RESOLUTION ADOPTED BY THE COMMISSION ON DRAFT EUROPEAN UNION LEGISLATIVE ACT NO. COM(2022) 695 FINAL (Doc. *XVIII-bis*, No. 2) ON COMPLIANCE WITH THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

The 4th Permanent Commission,

examined the proposal for a regulation on jurisdiction, applicable law and the recognition of decisions and authentic instruments in matters of filiation and the creation of a European Certificate of filiation (COM(2022) 695);

assessed the Government reports, prepared by the Ministry of Justice and the Ministry of the Interior, and submitted pursuant to Article 6 of Law No. 234 of 2012;

Taking into account the hearings of the lawyer Gianfranco Amato, the councillor Alberto Giusti, representatives of the Rainbow Families Association and the Lenford Network Association, Professor Emanuele Bilotti, the lawyer Maria Paola Costantini, Professor Mirzia Bianca, the lawyer Antonio Rotelli and Professor Gian Luca Contaldi, held on 20 February 2023, as well as the hearings of Professor Mauro Paladini and the Authority for Children and Adolescents' Rights, Dr Carla Garlatti, held on 7 March 2023

whereas the proposal has as its legal basis Article 81 TFEU on judicial cooperation in civil matters, and in particular paragraph 3 thereof, which allows the Council to adopt measures concerning family law with cross-border implications, acting unanimously after consulting the European Parliament

Having regard to the UN Convention on the Rights of the Child of 20 November 1989, which requires States Parties to respect and ensure the rights of the child without discrimination of any kind and to take all appropriate measures to ensure that the child is protected against all forms of discrimination or sanctions based on the situation of his or her parents pursuing in a preeminent manner the best interests of the child, as understood in Article 24 of the EU Charter of Fundamental Rights and Articles 3 and 12 of the UN Convention on the Rights of the Child, including by guaranteeing the child's right to be heard, i.e. the concrete and effective opportunity to express his or her views and that those views are duly taken into account;

endorsed the proposal's aim of strengthening the protection of children's fundamental rights in cross-border situations, including the right to identity, non-discrimination and respect for private and family life, inheritance rights and the right to maintenance in another Member State, taking the best interests of the child as paramount in a situation where it is estimated that currently two million children are in a state of non-full recognition, of filiation established in one Member State, by another Member State, and therefore considering the safeguarding of the child's personal rights and conditions of legal and emotional protection from birth to the age of majority to be a priority objective, to be pursued vigorously

considers, however, to issue a reasoned opinion in accordance with Article 6 of Protocol No 2 annexed to the European Treaties, since certain provisions contained in the proposal, and in particular the obligation to recognise (and consequently transcribe) a judicial decision or an authentic instrument, issued by another Member State, attesting parentage, and the obligation to recognise the European Certificate of parentage, do not comply with the principles of subsidiarity and proportionality, for the following reasons

The Court of Cassation in United Sections pronouncement no. 38162 of 30 December 2022, confirmed that the practice of surrogacy is contrary to public order, denying the automatic transcription of the foreign measure certifying parenthood and recognising the character of international public order rule to Article 12, paragraph 6, of Law no. 40 of 2004, which considers any form of surrogacy as a crime, with sanctions aimed at all those involved, including intended parents.

The same Court has thus identified, in the state of development of the national legal system and in the absence of a different legislative intervention, 'adoption in particular cases' within the meaning of Article 44(1)(d) of Law No. 184 of 4 May 1983, as the instrument that makes it possible to give legal recognition, with the attainment of child *status*, to the de facto bond with the *partner* of the genetic parent who has shared the procreative plan and has concurred in caring for the child from the moment of birth.

The Court therefore concluded that, also as a result of Constitutional Court Ruling No. 79 of 2022, "adoption in particular cases", as currently regulated, is a potentially adequate means of ensuring that the child born through surrogacy enjoys the legal protection required by conventional and constitutional principles, with the assessment in each case being subject to the judge's scrutiny in the specifics of the individual case and without prejudice to the legislature's possibility of intervening at any time to dictate rules that are even more in keeping with the peculiarities of the situation.

The proposal for a regulation indeed allows the invocation of the public policy clause to refuse recognition of a document from another Member State establishing the filiation relationship, as clearly expressed in Articles 31 and 39 of the proposal. However, this is provided for by way of exception and as a contingency to be assessed on a case-by-case basis.

The articles, in fact, first of all recall in Article 2 the limits that the case law of the Court of Justice of the EU imposes on the invocation of public policy, with particular regard to the recognition of the filial relationship, aimed at enabling the child to exercise without hindrance together with each parent, his or her rights deriving from Union law (and only these), such as the right to move and reside freely within the territory of the Member States, guaranteed by Article 21(1) TFEU, and the rights connected with and derived from them (judgment of 14 December 2021, Case C-490/20).

Furthermore, in Article 22 and in Articles 31 and 39 themselves, it is made explicit that the public policy clause can only be invoked for manifest contrariety to it, to which it is added that the refusal can only be exercised in compliance with the fundamental rights and principles recognised by the EU Charter of Fundamental Rights, in particular Article 21 on the principle of non-discrimination.

Recital 14 exemplifies the limitation of the public policy clause, stating that it cannot be invoked to justify a refusal to recognise a filiation relationship between a child and parents of the same sex for the purposes of exercising the rights conferred on the child by Union law.

Finally, the explanatory memorandum of the proposal clarifies that, when assessing a possible refusal to recognise a filiation on grounds of public policy, the authorities of the Member States must take into account the best interests of the child, in particular the protection of his or her rights, including the preservation of genuine family ties between the child and his or her parents, and that the ground of public policy as a basis for refusing recognition must be used exceptionally and in the light of the circumstances of each case, i.e. not in an abstract manner to exclude recognition of the filiation when, for example, the parents are of the same sex. In order to be refused, recognition would have to be manifestly incompatible with the public policy of the Member State in which it is

sought because, for instance, a person's fundamental rights were violated at the time of conception, birth or adoption of the child or when establishing the filiation. The authorities of the Member States could therefore not refuse, on grounds of public policy, to recognise a judicial decision or an authentic instrument establishing filiation by adoption by a single man, or establishing filiation in a same-sex couple on the sole ground that the parents are of the same sex.

Similarly, the European certificate of filiation has evidentiary effect in all Member States. Pursuant to Article 53, it shall produce its effects in all Member States without any special procedure being required and shall constitute an appropriate document for entering the filiation in the relevant register of a Member State, in the same way as the aforementioned court decision or authentic instrument establishing the filiation. However, unlike these, there is no provision in the proposal allowing the effects of the European Certificate of Succession to be denied by invoking the public policy clause. There would thus appear to be an internal inconsistency in the legislative text which, if not remedied, would prevent the public policy ground from being invoked to refuse recognition of a European Certificate of Succession where such a filiation is manifestly contrary to public policy.

The proposal, therefore, does not respect the principles of subsidiarity and proportionality insofar as it allows the ground of public policy to be invoked only on a case-by-case basis and insofar as it does not provide for it to be invoked to refuse recognition of the European Certificate of Succession. Moreover, the proposal does not provide for the possibility for the Member States to ensure full respect for the rights of children by means other than the recognition of judicial decisions, public acts or European certificates of filiation, such as the institution of adoption in particular cases, provided for in Article 44(1)(d) of Act No 184 of 4 May 1983.

It therefore appears to be an essential condition that the proposal explicitly provides for the possibility of invoking the public policy clause generally in all cases of filiation by surrogacy, provided that an alternative and equivalent protection, such as that of the above-mentioned institution of adoption in particular cases, is ensured, and that this also explicitly applies with regard to the European filiation certificate.

In particular, with regard to the limits evoked to the possibility of denying recognition on the ground of manifest conflict with public order, including that of proceeding only on a case-by-case basis, the Court of Cassation pointed out "that only such a broad prohibition is capable, as a precautionary measure, of avoiding forms of abuse and exploitation of fragile conditions" inherent in any form of surrogacy of motherhood, which is always to be considered detrimental to the dignity of the pregnant woman, but also potentially of the child itself. In this sense, the Court has made it clear that, "when faced with a legislative choice that protects fundamental values, the interpreter is not permitted to carve out from the normative case-law, in order to exclude them from the range of operation of international public order, forms of surrogacy which, although prohibited in Italy, would not [according to that interpretation] be capable of undermining, by the manner of the conduct or the purposes pursued, the essential nucleus of the protected legal good".

The Court explains that, irrespective of the procreative mode, the child born has a fundamental right to the continuity of the affective relationship with both parties who shared the decision to bring him into the world. In that sense, the child would certainly also have the right to be brought up by the mother who gave birth to him, who might also wish to perform the maternal function. This would be followed by the child's interest in not only social but also legal recognition of that bond with the expectant mother. Failure to attribute a legal status to that relationship would not be limited to the condition of the intended parent, who has chosen a method of procreation that the Italian legal system disapproves of, but would end up prejudicing the child himself, whose right to respect for his private life would be significantly impaired.

In addition, with regard to the recognition of foreign judgments on the subject of surrogacy, the Court emphasised that there can be no "withdrawal of control over the essential principles of the *lex fori* in matters that are governed by a set of systemic rules that implement the foundation of the Republic". Thus, the need for an absolute ban on this practice was reiterated, emphasising, inter alia, how a case-by-case assessment would make the civil registrar decide whether to recognise intended parenthood.

Finally, with reference to Article 51 of the proposal, and the reference therein to the law applicable to the establishment of filiation, it is considered necessary that such law be identified with stringent criteria, based on prior habitual residence, duly established, to protect both parties to the conjugal relationship, for instance in the case of de facto separation with abduction of the child to one of the parents.

This resolution is also to be understood as an act of address to the Government, pursuant to Article 7 of Law No. 234 of 2012.