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NOTE

From:	Presidency
To:	JHA Counsellors on Civil Law Matters (Brussels IIa)
No. Cion doc.:	10767/16
Subject:	Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) - Preparation for a general approach

I. STATE OF PLAY

1. By letter of 30 June 2016, the Commission transmitted a proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (the 'Brussels IIa Recast Regulation') to the Council and to the European Parliament.
2. The proposed Brussels IIa Recast Regulation is subject to the special legislative procedure of Article 81(3) of the Treaty on the Functioning of the European Union and requires the Council to act by unanimity.

3. The European Parliament delivered its opinion on the Commission proposal on 18 January 2018. If substantial changes are made to the Commission proposal, the European Parliament will need to be consulted again.
4. The European Economic and Social Committee delivered its opinion on the Commission proposal on 26 January 2017.
5. The European Data Protection Supervisor delivered its opinion on the Commission proposal on 15 February 2018.
6. In accordance with Article 3 and Article 4a (1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of the proposed Brussels IIa Recast Regulation.
7. In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark will not be taking part in the adoption of the proposed Brussels IIa Recast Regulation and will not be bound by it or subject to its application.

II. FINALISATION OF THE RECAST

8. The Council has regularly examined and provided guidance for work on the proposed recast of the Brussels IIa Regulation since the start of the negotiations in 2016. It has held policy debates on the following key parts of the proposal: the hearing of the child (June 2017), the abolition of *exequatur* (December 2017), the strengthening of the role of central authorities (March 2018), as well as the placement of the child in another Member State, the circulation of provisional, including protective, measures, and the way forward on how to complete the abolition of *exequatur* (June 2018). These debates paved the way for further work on the proposed recast of the Regulation.

9. Discussions have allowed for considerable progress on substantial issues at technical level. The Presidency is therefore of the opinion that the time has come for the Council to adopt a general approach on the text of the Articles and the most important recitals of the proposed Regulation. The remaining recitals and the Annexes will be finalised as soon as possible after the approval of the general approach by the Council.
10. Bearing in mind the unanimity requirement and the principle that nothing is agreed until everything is agreed, the Presidency is submitting this compromise proposal to the Council with the aim of achieving an agreement among all Member States.
11. The elements of the compromise text are to be seen as an overall package that aims at establishing new rules which are simpler and more efficient to use for the children and their families as well as for practitioners. The compromise also provides for a delicate balance between different positions of Member States, while at the same time fostering mutual trust among them.

III. MAIN ELEMENTS OF THE COMPROMISE PACKAGE

A - Complete abolition of *exequatur* for the decisions in matters of parental responsibility

12. The JHA Council agreed in December 2017 to abolish *exequatur* for all decisions in matters of parental responsibility, subject to the introduction of appropriate safeguards. The completion of the abolition of *exequatur* will save time and money for citizens whenever a decision needs to circulate. This is in particular of key importance in cross-border cases related to children where time is of the essence.

13. Therefore, all decisions in matters of parental responsibility which are enforceable in the Member State where they were given should be enforceable in another Member State without any declaration of enforceability being required. The safeguards to the abolition of *exequatur* will be contained in the grounds of refusal of recognition and enforcement, which are: public policy, irreconcilability, lack of effective service in cases of default of appearance, lack of opportunity of holders of parental responsibility to be heard, lack of opportunity of the child to be heard and non-compliance with the consultation procedure for cross-border placement. As under the current Regulation, it is left to national law whether these grounds may be examined *ex officio* or upon application by any interested party as defined by national law.
14. The new rules should make it clear that those decisions in matters of parental responsibility which enjoy certain privileges regarding their cross-border circulation would still remain 'privileged', subject to appropriate safeguards. The Presidency takes the view that a compromise should build upon the *status quo*, which privileges only certain decisions granting rights of access and certain decisions entailing the return of a child under the so-called 'overriding mechanism'.
15. A legally binding certificate would accompany such 'privileged' decisions, which could be rectified or withdrawn in the Member State of origin where it was wrongly granted. This would strengthen the rights of the defence and foster mutual trust among Member States. Against the recognition and enforcement of 'privileged' decisions only the ground of irreconcilability could be raised in the Member State where recognition and enforcement is sought.

B - Minimum harmonisation of rules for the enforcement procedure

16. The Presidency takes the view that the enforcement procedure for decisions given in another Member State should, in principle, continue to be governed by the law of the Member State of enforcement. However, minimum harmonised rules on how to deal with a significant change of circumstances that has arisen after the decision was given seem to be crucial for a system of free circulation of decisions in this area. Such rules should therefore include a limited number of harmonised grounds for suspending or refusing enforcement as such in the Member State of enforcement. This would ensure that enforcement may be refused or suspended in all Member States largely under the same conditions, which would increase legal certainty for all parents and their children, inside the European Union. This would not go as far as to exclude national grounds for refusal which are compatible with this Regulation and relate to formal requirements of the national enforcement law and procedure.

C - Strengthening the opportunity of the child to express his or her views

17. The Presidency compromise provides for clear rules to strengthen the right of the child to express his or her views. To this effect, a dedicated provision establishing the obligation to give the child the opportunity to express his or her views should be included.
18. This provision would provide a child who is capable of forming his or her own views with a genuine and effective opportunity to express those views. Where the child has expressed his or her views, the court, in accordance with national law and procedure, should give due weight to the views of the child in accordance with his or her age and maturity. This does not change the underlying principle of the best interests of the child for matters of parental responsibility but it makes clear that the child is not the mere subject of the proceedings. The modalities of how the child should be heard are left to national law and procedure, without any possibility of review by the courts of another Member State.

19. The obligation to hear the child is, however, not absolute but must be assessed in each individual case, taking into account the best interests of the child.
20. If a child was not offered an opportunity to express his or her views, the recognition and enforcement of a decision in matters of parental responsibility may be refused, except where the proceedings only concern the property of the child, if not required by the subject matter of the case, or where there were serious grounds for not hearing the child, taking into account, in particular, the urgency of the case.

D - Clearer rules on the placement of a child in another Member State

21. The existing consent procedure of the Brussels IIa Regulation should be applicable to all types of placements of a child in another Member State, subject to appropriate safeguards and exceptions, such as placements with parents (or, if and to the extent notified by the Member State where the child may be placed, other close relatives). The Presidency does however still see a need for a clearer scope of the procedure for cross-border placements; educational measures should also fall under this procedure. The new rules will also include a three-month deadline for giving or refusing consent, and a possibility for appropriate exceptions for urgent cases. It also makes provision for retaining or concluding cross-border agreements and arrangements to simplify the consent procedure.
22. In cases where a placement is contemplated, the child's ethnic, religious, cultural and linguistic identity (in light of Article 20 of the Convention on the Rights of the Child) should be taken into account. Therefore, the placement best suited to the particular situation of the child may be cross-border, in particular where close relatives living in another Member State may be the most suitable carers or guardians.

E - Clearer rules on the circulation of authentic instruments and agreements

23. Having regard to the fact that there is a growing number of Member States which use different forms of extra-judicial agreements, the Presidency compromise text makes it clear that the circulation of such agreements should be facilitated, subject to certain safeguards. Therefore, the solution should be that a public authority has to - depending on each national system - 'approve' or register these agreements before they are able to circulate. Furthermore, it is essential that these authorities should check their jurisdiction on the basis of the rules laid down in this Regulation. Finally, further safeguards, such as public policy as a ground for refusal of recognition and/or enforcement, and other grounds for refusal should be included.

F - Clearer rules on intra-EU child abduction cases

24. The circulation of decisions ordering the return of the child pursuant to the 1980 Hague Convention is included in the recast under the general rules on recognition and enforcement of decisions. Other return orders given as a result of the 'overriding mechanism' continue to circulate as 'privileged' decisions under the special rules on recognition and enforcement of decisions. The Presidency compromise text, however, provides that this mechanism should be limited to decisions on the substance of rights of custody which entail the return of a child and were given in the Member State of (former) habitual residence of the child after a decision refusing to return the child was issued in another Member State, based solely on point (b) of Article 13(1), or Article 13(2), of the 1980 Hague Convention. This would clarify the rules applicable to intra-EU child abduction cases and the relationship with the 1980 Hague Convention.
25. Moreover, the recast includes clear and realistic deadlines for the courts dealing with child abduction cases at any stage of the proceedings in the most expeditious manner. Alternative dispute resolution is given a more visible place where it is appropriate, to facilitate solutions building on party autonomy and helping to achieve sustainable arrangements.

26. To minimise possible risks for the child's physical and psychological wellbeing, in the course of abduction proceedings, adequate protection measures can be ordered, including to ensure contact between the left-behind parent and the child during those proceedings where this is in his or her best interests, and measures aimed at minimising a grave risk of physical or psychological harm to which the child might be exposed by the return.

IV. CONCLUSIONS

27. Against this backdrop, Ministers are invited to express their views on whether:
- (a) to approve as a compromise package the general approach set out in the Annex to this Note;
 - (b) to take note that the remainder of the recitals and the Annexes to the Regulation will be finalised at technical level as soon as possible after the Council.

[Text of the regulation]
