



Warsaw, May 12th 2021

Remarks to the announced legislative initiative of the European Commission on recognition of parenthood between Member States (Ares(2021)2519673)

I. Main thesis

- Article 81(3) TFEU, cited in the EC Communication as the basis for the planned European Union action on the recognition of parenthood between Member States, may not constitute the basis for action by the EU institutions aimed at interfering with the substantive family law of the Member States;
- in accordance with the Treaty law, the European Union does not have any competence to establish substantive family law that is binding on the Member States. This is confirmed by the content of the Treaty on the Functioning of the European Union, in particular Article 81 TFEU, as well as the provision of Article 9 of the Charter of Fundamental Rights and Article 12 of the ECHR, to which the EU is a party;
- the constitutional and legal orders of many EU Member States are unequivocally opposed to the possibility of recognizing both homosexual 'marriages' and the adoption of children by them. Therefore, adopting the legislative initiative proposed by the Commission would not only be a gross exceeding of the competences granted to the European Union, but would also violate the rights of Member States to legislate in accordance with the will of their citizens.

II. Introductory remarks.

April 14, 2021. The European Commission has announced the start of work on another EU legislative initiative, the "Regulation on the recognition of parenthood between Member States". According to the content of the EC Communication, the legislative proposal aims to facilitate the recognition of parenthood between Member States by establishing common conflict rules on parenthood, as well as

common rules on the recognition of court judgments on parenthood. The introduction of these mechanisms, as envisaged by the European Commission, would enable children to retain all their rights in cross-border situations. In fact, the proposed legal regulation is intended, in particular, to enable the recognition of adoption of children by homosexual couples in all sovereign Member States, including those, whose constitutional order and national law do not allow such a possibility.

The EC Communication lists as legal bases for EU action in this area the provisions of Chapter 3 of the Treaty on the Functioning of the European Union - TFEU ("judicial cooperation in civil matters"), in particular Article 81(3) on cross-border family law matters.

III. The EC's announced initiative violates EU law and Member States' rights.

1. Lack of EU competence in substantive family law matters.

According to the provision of Article 81 (3) TFEU, cited in the EC Communication as the basis for the envisaged European Union action on recognition of parenthood between Member States, by way of derogation from paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. With regard to the Treaty basis for EU actions in this area thus defined, it must be stressed that the above-mentioned **EU competence concerns only procedural matters of cross-border nature, but does not relate to substantive family law**. This derives directly from the provisions of Article 81 (1) and (2) TFEU:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) cooperation in the taking of evidence;

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States

(g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff.

These provisions of the TFEU clearly apply to procedural and not substantive matters. **Therefore, it is clear that the European Union has no competence to establish legal acts in the area of substantive family law, such as the definition of marriage or determining the group of persons entitled to adopt children, which are binding upon Member States.** This issue was also pointed out in the EC Communication: under the Union Treaties, *substantive law on family matters and the legal status of persons falls within the competence of Member States, which means that the establishment of the parenthood of a person is governed by national law.*

The Commission's proposal to regulate the recognition of parenthood at EU level is furthermore contrary to **Article 9 of the Charter of Fundamental Rights of the European Union - CFR: *the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.*** This provision clearly stipulates that matters concerning marriage and family formation (including, of course, adoption) are outside the competence of the European Union.

The Member States have exclusive competence in matters of substantive family law. This position was also expressed by the European Union Agency for Fundamental Rights (the "AFR") in its explanations of the provisions of the Charter of Fundamental Rights, in which it was pointed out that Article 9 of the CFR is based on Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")¹, ***in accordance with which: men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.***² While the AFR commentary notes that for the purposes of the Charter of Fundamental Rights, *the wording of the article has been updated to include cases in which national legislation recognizes other ways of creating a family than marriage*, it makes clear that the essence of the regulation in Article 9 of the CFR is its similarity to Article 12 of the ECHR, *but its scope may be*

¹Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, as amended by Protocols 3, 5 and 8 and supplemented by Protocol 2.

²European Union Agency for Fundamental Rights, Explanation of Article 9 of the Charter of Fundamental Rights of the European Union, https://AFR.europa.eu/pl/eu-charter/article/9-prawo-do-zawarcia-malzenstwa-i-prawo-do-zalozenia-rodziny?field_AFR_country_tid%5B%5D=1015#TabExplanations (accessed January 18, 2021).

expanded if national legislation so provides. It is clear from the foregoing that issues relating to marriage and the recognition of parenthood have been submitted exclusively to national legislation, to the exclusion of any interference by EU institutions. Significantly in the present case, the annotation on the AFR website regarding the status of the posted explanations of the provisions of the CFR may not be ignored either. According to this information, these explanations *are a valuable tool of interpretation intended to clarify the provisions of the Charter*. **The Union's institutions when applying European Union law are bound to take account of these interpretative guidelines in their activities and this obligation derives directly from Article 6(1), third sentence, of the Treaty on European Union** (*the rights, freedoms and principles in the Charter shall be interpreted in accordance with [...] due regard to the explanations referred to in the Charter, which identify the sources of these provisions*) in conjunction with Article 52(7) of the CFR (*the explanations drawn up to guide the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States*). In addition, by virtue of Article 6(2) TEU the European Union has become party to the ECHR and pursuant to paragraph 3 of that provision **the fundamental rights guaranteed by the ECHR form part of the law of the Union as general principles of law**. Consequently, **the right of men and women to marry and to found a family according to the national laws governing the exercise of this right, specified in Article 12 ECHR, has the status of a general principle of EU law** and as such is placed at the top of the hierarchy of laws (primary law). Lower in the hierarchy of legal acts is the secondary law of the Union, including **regulations or directives created by its institutions, which are valid only if they are compatible with the law placed higher in the hierarchy**.³ This remark obviously applies also to the proposed legislative guidelines of the European Commission (regardless of what legislative form they take) on the issue of recognition of parenthood between the member states. Regardless of whether the EC proposal would take the form of a regulation or a directive, the provisions of this act of secondary law (of a lower rank) could not be interpreted in a manner contrary to the norms of a higher order - in this context, with Article 9 of the CFR and Article 12 of the ECHR, clearly granting Member States exclusive competence to regulate the issue of determining parenthood. It must also be stressed that the legal steps announced in the EC Communication to force Member States to recognize adoptions of children from one EU country by all Member States will not only lack a legal basis, but will also constitute an **unlawful presumption of competence of the European Union**. **The principle of conferral expressed in Article 5(2) TEU** obliges the EU institutions to act *only within the limits of the competences conferred upon it by the*

³Parlament Europejski, *Noty tematyczne o Unii Europejskiej: „Źródła i zakres prawa Unii Europejskiej* [European Parliament, Thematic Notes on the European Union: "Sources and Scope of European Union Law], <https://www.europarl.europa.eu/factsheets/pl/sheet/6/zrodla-i-zakres-prawa-unii-europejskiej> (accessed January 18, 2021).

Member States in the Treaties in order to achieve the objectives set out therein. Conversely, any competence not conferred upon the Union in the Treaties remains with the Member States. **According to the will of the Member States, matters of substantive family law, including marriage and family formation (including the adoption of children), are outside the competence of the Union and fall within the exclusive competence of the states making up the Union.** Legislative activity by the EU institutions in this area constitutes a breach of the above treaty principle. It is worth noting that family law cases involve **sensitive issues**, which is why a **special legislative procedure** is provided for in EU law with regard to procedural issues. This is expressly provided for in Article 81 (3) TFEU, mentioned in the EC Communication, according to which measures concerning procedural family law (within the framework of judicial cooperation in cross-border civil matters - Article 81 (1) TFEU), by way of derogation from the general rule expressed in paragraph 2 thereof, shall be established by the Council, acting in accordance with a special legislative procedure. This means that **unanimity of all Member States is required in the Council in order to take legislative action affecting the area of family procedural law. However, the competence of the Council in this area (and the corresponding competence of the Commission as initiator of legislation) is limited exclusively to cross-border procedural matters** (Article 81 (1) TFEU) and does not include substantive regulations. Substantive law is made by Member States in accordance with their own legislative procedures (Article 5 (2) in fine TEU). The requirement that decisions in family matters must be taken by unanimity is also unaffected by the provisions of the second subparagraph of Article 81(3) paragraph 2 of TFEU, which provides that *the Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law [always exclusively procedural - note OI] having cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure.* Also in this situation, the **Council acts unanimously** after consulting the European Parliament. Furthermore, under the third paragraph of Article 81(3) TFEU, the Commission's proposal is transmitted to the national parliaments which may express their opposition to such a planned Council's decision. The effect of an objection is that the Council of the EU may not adopt an act determining those matters of family procedural law, for which the ordinary legislative procedure would apply. The provisions of the TFEU cited above confirm the Member States' intention to limit the legislative role of the Union, and thus its interference, in procedural matters touching on sensitive family issues. **It is therefore all the more unacceptable to assume that the European Union has competence to regulate family matters (including those relating to the adoption of children) of a substantive nature at all, and all the more so that its bodies may take any legislative action in that regard without the prior express consent of all the Member States.**

2. Legal orders of the European countries opposing the adoption of children by homosexual couples.

Family law, which defines i.a. the rules of marriage and child adoption, varies widely across the European Union. While the laws of some member states allow for the adoption of minors by homosexual couples (allowing also for same-sex "marriages"), the laws of many countries clearly oppose such a possibility (often it concerns both adoption and entering into same-sex partnerships). The legislation of those member states that do not allow for the adoption of children by same-sex couples, also referred to as "marriages" in some countries, is briefly outlined below.

2.1. Poland

Poland is one of many European Union countries, whose legislation does not allow adoption of children by same-sex couples. In accordance with Article 115 § 1 of the Family and Guardianship Code - FGC⁴ (which is the basic act of substantive family law), **in Poland only spouses may adopt a child together**. However, the fact that marriage is exclusively a union of a man and a woman is determined not only by Article 1 § 1 of the FGC, but above all by Article 18 of the Polish Constitution (*Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland*). This article effectively prevents the introduction in Poland not only of same-sex "marriages", but also excludes adoptions by same-sex partnerships - there is no legal possibility to equate any other type of relationship with the position occupied by marriage in the Polish legal system. In the Polish legal system it is inadmissible to give any legal significance in family law, in particular a legal position similar to marriage, to any other unions, regardless of their alternative or competitive character and the internal composition of the subject (persons of the same or different sex). Allowing same-sex couples to adopt minors should be considered equally unacceptable.

Consequently, the head of the registry office in Poland has a legal obligation to refuse to transcribe a foreign civil-status record that confirms an event unknown to Polish law, such as parenthood ("hidden adoption") of a child by a person of the same sex as the mother (father) or the conclusion of a same-sex union. It should also be noted that Polish administrative courts in some judgments have sanctioned

⁴Act of 25 luteo 1964 r. Family and Guardianship Code i.e. of 15 July 2020 ([Polish Journal of Lawsof 2020 item 1359](#))

such transcriptions⁵. However, ultimately the Supreme Administrative Court, in a resolution of seven judges, unequivocally rejected this line of jurisprudence⁶, indicating that such a transcription - as incompatible with the fundamental principles of the Polish legal order - is inadmissible.

In this context it should be added that imposing on Poland the obligation to recognize adoptions incompatible with the legal order of this country was also unequivocally ruled out by the so-called Polish-British Protocol (no. 30) to the Charter of Fundamental Rights, according to which the Charter does not extend the competence of the Court of Justice of the European Union or any Polish court to declare that Polish regulations are incompatible with the Charter. Poland also made its own declaration (No. 61) to the CFR, asserting that *the Charter in no way affects the right of Member States to legislate on public morality, **family law**, and the protection of human dignity and respect for human physical and moral integrity*. Earlier, an analogous declaration (no. 39) was made by Poland to the 2003 Accession Treaty: *nothing in the provisions of the Treaty on European Union, the Treaties establishing the European Communities or in the provisions of the Treaties amending or supplementing these Treaties shall prevent the Polish State from regulating **matters of moral importance** as well as matters relating to the protection of human life*.

In view of the above, recognition of "marriage" certificates, registration of a partnership or adoption of a child by a same-sex couple is in no way acceptable in Poland. This issue has been settled both in legislation and judicature and at the same time has firm foundation in the Constitution of the Republic of Poland and treaty provisions.

2.2. Romania

Romanian law does not allow for same-sex "marriages" or any form of civil partnerships⁷.

There is also no recognition of same-sex "marriages" or civil unions concluded abroad, which derives from Article 277 (1-3) of the Romanian Civil Code, which explicitly states that Romania will not recognize same-sex "marriages" or other same-sex "civil unions" concluded abroad by Romanian citizens or foreigners⁸. Following the judgment of the European Court of Justice in the Coman et al.

⁵ Judgment of the Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16; judgment of the Provincial Administrative Court in Kraków of 10 May 2016, ref. no. III SA/Kr 1400/15; judgment of the Provincial Administrative Court in Gdańsk of 14 January 2016, file III SA/Gd 835/15; judgment of the Provincial Administrative Court in Gliwice of 6 April 2016, file II SA/Gl 1157/15; judgment of the Provincial Administrative Court in Kraków of 10 May 2016, file III SA/Kr 1400/15; judgment of the Provincial Administrative Court in Poznań of 5 April 2018, file II SA/Po 1169/17.

⁶ Resolution of the Supreme Administrative Court of 2 December 2019, ref. no. II OPS 1/19.

⁷See: CodulCivildin 17 iulie 2009, art 258 (4), art 259 (1), art 271, <http://legislatie.just.ro/Public/DetaliiDocument/175630> (accessed 06.05.2021), hereinafter: "Romanian Civil Code".

⁸Ibid, Article 277(1)-(3).

case, which confirmed the right of residence in EU countries for same-sex couples on an equal footing with married couples, even in cases where the country in question does not recognize same-sex unions, Romania recognizes "marriages" and other formal same-sex unions contracted abroad only as far as residency rights are concerned, and in no other aspect. Romania recognizes marriage (as a union between a man and a woman) as the basis for family formation, as well as natural parenthood and adoption. **In Romania, there is no path to adoption for same-sex couples, nor is it possible to adopt the child of a partner⁹.**

2.3. Bulgaria

Bulgarian law does not allow same-sex "marriages" or any form of civil partnerships.

In accordance with the Bulgarian Constitution, marriage under the law may only be between a man and a woman (Article 46 of the Bulgarian Constitution)¹⁰. It is worth noting that although after the CJEU judgment in Coman et al, the Sofia court granted the first same-sex couple who entered into a "marriage" outside Bulgaria the right of residence under EP Directive 2004/38/EC, **according to the Bulgarian Family Code, same-sex couples still do not have the right to jointly adopt children.**

2.4. Lithuania

Lithuanian law does not allow for same-sex "marriages" or any form of civil partnership. **The Lithuanian Civil Code explicitly defines marriage as a union between a man and a woman¹¹. Adoption of children in Lithuania is available only to married couples.**

2.5. Latvia

Latvian law also does not allow same-sex "marriages" nor any form of civil partnerships¹². Thus, **in Latvia, marriage is understood as the union of a man and a woman.**

⁹LEGE no. 273 din 21 iunie 2004 privind regimul juridic al adopției EMITENT: PARLAMENTUL PUBLICAT IN: MONITORUL OFICIAL no. 557 din 23 iunie 2004, <https://www.protectiacopilului6.ro/Files/legislatie/legislatie-protectia-copilului/11.2008/LEGENr273.pdf> (accessed: 19.01.2021).

¹⁰КОНСТИТУЦИЯ НА РЕПУБЛИКА БЪЛГАРИЯ (Обн., ДВ, бр. 56 от 13.07.1991 г., в сила от 13.07.1991 г., изм. и доп., бр. 85 от 26.09.2003 г. изм. и доп., ДВ, бр. 18 от 25.02.2005 г., бр. 27 от 31.03.2006 г., бр. 78 от 26.09.2006 г. - Решение № 7 на Конституционния съд от 2006 г., бр. 12 от 6.02.2007 г., изм. и доп. ДВ, бр. 100 от 18 Декември 2015 г.), Чл. 46, <https://www.parliament.bg/bg/const> (accessed: 18.01.2021), hereinafter: "Constitution of Bulgaria".

¹¹Lietuvos Respublikos civilinio kodeksas. Trečioji knyga. Šeimovietė (Žin., 2000, Nr. 74-2262), art. 3.7 (1), <https://www.infolex.lt/ta/60696> (accessed: 19.01.2021), hereinafter: „the Lithuania Civil Code”.

¹²LATVIJAS REPUBLIKAS LIKUMS Civillikums, art. 35, <https://likumi.lv/ta/id/225418-civillikums> (accessed: 19.01.2021), hereinafter: "Latvian Civil Law" and Latvijas Republikas Satversme, art. 110, <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme> (accessed: 19.01.2021), hereinafter: „Constitution of Latvia”.

Latvia recognizes “marriages” and other institutionalised same-sex unions only insofar as it is bound by the CJEU judgment in *Coman et al*, i.e. the right of residence, but not the right of joint adoption of children. **As in Poland, under Latvian law joint adoption of the same child is reserved exclusively for married couples¹³.**

2.6. Slovakia

Slovakia is another member state whose domestic law does not allow same-sex “marriages” or any form of civil partnerships¹⁴.

The country recognizes “marriages” and other institutionalized same-sex unions only to the extent covered by the CJEU judgment in *Coman et al*. i.e. the right of residence, but not the right of joint adoption of children.

In Slovakia, it is not legally possible for homosexual couples to adopt children. It is also not possible to adopt a child whose biological parent is the partner of the adopter¹⁵.

2.7. Hungary

Also in Hungary, persons in a same-sex partnership do not have the right to jointly adopt children. Adoption of their partner's biological child is only possible for a person who is the spouse of that child's parent (and therefore only applies to heterosexual couples). **In December 2020, an amendment was made to the Hungarian constitution that completely prevents the adoption of children by same-sex couples¹⁶.**

Significant restrictions on the possibility for same-sex couples to adopt children also exist in Croatian and Czech legislation. In **Croatia**, same-sex couples have no officially granted right to joint adoption. Similarly, in **Czechia**, same-sex couples do not have the right to jointly adopt a child, nor is it legally possible to adopt the biological child of the adopter's partner.

¹³Op. cit. Latvian Civil Law, Otrāapakšnodāja: Adopcija.

¹⁴ÚSTAVA SLOVENSKEJ REPUBLIKY z 1. septembra 1992, Čl. 41, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/#ustavnyclanok-107> (accessed: 19.01.2021), hereinafter: „Constitution of Slovakia”.

¹⁵Zákon č. 36/2005 Z. z. o rodine a o zmene a doplnení niektorých zákonov, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/36/20170701> (dostup: 21.01.2021), Zákon č. 305/2005 Z. z. o sociálnoprávnej ochrane detí a o sociálnej kuratele a o zmene a doplnení niektorých zákonov, <https://www.zakonypreludi.sk/zz/2005-305> (accessed: 21.01.2021).

¹⁶*Magyarország Alaptörvénye (2011. április 25.)*, L) cikk, <https://net.jogtar.hu/jogszabaly?docid=a1100425.atv> (accessed: 21.01.2021), L) cikk.

2.8. Ukraine*

Although Ukraine is not a member state of the European Union, due to the ongoing negotiations for its accession to the EU, it seems important to cite its legislation in this regard as well.

Ukrainian law does not allow same-sex "marriages" or any form of civil partnerships¹⁷.

Institutionalized forms of same-sex relationships entered into abroad are also not recognized.

Same-sex couples do not have the right to adopt together (prohibition explicitly expressed in Article 211 of the Ukrainian Family Code). Adoption of a Ukrainian child by persons from abroad is possible only for married heterosexual couples¹⁸.

In conclusion, the legal situation in this area is not uniform throughout Europe. There are many EU countries that do not allow any possibility of adopting children by homosexual couples, just as they do not allow same-sex "marriages" or civil partnerships. The European Commission's proposal to impose an obligation on all Member States to recognize adoptions by same-sex couples is therefore not only a flagrant and direct violation of the provisions of the Treaty (including the Charter of Fundamental Rights of the European Union), but also of the legal systems of many EU countries.

¹⁷Конституція України (Відомості Верховної Ради України (ВВР), 1996, № 30, ст. 141), Стаття 51, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/print1143222355067739#Text> (accessed: 21.01.2021), hereinafter „Constitution of Ukraine”.

¹⁸Сімейного кодексу України, (Відомості Верховної Ради України (ВВР), 2002, № 21-22, ст.135), Стаття 211, <https://zakon.rada.gov.ua/laws/show/2947-14#Text> (accessed: 20.01.2021), hereinafter: „the Ukrainian Family Code”.