

THEMIS 2021
Semi-final B: EU and European Family Law



Best interests of the child: the guiding light, or the North Star?

**Recognition of a judgement concerning the personal relationship between a donor and
“his child” in Romania.**



“Children are not the people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they were meant to be – the unknown person inside each of them is our hope for the future.” (Janusz Korczak)

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Introduction

What is “third party reproduction”? Nowadays, medical progress made it possible to procreate through medical assistance. The process of helping people to artificially have children without following the natural and conventional process of procreation is referred to¹ as “assisted reproductive techniques” (ART)².

The phrase “third-party reproduction” refers to involving someone in the process of reproduction other than the individual or couple which plans to raise the child as intended parent[s]. This includes using donated eggs, sperm, or embryos and gestational-carrier arrangements, in which the pregnancy is carried by someone other than the intended parent(s). Sperm donation³ enables a man to father a child for third-party individual(s) and is therefore categorized as a form of third-party reproduction⁴.

A practical approach. Miss Jane Doe, who is habitually resident in the territory of a Member State of the European Union is yearning to be a mother and decides to undergo artificial insemination. She becomes pregnant and gives birth to a girl, whom she names Judy. Jane couldn't be any happier...until one day a man called Frank Foe, comes knocking at her door, wanting to meet his biological daughter. He tells Jane that he found out Judy was conceived using the sperm he donated years ago. Frank tells her that he wants to acknowledge Judy as his daughter and wants to be a part of her daughter's life.

Jane would not allow Frank to have any personal contact with her daughter and asks him to go away. And he goes... straight to court. A national court grants Frank the right to get access to information about his biological daughter's school progress as well as her medical history and a visitation right, allowing him to meet with his daughter twice a year⁵.

Some time later, the company Jane works at opens a subsidiary in Romania, where Jane is offered the position of chief executive officer for a five-year term. She takes the job and relocates to Romania with her daughter. She enrolls Judy in a Romanian school and registers her at a Romanian family doctor. Frank is keen on seeing his biological daughter and very interested in her academic progress and her welfare. Upon discovering that Romania has a very strict policy in the field of assisted human reproduction and that according to Romanian law Frank has no parental rights with regard to Judy, Jane does not allow the biannual visits

¹ Scaravelli G, Spoletini R (2015) The application of reproductive techniques (ART): worldwide epidemiology phenomenon and treatment outcomes. In: Ronald Ross Watson Handbook of Fertility, pp 75-87 <https://doi.org/10.1016/B978-0-12-800872-0.00007-X>Google Scholar.

² Assisted reproduction technology (ART) includes numerous procedures such as ovarian stimulation, oocytes and sperm donation, and intracytoplasmic sperm injection. Additional techniques such as ovulation induction and intrauterine insemination have become more frequent in the past three decades (*Pediatric Neurology Part I*, William D. Graf, Barry E. Kosofsky, in *Handbook of Clinical Neurology*, 2013 <https://www.sciencedirect.com/topics/medicine-and-dentistry/sperm-donation>).

³ Following Art. 3 c) EU Tissues and Cells Directive (2004)) a ‘donor’ means ‘every human source, whether living or deceased, of human tissues and cells.’ ‘Donation’ is defined as donating human tissues or cells intended for human application.

⁴ Sperm may be donated by the donor directly to the intended recipient woman or through a sperm bank or fertility clinic. Pregnancies are usually achieved by using donor sperm in assisted reproductive technology (ART) techniques which include artificial insemination, either by intracervical insemination (ICI) or intrauterine insemination (IUI) in a clinic, or intravaginal insemination at home. Less commonly, donor sperm may be used in in vitro fertilization (IVF) (more information at https://en.wikipedia.org/wiki/Sperm_donation).

⁵ considering such measures to be in the best interest of Judy.

Frank was granted. Since he is no legal relative of Judy, Romanian authorities would not give Frank any information about her school activities and health situation.

Frank is desolate because his efforts were futile. He remembers he has a court order which grants him rights of access to Judy. He wants to enforce this court order in Romania, as he knows that a judgment on parental responsibility given in a Member State is recognised in the other Member States. Frank submits an application for a declaration of enforceability to a Romanian court. To his further dismay, the court of first instance invokes the public policy exception, finding the recognition of this particular judgment to be manifestly contrary to the public order of Romania which expressly excludes the legal parent-child relationship between the sperm donor and the conceived child.

Motivation. European Union law allows for the diversity between the legal regimes of the EU Member States in reproductive matters, states are left room to make their own choices in these moral and ethical issues. Yet, in the context of cross-border movement, EU Member States may experience that a complete isolated position in reproductive matters may be no longer tenable in the EU's multilevel legal order⁶.

On the other hand, given the importance of protecting children's rights, the manner in which Member States choose to regulate parental responsibility may be a matter of public policy. This runs the risk of non-recognition for judgments relating to the parental rights of third party-donors, given in other Member States, a problem which arises in our practical approach too.

Overview of relevant case law. As the law of parentage is striving to meet the challenges of new reproductive technologies and the considerable legal diversity as to medically assisted reproduction all over the world, it arises the question whether it should be possible for judicial ruling related to paternity of the sperm donors. Consequently, if the answer is positive, further questions are to be answered. Could it be legally possible to establish a personal relationship between a donor and "his child"? If such a judicial recognition of this personal relationship is conceivable in a given Member State, what are the effects of this possible decision? Could it be recognized in other Member States?

The current national legal situation as regards third party reproduction with sperm donation is quite diverse and not well-defined at this point. Moreover, European courts struggle with a coherent approach on how to treat this topic.

⁶Nelleke R. Koffeman LL.M, *Legal Responses to cross-border movement in reproductive matters within the European Union, Paper for Workshop no. 7. Sexual and reproductive rights: liberty, dignity and equality of the IXth World Congress of the IACL CONSTITUTIONAL CHALLENGES: GLOBAL AND LOCAL Oslo, Norway, 16-20 June 2014*, p.19.

The Svea Court of Appeal judgments, T 7894-15 and T 7895-15 established the paternity of a sperm donor, AF, in relation to two children, SJ & JJ, then aged five and three years respectively⁷. Grounds for the judgments were based on Chapter 1, Section 5 of the Children and Parents Code⁸, which enables the Court to establish paternity if, *inter alia*, a genetic test shows that the man in question is the child's father, unless the sperm used for the pregnancy has been donated in accordance with Chapters 6 and 7 of the Genetic Integrity Act⁹. The sperm donor maintained that he had never met the mother of the two children and that they must have been conceived from sperm he had donated to a Danish Clinic. This factor, however, had no bearing on the Court in resolving the question of paternity which was determined by applying a literal interpretation of the Code.

In *Menesson*¹⁰ and *Labassee*¹¹, the European Court of Human Rights (ECtHR) approaches the subject of recognition of parent-child relationships that had been legally established abroad and finds that Article 8 of the European Convention on Human Rights¹² (ECHR) was applicable in both its family life aspect and its private life aspect, but in these judgments the recognition of parent child relationships regards the legal parent, not the sperm donor. In *Paradiso and Campanelli v. Italy*¹³, the Court held that the removal of the child by the Italian authorities constituted an interference with their family life in breach of Article 8 because the authorities had not properly considered the balance between Italy's public policy considerations, on the one hand, and the best interests of the child, on the other¹⁴.

Also, in the case of *Foulon and Bouvet v France*¹⁵, the ECtHR has delivered a judgment protecting the rights of children born as a result of international commercial surrogacy to have their relationships with their biological parents legally recognised. The Court unanimously found that refusal by French authorities to transcribe the birth certificates of children born under surrogacy agreements in India violated the children's right to respect for private life under Article 8 of the ECHR.

In the Decision XII ZB 463/13¹⁶, the German Federal Court found that any consideration of whether a foreign court decision is contrary to German public policy must take into account the human rights guaranteed by the ECHR. A foreign judgment assigning parenthood to a child's intending parents, rather than to the

⁷ Stoll, J. (2017) Establishing paternity by court judgment following sperm donation: Some reflections on two judgments rendered by the Svea Court of Appeal In: Jänterä-Jareborg, Maarit; Brattström, Margareta (ed.), *För barns bästa: Vänbok till Anna Singer* (pp. 317-344). Uppsala: Iustus förlag.

⁸ Swedish Code of Statutes SFS 1949:381.

⁹ (Swedish Code of Statutes SFS 2006:351, which stipulates the conditions for treatment, where the treatment may be carried out, choice of sperm donor, right to information, duty to provide information to a court, etc, full provisions available at <https://www.icj.org/wp-content/uploads/2013/05/Sweden-Genetic-Integrity-Act-2006-eng.pdf>.

¹⁰ ECtHR, *Menesson. v. France*, Appl. no. 65192/11, Judgment of 26 June 2014.

¹¹ ECtHR, *Labassee v. France*, Appl. no. 65941/11, Judgment of 26 June 2014.

¹² Formally, the Convention for the Protection of Human Rights and Fundamental Freedoms

¹³ ECtHR, *Paradiso and Campanelli v Italy*, Appl. no.25358/12, Judgment of 24 January 2017.

¹⁴ However, the Court also noted that its decision should not be read to require return of the child to the applicants, as the child has no doubt developed a bond with the family with whom he has been living since 2013.

¹⁵ ECtHR, *Foulon and Bouvet. v. France*, Appl. no. 9063/14 & 10410/14, Judgment of 21 July 2016 .

¹⁶ Bundesgerichtshof, Beschluss XII ZB 463/13, 10 December 2014, Judgment available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=69759&pos=0&anz=1>.

surrogate mother as provided by German law, does not automatically constitute a breach of German public policy if at least one of the intending parents is genetically related to the child.¹⁷

Even though the European and national courts have a well-established case-law regarding the “best interests of the child” principle, there is a lack of relevant case-law considered pertinent for the application of the public policy exception according to point (a) of Article 23 of Regulation (EC) No. 2201/2003 (Brussels IIbis Regulation)¹⁸.

Foreshadowing. This research aims to establish, first, whether the national relevant provisions are mandatory rules or a public order issues and the steps to be taken into consideration in order to assess if the subject matter is a question of public policy. Afterwards, we will analyze the public policy from two different perspectives, if it is opposing to the parentage rights of the donor or if it is opposing to any personal connection with the child. Not the least, we will make an assessment of the public policy and public order issues involved from the perspective of the best interests of the child.

The prohibition of parental rights over the child born out of assisted human reproduction procedure (AHR)- mandatory rule or a public order issue?

The applicability of the internal law. According to Romanian law¹⁹, there is no parentage relationship between a child and the donor under an assisted human reproduction procedure²⁰. However, such legal provision is applicable only if the parties enter into a specific authentic agreement protecting the confidentiality of the donor²¹.

The first aspect that needs to be cleared is whether this provision is applicable only in a regulated procedure as specified above or in any circumstances. A textual argument would plead for a strict interpretation. The above-mentioned provision is located in a special chapter in the Romanian Civil Code (RCC) that provides for certain conditions to be met (*i.e.* entering into an authentic agreement). As *exceptio est strictissimae interpretation*, the prohibition should be applied only in this respect.

Does such interpretation meet the legal standards of certainty and protection of human rights? In order to give a well-rounded answer to such a question, one should firstly assess the purpose of such regulation. In this

¹⁷ This also applies where the foreign court decision establishes the parenthood of the registered civil partner of the genetic father of the child, as well as the genetic father. Article 8 ECHR would be infringed if the German authorities only recognised one of the intending parents because every child has the right to a legal parent-child relationship with two parents.

Wells-Greco, M, Dawson H, *Inter-Country Surrogacy and Public Policy: Lessons from the European Court of Human Rights* published in *Yearbook of Private International Law Vol. XVI - 2014/2015*, <https://doi.org/10.9785/9783504384784-013>.

¹⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

¹⁹ Prior to the enactment of the RCC, that came into force in 2011, the Romanian legislator drafted various bills regulating the assisted human reproduction procedure. One of those bills was declared unconstitutional by the Constitutional Court. Among several criticisms regarding the bill, the Constitutional Court noted that each individual has the right of maintaining its spiritual identity, which under the family ties is transmitted to the children, as descendants. Nevertheless, the current provisions of the RCC which establish no parentage relationship between a child and the donor under an assisted human reproduction procedure are in force and thus it is presumed they are compliant with the constitutional standard.

²⁰ RCC, Article 441 (1).

²¹ RCC, Article 442.

respect, the aim is to provide for legal certainty regarding the civil status of the child and preserve the principle of confidentiality²². The principle of confidentiality of any information regarding the involved parties, the child, the legal parents and the donor, is meant to protect the right to respect for private and family life encompassed under article 8 of the ECHR.

In this respect, the ECtHR stated that “since *private life*, which is a broad term, encompassing, *inter alia*, elements such as the right to respect for the decisions both to have and not to have a child²³ or the right of a couple to conceive a child and to make use of medically assisted procreation to that end, such a choice being clearly an expression of private and family life.”²⁴

As a consequence, the general applicability of the protection of family life and private life suggest that the prohibition of parental rights of the donor over the child born out of AHR should be assessed from a broader perspective. Thus, such provision should be applicable in any assisted human reproduction procedure.

Mandatory rule or an international public order issue?

A mandatory rule is a provision of law that the parties are not allowed to derogate from. Its mandatory character is justified by the public interest which is protected. Public policy is defined under Oxford dictionary of law as the interest of the community. If a contract is contrary to the public policy, this will normally make it an illegal contract²⁵.

The public order under the international law order is similar to the mandatory rules, from the perspective of the protected public interest. The mandatory nature of a provision within the internal legal order has to be a prerequisite that some rule may further qualify for the assessment of its international effects²⁶.

The international public order is regarded as crucial by that country to the extent that they purport to apply irrespective of the law otherwise governing a contractual relationship or any legal relationship between the parties. The fact that a rule is assuring some private interests, should not automatically disqualify that rule from the internationally mandatory category. In order to be still considered internationally mandatory it must, at the same time, guarantee a general interest crucial for state organisation²⁷.”

²² Baias, F, A, *Noul Cod Civil. Comentariu pe articole*, CH. Beck, Bucharest, 2011, pp.484, 488.

²³ ECtHR, *Evans v. the United Kingdom*, Appl. no. 6339/05, Judgment of 10 April 2007, par. 71; ECtHR, *A, B and C v. Ireland*, Appl. no. 25579/05, Judgment of 16 December 2010, par. 212.

²⁴ ECtHR, *S.H. and others v. Austria*, Appl. no. 57813/00, Judgment of 3 November 2011, par. 82; ECtHR, *Knecht v. Romania*, Appl. no. 10048/10, Judgment of 2 October 2012, par. 54.

²⁵ Oxford dictionary of law, Oxford University press, 2009, p. 440.

²⁶ Ivana Kunda Defining Internationally Mandatory Rules in European Private International Law of Contracts, GPR 5/07, p. 213, on <https://www.academia.edu/>, GPR 5/07.

²⁷ *Op cit.*, p. 222, on <https://www.academia.edu/>, GPR 5/07. For clarification purposes, the legal provisions related to the public order and the international mandatory rules are equivalent concepts used in this paper. Other author states that “Public policy serves as a tolerance limit with regard to repugnant or otherwise unacceptable outcomes of the application of foreign law and to unacceptable foreign judgments. It is a barrier raised as the last resort to protect fundamental principles of the forum from the intolerable effects of foreign norms or judgments”. M. Wells-Greco, H. Dawson, *Inter-country surrogacy and public policy; Lessons from the European Court of human rights*, Yearbook of Private International Law, Vol. XVII-2014/2015, p.320.

The domestic mandatory rules intend to preserve the proper functioning of the community, while the international public order is protecting the core values of that society. Thus, one may conclude that the scope of the international public order or of international mandatory rules is much broader than of the domestic mandatory rules.

In the following paragraphs we intend to analyse the characteristics of the public order under the international law in order to establish if the prohibition of parental rights over the child born out of AHR is a mandatory rule or a public order issue.

The public order criteria. In order to conclude if a legal provision is protecting the public order one must perform a four steps reasoning. The first aspect to be taken into consideration is to examine the value contained within the international mandatory rule. Secondly, in order to assess whether such value is of utmost importance in a society, a research in comparative law is required. After establishing if the preserved value is a central foundation of the legal domestic order, it should be established if the case has sufficient connection points with the *lex foris*' legal order. The final step is a proportionality assessment of the protected value under the domestic legal system and the values covered by the foreign decision.

The protected value. First of all, in qualifying a provision as an international public order rule, one must identify a fundamental value protected by such provision. Regarding the present subject numerous values were identified by the doctrine such as, the inalienability of the human body, the inalienability of a personal status (e.g. parentage) by private agreement, the public policy against the commodification of children and the unlawful placement of children, the public policy against the exploitation of women, the protection of the family life of the mother and her child²⁸, the social family life of the established legal family, the interest of the child to know his genetic affiliation, public policy against the infringement of the law of adoption, including terms of consent, termination of parental rights and the payment of funds and statutes and case law governing legal custody and physical placement focusing on the best interests of the child.²⁹

If we were to examine the specific domestic provision, the prohibition of parental rights of the donor over the child born out of assisted human reproduction procedure encompass the value of the social family life of the established legal family. In this respect, the ECtHR stated that “a biological kinship between a natural parent and a child alone, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8.³⁰” As a rule, cohabitation is considered a requirement for a family life relationship. Exceptionally, other factors may also be taken into consideration in order to analyse if a relationship has sufficient constancy to create *de facto* “family ties”. Also, similarly, the

²⁸ Including the non-relinquishment of a child against a mother's wishes.

²⁹ *Idem.*, p.324.

³⁰ ECtHR, *Anayo v. Germany*, Appl. no. 20578/07, Judgment of 21 December 2010, par.56.

Supreme Court of United States has sometimes suggested that the American Constitution's protection of family relationships arises from the lived "intimacy of daily association," implying that protection would not be triggered in the absence of established emotional bonds³¹.

Consequently, the domestic rule seems to protect the rights of the legal parent who expressed his intent to become a parent and behaved in such manner to develop personal strong ties to the child in the sense of a family as described above.

Comparative law research. In order to make a complete assessment of the value involved, one should also verify if the Romanian lawmaker's option regarding the prohibition of parental rights of the donor over the child is found in the legal tradition of other countries. Such valuation does not mean that the public order has a regional or international nature³². At this phase, if a specific rule is replicated in various other legal systems may be an indication of the fundamental nature of such rule.

The status of children resulting from AHR has been under discussion for some years. In many countries legislation concerning such does not exist, and the legitimacy of the child is determined by the courts on a case by case basis. The usual recommendation on this matter, including that of the Council of Europe, is that a child conceived by assisted human reproduction procedure with the consent of the mother's husband should be treated under the law for all purposes as the legitimate child of the husband.³³

In most European countries where such procedures are practiced, the identity of the donor is unknown to both the prospective parents and to their children and, even if they are informed about the circumstances of their conception, these children are not entitled to know the identity of their father.

Furthermore, the Council of Europe recommends that all precautions should be taken to keep secret the identity of all the parties involved, and the identity of the donor must never be revealed even in court. The present trend is that the child should be informed by his parents of his conception, following the principle that an adopted child should be placed in position of this fact.³⁴

In addition, the Tissues and Cells Directive (2004)³⁵, deals with substantive AHR-issues, but its harmonising effect is limited. It provides that Member States must 'endeavor to ensure' voluntary and unpaid donations of gametes. Also, as a matter of principle, such donation must be anonymous, although this is 'without prejudice

³¹David D. Meyer, *The Constitutionality of Best Interests Parentage*, <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1184&context=wmborj>, p.871-872.

³² Dan Petrace, *Ordinea publică de drept internațional privat*, ed. Universul Juridic, 2019, pp.83-84.

³³ Texts of the Council of Europe on bioethical matters Volume II Directorate General I – Human Rights Directorate Human Rights Policy and Development Department Bioethics Unit, Strasbourg, April 2014, p.107 available on <https://www.coe.int>, accessed on 16th May 2021.

³⁴ Joseph G.Schenke, Assisted reproduction practice in Europe: legal and ethical aspects, p.177, Human Reproduction Update 1997, Vol. 3, No. 2 pp. 173–184 at <https://academic.oup.com>.

³⁵ Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, JO L 102, 7.4.2004, p. 48-58, paragraph 29 of the Preamble and article 14 (1)§. The Tissues and Cells Directive is made up of the parent Directive 2004/23/EC, OJ EU L 102/48 (07.04.2004) and two technical directives (Directive 2006/17/EC, OJ L 38/40 (09.02.2006) and Directive 2006/86/EC, OJ L 294/32 (25.10.2006)).

to legislation in force in Member States on the conditions for disclosure, notably in the case of gametes donation’.

However, the current domestic regulations enacted by the Member States on the matter is not consistent due to the fact that sperm donors can be either anonymous or known to the couple. In most European countries, anonymity of the donor is preserved³⁶. Finland, Sweden, and the United have banned anonymous gamete donation, which tends to discourage donation³⁷. In Austria, for example, not only the donor is not anonymous, but also the donor may be a friend or a relative of the couple³⁸.

Most centres disapprove donation by family members or friends, since this can cause problems in the family structure of the recipients, e.g. ambiguous emotions between the donor, the child and the legal parents.³⁹

In a case regarding two couples of lesbians who used as a donor a male friend, who was also in a relationship, the High Court of Justice Family Division from UK, decided that “each case is, however, fact specific, and on the facts of these cases, [...] the most important factor is the connection that each applicant was allowed by the respondents to form with the child”⁴⁰. Also, the court acknowledged that it was always part of the plans in both cases that there should be some contact between the children and their biological fathers. So, considering the former personal relationship between the parties and especially between the donor and the child, a court may establish or confirm personal ties between the biological father and his offspring.

To conclude, there are a different rules regarding the legal status of a child born using AHR and its personal connection with its biological father. Some countries regulated the rule of anonymity of the donor, prohibiting for the donor to be a friend or a relative of the legal parents, other countries don’t have a specific rule on the subject. Thus, from this perspective there cannot be any indication whether the Romanian prohibition of parental rights of the donor over the child is of public order.

The connection between the case and the legal regime of *lex fori*. *Lex fori* may consider the application of a domestic legal provision which envisages a public order value if the case to be enforced or recognised has sufficient links with the forum. This requirement is self-implied from the definition of public order, as mentioned above. The importance of the preserved value is relevant only to a case which may impact the forum to some extent.

³⁶ Joseph G. Schenke, *Op. cit.*, p.177.

³⁷ Patrick PrägEmail authorMelinda C. Mills, *Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross-Border Reproductive Care* available on <https://link.springer.com/>, accessed on 16th May 2021.

³⁸ <https://www.ivf.com.au/> accessed on 16th May 2021.

³⁹ In other cases where the donor is not a relative or a friend, the donor’s anonymity is crucial in order to protect family privacy; in most cases, anonymity is also in the donor’s interest. A donor may feel that he may be considered legally liable for the child’s welfare, or that there may be claims to inheritance rights. Joseph G. Schenke, *op. cit.*, p.176.

⁴⁰ Case No.:FD12P01675 of Royal Courts of Justice Family Division in the matter of the Children Act 1989 and matter of G (a minor) between S and D and E and in the matter of Z (a minor) between T and X and Y, 31.01.2013.

From this perspective, in the case analysed herein, the child and his legal family are not Romanian citizens and they have moved to Romania for a limited period of time. Consequently, from a factual point of view, the period of time the family intends to reside in Romania should be relevant.

In order to establish the degree of connection between the child and the forum, one may take into consideration the criteria mentioned by the Court of Justice of European Union (CJEU) in its jurisprudence regarding the habitual residence of a child: “In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.”⁴¹

The conflicting values. The most relevant step is assessing the incidence of public order is the proportionality test. *Lex fori* needs to balance the protected value of the forum, in the case at hand, the family life relationship against, on one hand, the right of the child to establish its identity and, on the other hand, his right to private life. Nevertheless, our aim is not to conclude that a value is more legitimate than the other, or certain right should prevail over other fundamental right. Establishing the public order margin implies indicating a hierarchy between the conflicting values.

The ECtHR stated that protection of private life implies “that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship [...]; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned”⁴². In the cases of *Menesson* and *Labassee*, the French Government disregarded the biological link between the children and the father⁴³.

However, internal courts in other Member States emphasised the meaning and the importance of a family life for the child. One jurisdiction stated that, “the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront.”⁴⁴ Other Court

⁴¹ CJEU Judgement of 2 April 2009, A (C-523/07 ECLI :EU :C :2009 :225) par.38-39.

⁴² ECtHR, *Menesson. v. France*, Appl. no. 65192/11, Judgment of 26 June 2014, par.80, par.96. In that case, ECtHR stated that the lack of recognition under the domestic legal system of the parent-child relationship created a situation of “legal uncertainty” that “undermines the children’s identity within French society”.

⁴³ The Court then underlined that the situation of legal uncertainty concerning the parent-child relationship of the children born from such procedures particularly impacted the recognition of their nationality and inheritance rights, and thus crucial aspects of their identity. Ilaria Anrò *Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue* p.19 at http://www.ceje.ch/files/7414/6366/2490/Geneva_JMWP_09-Anro.pdf.

⁴⁴ ECtHR, *Kroon v the Netherlands*, Appl. no. 18535/91, Judgment of 27 October 1994, par. 40. cited in M. Wells-Greco, H. Dawson, p.339.

pointed out that “respect for family life implies [...] the existence in domestic law of legal safeguards that render possible as from the moment of birth the child’s integration in his family.”⁴⁵

Although recognising the right of children to know their identity, ECtHR also held that “the institution of the family is not fixed, be it historically, sociologically or even legally” and states are required to have in place a legal framework that ensures family life can be meaningfully enjoyed by a child⁴⁶. A meaningfully family life that serves the child best interests could be impaired if any parental rights would be recognised for the benefit of the donor, a third party for the family in which the child was born and raised⁴⁷.

AHR must be approached on its very specific facts. If a child is born as a result of such procedures, the child’s welfare must be a central priority. Any decision taken by a court on the subject has and will have a fundamental impact on the entire life of that child. If the child has been entrusted to the intending parents, recognising the right of the donor to take the child, recognising a paternal approach towards the child or placing him or her into care may not promote the child’s best interests.

In consequence, the internal prohibition of parental rights for the benefit of the donor should be a provision circumscribed to the international public order, noting however, that such assessment should not be of general applicability, but construed and adapted depending on each factual detail of the case.

The exact scope of Romania’s public policy with regard to donor’s parental rights? The question which now arises is whether the public policy of Romania in the area of assisted human reproduction is limited to the non-recognition of the legal parent-child relationship between the donor and the conceived child or it precludes the assertion of any right to access?

As we stated above, according to the RCC⁴⁸, AHR does not establish between the donor and the child a parent-child relationship⁴⁹ and, therefore, the donor has no parental responsibility⁵⁰. The preclusion of the donor from asserting any parental rights, such as the right to have contact with the child, is the corollary of the former having no form of parental responsibility. The Romanian legislator’s intention was to exclude not only the legal

⁴⁵ ECtHR *X,Y&Z v. UK*, Appl. no. 21830/93, Judgment of 22 April 1997, par.47 cited in M. Wells-Greco, H. Dawson, p.339.

⁴⁶ ECtHR, *Mazurek v France*, Appl. no. 34406/97, Judgment of 1 February 2000, par. 52. Some scholars recognised that public order favours recognizing a mother and a father for each child, consistent with the goal of serving best interests. Susan Frelich Appleton *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation* published in *Family Law Quarterly*, Vol. 49, No. 1 (Spring 2015) p. 93–116. © 2015 by the American Bar Association, p.99.

⁴⁷ Trying to see how the internal legal systems interpreted by domestic courts coexist with the ECtHR perspective, Baroness Hale proposed the following: «where it was necessary to strike a balance between competing Convention rights, the Court should be particularly cautious about interfering with the way in which the national courts have struck the balance when they have been applying the Convention principles and have reached a decision which is “on its face reasonable and not arbitrary». B. Hale *Argentorum Locutum: Is the Strasbourg or the Supreme Court Supreme?*, [2012] *Human Rights Law Review*, p. 65-78, 77.

⁴⁸ Article 441 and the following are comprised in Book II “Family” - Title X “Kinship” - Chapter II “Filiation” – Section 2 “Assisted human reproduction using a third party donor” of the RCC.

⁴⁹ The woman who undergoes the procedure is the legal parent of the child and so is her partner, provided he consents to the procedure.

⁵⁰ The Romanian legislator is inconsistent with the use of terms while referring to the ensemble of parental rights and duties. The term “responsibility” is also used in the Child Protection Act (Romanian law no. 272/2004, regarding the protection and promotion of children’s rights, published in the Official Journal of Romania on 21 June 2006; Article 5(2); Article 6(d); Article 36), given the external source of inspiration for this law, but generally the notion of “authority” is preferred.

relationship based on ties of filiation, but also any other effect of the genetic parentage between the donor and the child, along with the right to have personal contact. As a result, in Romania, genetic parentage *per se* is not sufficient reason to grant the sperm donor the right to have personal contact with the child.

In addition, Article 445 of the RCC rules that all information regarding AHR is confidential, thus any information about the donor can only be transmitted to the child, his descendants, medical practitioners or competent authorities, with prior authorisation from the court, if access to such information is imperative to prevent an imminent risk of *grave harm* to the child's or his descendants' health. Such an impermissible regulation denotes the interest that the RCC takes in protecting the intimacy of the family who resorts to AHR. By contrast, in countries such as Austria and Germany the conceived child has the right to receive information about the sperm donor after he turns 14⁵¹, respectively 16⁵², while in Sweden, a person conceived through sperm donation has the rights to access the data on the donor after reaching "sufficient maturity"⁵³.

As the public policy of Romania expressly excludes such legal filiation, taking into consideration the interest that the Romanian legislator takes in protecting the intimacy of the family who resorts to AHR and having concluded that the blood relationship is not by itself sufficient reason to grant parental rights, the non-recognition of any parental right based solely on the genetic relationship deriving from assisted human reproduction innately appears to be a matter of public policy in Romania.

Compliance with ECHR. Comparison to adoption. Before concluding the public policy of Romania forbids the recognition of a judgment which grants a sperm donor rights of access, we shall examine whether the provisions of the RCC which ban the donor from any right of access to the child conform to the ECHR and to the case-law of the ECtHR⁵⁴.

One might argue that these regulations, which deny the biological father any right of contact with his child, violate his right to respect for his family and private life, under Article 8 of the ECHR.

The ECtHR has not ruled on the parental rights of sperm donors so far. However, the principles set out in the *Case of I.S. v Germany*⁵⁵ shall prove pivotal in our analysis. Herein, the ECtHR ruled that the German courts which did not allow the applicant the right to have contact with her biological children whom she had priority given up for adoption shortly after giving birth. The children had been adopted by another family with whom they developed; they were emotionally attached to their adoptive parents and had no memory of their biological

⁵¹ Article 20 (2) of the Federal law that regulates medically assisted reproduction, published in the Austrian Federal Law Gazette No. 275/1992.

⁵² Article 1(10)(1) of Act to Regulate the Right to Know One's Heritage in Cases of Heterological Use of Sperm, published in the German Federal Law Gazette No. 48/2017.

⁵³ Chapter 6, Section 5 of The Genetic Integrity Act (Swedish Code of Statutes no. 2006:351) of 18 May 2006.

⁵⁴ Article 20 of the Romanian Constitution states that constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to and where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence.

⁵⁵ ECtHR, *I.S. v. Germany*, Appl. no. 31021/08, Judgment of 5 June 2014.

mother. Firstly, we seek to draw a parallel between the biological parent who gives the child for adoption at a very young age to another family and the sperm donor who agrees that a child carrying his genes will be born in another family. Secondly, if the line of argument will prove to be consistent, we analyze the need to apply *mutatis mutandis* the reasoning of the ECtHR in the aforementioned judgement to the particular situation of the sperm donor.

At the outset, we shall address whether the sperm donor's rights to access fall under the scope of Article 8(1) ECHR⁵⁶.

As a similarity to the signing of the adoption papers, by which the biological parent consents to the termination of the legal relationship between him and the child, at the moment of the sperm donation, the donor signs a deed, by which he is informed that the act of sperm donation does not establish a parent-child relationship and that the individual/couple who benefit from the donation is/are the legal parent(s) of the child. Consequently, the relationship between the donor and the children conceived using his genetic material should not fall within the scope of "family life". However, since his status as a biological father might be viewed as an important part of his identity and legacy as a human being, his relationship with his biological children falls within the scope of "private life" and attracts the protection of Article 8, which is not an absolute right, as this right may be subjected to limitations⁵⁷. The preclusion of the donor from asserting the right to have contact with his biological child is clearly a limitation of the donor's right to respect for private life prescribed by the Romanian law. As such, it must be decided if this limitation has a legitimate aim and is necessary in a democratic society.

One can notice that the Romanian provisions⁵⁸ aim at protecting the legal parents' right to respect for private and family life. Hence, the emergence of a virtual stranger⁵⁹ who is asserting parental rights could be a major stressor, placing excruciating burden on the family relationship. Nonetheless, the law also aims to protect the child's right to undisturbedly develop and bond with his legal parents.

Concluding that provisions of the RCC pursue the legitimate aim of protecting of the rights and freedoms of others, we shall now determine whether such drastic rules are necessary in a democratic society.

⁵⁶ Which reads: "everyone has the right to respect for his private and family life his home and his correspondence".

⁵⁷ According to Article 8(2) ECHR which reads "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".

⁵⁸ The RCC which rule that sperm donation does not establish a parent-child relationship and impose confidentiality and thus do not provide a right to contact with and information about the children born via this procedure.

⁵⁹ We are referring to the hypothesis in which the donor is unknown, as this is the most common scenario.

Firstly, the act of sperm donation is from the outset done for the benefit of the family in which the child will be born, which is a mere convention between the sperm donor and the fertility clinic⁶⁰. Consequently, he is involved in a contractual relationship, not in a family relationship. By contrast, the individual/couple who benefit the donation enter into this procedure with the intent of establishing a family relationship with the conceived child, and thus should be protected against any subsequent second thoughts of the donor, who might request to establish a connection with his biological offspring despite not having initially intended a family relationship with the conceived child.

Reverting to the rationale of the ECtHR, in such case, the birth of a child in regard to whom the donor has no parental rights is, as well, the result of an act, the donor takes in full knowledge of the legal consequences. According to the scope of the RCC, the interests of the family into which the child is born to enjoy and build a family life together with the child, undisturbed by attempts by the donor to establish contact prevail. The provisions of the RCC, which attach greater weight to the privacy and family interests of the family, are necessary in a democratic society, and thus in compliance with the ECHR.

As a consequence, we argue that the public policy of Romania prohibits the recognition of a foreign court order which grants the sperm donor access rights to the child conceived using his genetic material.

A very well known donor... What if the court of the Member State which passed judgement held as grounds for its decision not only blood relationship, but also the fact that the known donor was previously part of the child's life?

The future parent(s) and the sperm donor may enter into an agreement which entitles the donor to be a part of the child's life. Even though the donor is not the legal father of the child and does not enjoy a parent-child relationship, their connection could resemble a family relationship. The very bond which that sperm donor and the have developed may be the determinant ground for which a foreign court grants the sperm donor further visitation and information rights on its basis in case the legal parents decide to terminate his contact with the child.

According to Article 17 (1) and (2) the Child Protection Act, the child has the right to maintain personal and direct contact with his parents, relatives and any other person to whom the child is emotionally attached and has developed a bond which falls within the scope of "family life". Moreover, the following paragraph states that the parents cannot prevent the personal relationship between the child and any person with whom the child has enjoyed family life, unless this relationship could endanger the physical, mental and moral development of the child, while taking into consideration the child's best interests.

⁶⁰ In accordance with Article 144 (1)(c) of the Healthcare Reform Act (Romanian law no. 96/2006, regarding reform in healthcare, published in the Official Journal of Romania on 14 April 2006) the donor shall sign a legalized deed by which he declares that sperm donation is an entirely altruistic act and is for humanitarian purpose.

Consequently, the recognition of judgment passed in a Member State, similar to the Case of *Re G and Re Z*⁶¹, would not violate the public policy of Romania. In that particular trial, the English High Court ruled in 2013 that two sperm donors (S and T) who were not legal fathers had the right maintain contact with their biological children (G and Z) on the basis that they had, through previous contact, formed sufficient connection⁶². With regard to T (who donated the sperm with which Z was conceived), the High Court ruled that, irrespective of the legal status, the relationship that he had developed with the conceived child was linked to their biological kinship, since the legal parents (also a lesbian couple) wanted the him to be role model for the child. While they could have chosen any other friend to be a masculine role model for the child, they chose the biological father. Like S, T was involved in the birth preparations and had been allowed to regularly visit his biological child more than 50 times in the first 18 months of the child's life.

The High Court held that denying the biological fathers who were priorly involved in the upbringing of their children any further right of contact with his their children, would violate their right to respect for family and private life, under Article 8 ECHR. While admitting that the biological fathers' visitation rights would inevitably harm the legal parents' own right to respect for their family and private life, the judge argued that the disruption is outweighed by the other factors, as it is in the best interest of the children to maintain the bond between them and their biological fathers.

Recognising a similar judgment in Romania would not transgress the provisions of the RCC, since the primary ground of the decision was not the biological identity of the donors. In such case, the sperm donors are not mere donors, but close family friends which are involved in child rearing, both emotionally and financially. Even though they were no legal relatives of the children and therefore had no maintenance obligation towards them, they still supported the mothers in preparation for the births⁶³. While the biological identity of the donors is not the ground of the access rights, this was an important factor for which the initial contact with the child had been allowed by the legal parents in the first place. The termination of the ties between the child and the biological father by the legal parents was found unreasonable by the Court, as the children had developed a relationship with a fatherly figure, of which they were afterwards deprived by their legal parents.

Public policy and the best interests of the child. The Brussels IIbis Regulation sets out the current rules governing the jurisdiction, recognition and enforcement of matrimonial and parental responsibility orders in the EU. The scope of the Regulation is confined to matrimonial matters (divorce, legal separation, annulment)

⁶¹ Her Majesty's High Court of Justice in England, [2013] EWHC 134 (Fam), Judgment of 31 January 2013.

⁶² On the merits of the case, the Court took into consideration that S (who donated the sperm with which G was conceived) was an old friend of the S' legal parents (a lesbian couple) who lived in close proximity of the couple's home, was involved in the birth preparations and was invited to see the child immediately after birth. Afterwards, not only did the legal parents allow for regular visits, but also they asked the donor to provide sperm for one more child so that their both children have the same biological father.

⁶³ Both donors, were later heavily involved in the family lives of the couples, since one of them was asked to father another child for the couple so that both siblings have the same genetic parentage, while the other was asked by the legal parents to be a part of the child's life so that the latter has a masculine role model.

while parental responsibility includes rights of custody and rights of access, guardianship, the placement of a child in a foster family or in institutional care⁶⁴. In accordance to article 23 of the regulation, a ground of non-recognition for judgments relating to parental responsibility is the public policy of the Member State in which recognition is sought taking into account the best interests of the child.

As we mentioned above, the recognition of a judgement relating to parental responsibility, respectively the right of the donor to have a personal relationship with the child could be contrary to the public policy in Romania, but we should take a step further and see if this right would be contrary to the public policy taking into account the best interests of the child.

Prior to deciding whether the notions of public policy and the best interest of the child are convergent, a certain evaluation of the both concepts is needed. The concept “best interest of the child” is essential, yet vague and indeterminate. Although it existed for a long time, its importance grew when it was included in the United Nations Convention on the Rights of the Child (UNCRC)⁶⁵, ratified by all the Member States, but not by the EU itself⁶⁶. The Convention on the Rights of the Child has a progressive approach to the ‘best interests’ of the child. It deals with the concept as a general principle and an umbrella provision for the whole Convention. The definition of what is indeed in the best interests of the child is rooted in the substantive articles of the Convention itself.

The concept of “all actions concerning children” implies that the best interests principle is applicable not only where a decision directly affects a child, but also when he is indirectly affected, as in cases where a child’s parent is at risk of being removed. The best interests principle operates as both a substantive right and an interpretative device⁶⁷.

The Strasbourg interpretation: a fundamental principle. Unlike the UNCRC, the ECHR does not expressly refer to “the best interests of the child”, but it has developed a large body of case law dealing with children’s rights and has on numerous occasions analyzed the best interest of the child. At the core of the Court's reasoning is the principle that where a child is concerned, the best interests of that child must be paramount. While the Court continues to recognise the margin of appreciation of Member States to prohibit surrogacy agreements domestically, this decision limits the legal effect of such prohibitions where commercial

⁶⁴ Also, in accordance with the Treaty on the Functioning of the European Union, article 288, a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. Therefore, the current rules set out by [Regulation 2201/2003](#) are directly applicable in Romania, and the situation presented in this paper falls within the scope of the Regulation because it is a civil matter related to the attribution and exercise of parental responsibility, according to article 1, paragraph 1, letter b and article 1, paragraph 2, letter a) rights of custody and rights of access.

⁶⁵ *The best interests of the child – A dialogue between theory and practice*, Council of Europe, <https://rm.coe.int/1680657e56>.

⁶⁶ Article 3.1 of the UNCRC states that: [i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

⁶⁷ “Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue” Ilaria Anrò, http://www.ceje.ch/files/7414/6366/2490/Geneva_JMWP_09-Anro.pdf.

surrogacy occurs abroad. While a State may prohibit surrogacy agreements, once a child is born through surrogacy, the State's laws cannot be used to prejudice the rights of the child⁶⁸.

For instance, in the *Paradiso and Campanelli* case, even if the Court did not separate the position of the child from that of the parents (and rejected the application brought by the parents in the name of the child for lack of representation), the child's best interests principle played a fundamental role in assessing the violation of the parent's right to the respect of their family and private life⁶⁹.

In *Schneider v. Germany*, the applicant had a relationship with a married woman and claimed to be the biological father of her son, whose legally recognised father was the mother's husband. The applicant argued that the decision of the domestic courts to dismiss his application for contact with the child and information about the child's development on the basis that he was neither the child's legal father nor had a relationship with the child violated his rights under Article 8 of the ECHR. In finding a violation, the ECtHR focused on the failure of the domestic courts to give any consideration to the question of whether, in the particular circumstances of the case, contact between the child and the applicant would have been in the child's best interests. As regards the applicant's request for information about the child's personal development, the Court held that the domestic courts failed to give sufficient reasons to justify their interference for the purposes of Article 8 (2)¹⁶³ and that, therefore, the interference had not been "necessary in a democratic society"⁷⁰.

Also, in *Odièvre v. France*⁷¹, when deciding whether Article 8 has been complied with in either of those situations, the Court seeks to determine whether a fair balance has been struck by the state between the competing rights and interests at stake. In this context, the Court frequently recalled that the expression "everyone" in Article 8 of the Convention applies to both the child and the putative father. On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life. The Grand Chamber found no violation of Article 8 given that the French Government had meanwhile amended domestic legislation.

In *Godelli v. Italy*⁷², the applicant, who had been abandoned at birth, was unable to access information concerning her origins. Where the birth mother had opted not to disclose her identity, the Italian legislation did not provide any means for a child who was adopted and had not been formally recognised at birth to request access to non-identifying information on his or her origins or the waiver of confidentiality by the mother. The Court considered that the Italian authorities had overstepped their margin of appreciation.

⁶⁸ ECtHR, *Foulon and Bouvet. v. France*, Appl. no. 9063/14 & 10410/14, Judgment of 21 July 2016.

⁶⁹ The Court held that the Italian authorities had failed to strike the correct balance between the interests and rights involved, disregarding the child's best interest principle, and violating Article 8 ECHR.

⁷⁰ https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf The issue there was the legal recognition of children born through surrogacy agreement abroad.

⁷¹ ECtHR, *Odièvre v. France* [GC], Appl. no. 42326/98, Judgment of 13 February 2003.

⁷² ECtHR, *Godelli v. Italy*, Appl. no. 33783/09, Judgment of 25 September 2012.

In *Krisztián Barnabás Tóth v. Hungary*⁷³, after carrying out a careful weighing of the child's best interests, the domestic authorities refused to bring a paternity action on behalf of the applicant, whose child born out of wedlock had already been recognised by another man and adopted by his wife. The Custody Board's home visit conducted with the adoptive family concluded that the child had developed emotional ties with, and was integrated into, a family which provided her with the necessary care and support. Establishment of the applicant's paternity would deprive the child of her existing loving family and social environment, potentially causing such damage to her that this could not be outweighed by the putative father's interest in having a biological fact established. In those circumstances, the Court was satisfied that the domestic authorities carried out a thorough scrutiny of the interests of those involved – attaching particular weight to the best interests of the child while not ignoring those of the applicant – and that there had been no violation of Article 8.

The ECHR reiterates the child's best interest⁷⁴ in *Chavdarov v. Bulgaria*⁷⁵, *A.M.M. v. Romania*⁷⁶ and *Krušković v. Croatia*⁷⁷.

The Luxembourg interpretation: a not so fundamental principle? The best interest of the child plays a fundamental role in the European Union law, for example in family reunification, jurisdiction in matrimonial matters and the matters of parental responsibility⁷⁸. Moreover, the Charter of Fundamental Rights of the European Union states in article 24 paragraph 2: “[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.” Nevertheless, the case law of the CJEU is not clearly outlined in this matter.

In the C.D. decision⁷⁹, the best interests of the child was not even mentioned and did not play any part, even if it was maintained that maternity leave was required by EU law in order to protect the child-mother relationship. The Court simply relied on a literal interpretation of the EU instruments invoked by the applicant, including a consideration of their rationale, which was rooted in a society where the only conception of

⁷³ ECtHR, *Krisztián Barnabás Tóth v. Hungary*, Appl. No. 48494/06, Judgment of 12 February 2013.

⁷⁴ In *D. and others v. Belgium*, instead, the Court, even if it did not rely expressly on the child's best interests, recognized that the interference of the State, who refused to issue a travel document for the commissioning parents, was enacted in compliance with the aim to protect the child. ECtHR, *D. and Others v. Belgium*– Appl. no. 29176/13, Judgment of 8 July 2014.

⁷⁵ ECtHR, *Chavdarov v. Bulgaria*, Appl. No. 3465/03, Judgment of 21 December 2010.

⁷⁶ ECtHR, *A.M.M. v. Romania*, Appl. No. 2151/10, Judgment of 14 February 2012.

⁷⁷ ECtHR, *Krušković v. Croatia*, Appl. No. 46185/08, Judgment of 21 June 2011, par. 41.

⁷⁸ Article 15 of Regulation No 2201/2003, headed ‘Transfer to a court better placed to hear the case’, clearly provides that a court of a member state has to take into consideration where is in the best interests of the child when analyzing to stay the case or request a court of another Member State to assume jurisdiction. Furthermore, in CJUE Judgment of 27 October 2016 J. D., Case C-428/15, ECLI:EU:C:2016:819, the Court states Article 15(1) of Regulation No 2201/2003 must be interpreted as meaning that:

– in order to determine that a court of another Member State with which the child has a particular connection is better placed, the court having jurisdiction in a Member State must be satisfied that the transfer of the case to that other court is such as to provide genuine and specific added value to the examination of that case, taking into account, inter alia, the rules of procedure applicable in that other Member State;

– in order to determine that such a transfer is in the best interests of the child, the court having jurisdiction in a Member State must be satisfied, in particular, that that transfer is not liable to be detrimental to the situation of the child, reaffirming the best interest of the child principle once again.

⁷⁹ ECJ, case C-167/12, C.D., [2014], ECLI:EU:C:2014:169.

motherhood was the biological one, and reached the conclusion that there was no legal basis for maternity leave. On the other hand, General Advocate Kokott made an effort to rely on the child's best interests principle.

“BEST INTERESTS OF THE CHILD” -So what does it really mean? Though it is very hard to give a general and complete definition for this concept, a reasonable first building block towards establishing the meaning of this notion is the sum total of the norms in the Convention. This means, for instance, that it is in the best interests of the child to: receive education (Art. 28); have family relations (Art. 8); know and be cared for by his or her parents (Art. 7); be heard in matters concerning him or her (Art. 12), and to be respected and seen as an individual person (Art. 16). In the same way, the Convention states what is not in the best interests of the child: for instance, to be exposed to any form of violence (Art. 19); the right to live with his or her parents (Art. 9); to be subjected to any traditional practices prejudicial to the child's health (Art. 24); to perform any work that is hazardous or harmful (Art. 32), or to be otherwise exploited or abused (Arts. 33-36)⁸⁰.

How to balance the interests of the child versus the public policy? Is the public order in view of the Brussels IIbis Regulation an autonomous concept or the public order and the best interests of the child principle are two different notions?

For the purposes of Article 8 ECHR, the public policy of a Contracting State cannot be understood as being made exclusively of national values and principles. Instead, public policy represents for the Court a focus point where national values and supra-national imperatives including the CRC, interconnect: public policy, in order to properly play a role in respect of the recognition of foreign judgments in matters of personal status and family relationships, should be treated “as the result of a dynamic process of osmosis between local and regional policies [...] i.e. a perspective where the point of view of the forum is no longer a merely national one, but embodies that state's international undertakings concerning, inter alia, the protection of human rights.”⁸¹

In determining whether an interference with family life is justified, the Strasbourg Court “attaches special weight to the overriding interests of the child” and the circumstances as a whole. In order to assess the proportionality of an interference with a right, it is appropriate to examine its impact on that right, as well as the grounds and consequences for the applicant and the context. It is for the state to justify the interference⁸².

The “best interests of the child” principle should be considered a component of public policy in family matters and the public order in view of the Regulation Brussels IIbis an autonomous concept, that should be always analysed through the “best interest of the child” principle. In this perspective, the assessment regarding the recognition of the foreign judgement could differ in the light of the “best interests of the child” principle.

⁸⁰ *The Principle of the Best Interests of the Child – What it Means and What it Demands from Adults*, Lecture by Thomas Hammarberg, Commissioner for Human Rights Council of Europe Warsaw, 30 May, 2008, <https://rm.coe.int/16806da95d>.

⁸¹ Wells-Greco, M, Dawson H, *op.cit.*

⁸² Spielmann notes that the grounds “must be “relevant and sufficient”, the need for a restriction must be “established convincingly”, any exceptions must be “construed strictly” and the interference must meet “a pressing social need”.

This conclusion is also reached by a national court from Italy⁸³, which has stated that the recognition of a judgment relating to parental responsibility was not contrary to the public policy because there was a relevant interest of the child in enforcing the judgment in Italy.

Also, in Portugal, the criterion of the best interests of the child is applied independently of the public policy test, as shown by a decision of the Court of Appeal of Lisbon⁸⁴: "[...] in principle, against the request of surrender and enforcement of a decision by the Italian court, an opposition can be filed [...] given the primacy of the interests of the child".

The welfare of the child should remain, however, the paramount consideration for judges in parental responsibility cases and more particular, in analysing the public order in view of the Brussels IIbis Regulation.

The relevant date for assessing whether a foreign judgment contradicts the public policy is the date where recognition and enforcement are sought, so that changes, especially regarding the compliance with the interest of the child, e.g. an improvement of the child's relationship to a parent, can be considered. Even though, the views of the child in the matter are not likely the only competing elements at stake when establishing the best interests of the child, they do represent an important factor in reaching the final decision. In accordance with the age, the maturity of the child and their competence or evolving capacity, the views of the child will be of crucial importance to the decision⁸⁵. Also, a child needs role models and the different characteristics, views and skills provided by each parent during the different phases of childhood. The perception is that men and women offer different but equally important viewpoints on life and that children are best served by having balanced views in their lives. A stable relationship with both parents, and in this case the sperm donor, who is willing to have a personal relationship with the child is thought to "anchor" children and to aid in preparing them for adulthood and a responsible place in society.

In conclusion, it cannot be envisaged a straightforward decision in this matter, the values at stake must be analysed in every concrete situation, in order to establish if the relationship with the sperm donor will ultimately result in providing a sense of identity for the child, additional love, security and stability or if it will confuse the child even more and create an unstable environment, improper for his/her development.

Conclusions

Firstly, regarding the scenario envisioned, the judge should analyse the public policy matter, taking into consideration the best interest of the child principle, or to put it in other words, the best interest of the child should be the guiding light or the north star in this matter. A key point in this decision is if the donor is known, respectively if the donor previously had any kind of relationship or connection with the child. If he doesn't have

⁸³ Corte d'appello Milan, February 24, 2003, *Rivista di diritto internazionale privato e processuale*, 2004, 622 et seq.

⁸⁴ 24.3.2009, RL 2273/07.9TMLSb-7, in www.dgsi.pt.

⁸⁵ "In particular when considering the best interests of the child, the Court places great weight on the exercise of the child's right to freedom of expression and the wishes of the child" ECtHR, *Hokkaen vs Finland*, Appl. no. 19823/92, Judgment of 23 September 1994.

any connection to the child and he consented to the fact that the act of sperm donation is performed in the sole benefit of the individual/couple – the contracting parties, then a greater protection is established to actual family relationships than it does to one based solely on biological kinship. Thus, the judgement should not be recognized in a Member State with a similar legislation to Romania, being contrary to the public order having in mind the best interest of the child.

On the other hand, a different conclusion should be reached if the child had a connection, a previous relationship with the sperm donor, him being actively involved in his life, having in mind that EU legislation provides on a prohibition of reviewing the merits of the initial case. In this case, it would be in the child's best interests to have a better sense of identity, additional love and stability and the judge should apply the mutual recognition principle, which is the cornerstone of the EU area of justice.

Consequently, in this matter, a straightforward conclusion cannot be drawn. The judge has to analyse, *in concreto*, if the sperm donor has a connection to the child prior to the decision and it is in the best interest of the child to have a personal relationship with the donor, for her/his emotional stability.

Firstly, the judge must verify whether the decision for which recognition is sought falls within the scope of Brussels IIbis Regulation. Secondly, the national provisions regarding the exercise of parental responsibility of the Member State in which recognition is sought shall be verified. Afterwards, one must address whether a national regulation which precludes the sperm donor from asserting parental rights is just a mandatory rule or represents an issue of public policy. The next step is to determine if the foreign court based its decision solely on the biological kinship between the donor and the child or other reasons, such as a priorly developed personal relationship between the two, were held as primary grounds for the decision.

In the hypothesis in which the decisive argument for granting visitation rights was the filiation, the restrictive public policy of the Member State in which recognition is sought and the best interest of the child could converge to forbid the recognition of such a judgment.

On the other hand, if there were other grounds for granting visitation rights, such as the existence of sufficient prior contact, the judge of the Member State in which recognition is sought must determine whether under his national law the right of access to a child could be granted for similar grounds. If the answer is affirmative, we argue that the judge should apply the principle of mutual trust and recognise the judgment without any further requirements. However, if the answer is negative, the judge must decide by analysing if the recognition of the decision is in the best interest of the child. In this perspective, the best interest of the child appears as the guiding light for the judge confronted with recognition of judgment granting access rights to a sperm donor which raises public policy issues.