different Member State permits a particular form of presentation of evidence. In this context, the court would have to determine the content of foreign procedural law. In some cases, disputes may arise about the admissibility of a specific type of evidence. In any case, this would introduce considerable uncertainty into national proceedings which could considerably delay the court proceedings.





### 3. Distinction between authentic instruments with binding legal effect and authentic instruments without binding legal effect

The proposal makes a conceptual distinction between authentic instruments that establish parenthood “with binding legal effect” (Article 35 et seq. of the Parenthood Regulation) and authentic instruments that do not have “binding legal effect” in the Member State of origin but have evidential value (Article 44 et seq. of the Parenthood Regulation). This distinction should be abandoned. Instead, it would be sufficient to refer to “authentic instruments which establish parenthood” and “authentic instruments”.

According to the proposal, authentic instruments which establish parenthood “with binding legal effect” – as a court decision would – are to be recognized in other Member States – as a court decision would – (Art. 35 ff. of the Parenthood Regulation), while the probative force of authentic instruments “without binding legal effect” (which seems to mean that they are authentic instruments that do not establish parenthood) is to extend to other Member States by way of acceptance (Art. 44 f. of the Parenthood Regulation).

The terminological differentiation between authentic instruments “with and without binding legal effect” is inappropriate and not suitable for distinguishing authentic instruments appropriately according to their content:

- The concept of authentic acts “which establish parenthood with binding legal effect” is not clear for all Member States which may lead to misunderstandings and legal uncertainty. Simply referring to “authentic instruments which establish parenthood” seems more appropriate. It would also be in line with the Brussels IIb Regulation which differentiates between authentic instruments on one hand and agreements with binding legal effect on the other hand.
- If an authentic act in a Member State establishes parenthood (like a court decision would), it is to be recognized as a court decision (Art. 24 et seq.) in another Member State.
- The evidentiary effects of other authentic instruments (meaning authentic instruments which do not establish parenthood), are to be accepted (Art. 44 et seq.) in other Member States.
- The suggested differentiation should not lead to the (most likely unintended) result that authentic instruments which establish parenthood could be excluded from the scope of application of Art. 44 et seq. and therefore have no probative value in other Member States.
- Finally, the terminology wrongly suggests that authentic instruments which do not establish parenthood do not have any legal effect at all. However, evidentiary effect is a legal effect





which, moreover, may be binding on the parties. It is therefore incorrect to imply that authentic instruments that only have evidentiary effect have no binding legal effect.

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## **\_ About the CNUE**

**The Council of Notariats of the European Union (CNUE)** is the official body representing the notarial profession in the European institutions. It brings together the notariats of the 22 Member States that know this institution: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. In these 22 Member States, the notaries serve more than 400 million EU citizens. The Notariats of North Macedonia, Montenegro, Serbia, Turkey and Ukraine are observer members. The CNUE represents more than 45 000 notaries and 200 000 employees.

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