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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
No. prev. doc.:	WK 5263/17
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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) - Policy debate

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. In accordance with Article 3 and Article 4a (1) of the 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.

3. 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.
4. The proposed Brussels IIa (Recast) Regulation is subject to the special legislative procedure. The opinion of the European Parliament is expected to be issued before the end of 2017.
5. The Working Party on Civil Law Matters (Brussels IIa) has examined the proposed Brussels IIa (Recast) Regulation at regular meetings since the transmission of the Commission proposal.
6. The discussions have allowed progress to be made on the text of the proposed Brussels IIa (Recast) Regulation, in particular on its Chapters I and II. In the light of the outcome of those discussions, the Presidency is of the opinion that a policy debate on a key issue which relates to the hearing of the child in the context of the Brussels IIa recast is timely.
7. The elements identified in the Annex should not be construed as signifying that these are the only issues which have arisen during the Working Party meetings. However, these elements have been identified as already requiring a certain degree of political guidance for future work at the expert level. Therefore, the Working Party shall continue to work on all other elements of the proposed Brussels IIa recast.
8. The Presidency invites Coreper/Council (Justice and Home Affairs) to hold a policy debate with a view to endorsing the policy approaches on the issue of the right of the child to be heard, as set out in the Annex to this note, in order to pave the way for further progress to be made on the proposed Regulation.

A. BACKGROUND

9. The right of the child to be given an opportunity to be heard is protected by Article 24(1) of the Charter of Fundamental Rights of the European Union as well as by Article 12 of the United Nations Convention of the Rights of the Child ('UNCRC'). This is also regarded as an integral part of providing the child with a fair trial under Article 6 of the European Convention on Human Rights and providing a right to respect for private and family life under Article 8 of the same Convention. In 2005, the Brussels IIa Regulation raised the standards for intra-EU 1980 Hague Convention proceedings. Under the latter Convention there is no explicit requirement to hear the child, but Article 13(1)(b) of this Convention provides for the possibility that an order of return of the child may be refused if the child objects to being returned and this child has attained an age and degree of maturity at which it is appropriate to take account of its views. Article 11(2) of the Brussels IIa Regulation, therefore, provides that a child is given the opportunity to be heard in return proceedings under the 1980 Hague Convention following an international child abduction between two Member States. According to the case-law of the European Court of Justice, neither Article 24 of the Charter of Fundamental Rights of the European Union nor Article 42(2)(a) of the Brussels IIa Regulation refer to the hearing of the child *per se*, but both refer to the child having the opportunity to be heard. The Court also stated that a child may not be heard if the hearing would not be in his or her best interests or if it is unnecessary. A child may also not be heard if this appears inappropriate having regard to the child's age or maturity.
10. At present, the hearing of the child is one of the requirements for the abolition of the *exequatur* procedure for access rights and decisions entailing the return of the child pursuant to Article 11(8) of the current Brussels IIa Regulation. Article 23 of the current Brussels IIa Regulation lists the grounds of non-recognition for judgments relating to parental responsibility, and one of the grounds to oppose the recognition and enforcement of the said judgment is the fact that the child concerned was not given the opportunity to be heard.

11. The current Brussels IIa Regulation does not modify the applicable national procedures on the hearing of the child⁽¹⁾. In general, the procedure of the hearing of the child needs to be carried out in a manner which takes into account the child's age or maturity. In practice, this procedure was not proven to work in a satisfactory manner due to the fact that Member States apply different national standards as to when the child should be given the opportunity to be heard or not. Therefore, this may lead to situations where the child is not heard at all in one Member State, even if he or she should have been given the opportunity to be heard according to the view of another Member State. Consequently, one of the most commonly cited grounds for non-recognition of judgments relating to parental responsibility under Article 23 of the current Brussels IIa Regulation is that the judgment was given without the child having been given an opportunity to be heard⁽²⁾ and this violates fundamental national standards of the Member State in which the recognition of a judgment is requested. Thus, although all Member States are bound by Article 12 of the UNCRC, the way in which this provision is being interpreted at national level varies to such an extent that it is undermining the application of the Regulation.
12. The recast of the Brussels IIa Regulation should be taken as an opportunity to make progress in this sensitive and important area of family law. As regards the hearing of the child, certain questions still remain open and will be subject to further discussions at Working Party level, such as the manner in which the right of the child to be heard dovetails with the grounds for refusal of judgments on parental responsibility and the adaptation of the certificate⁽³⁾ to the operative body of the text. Further consideration should be given to these questions in future discussions at technical level.

¹ Recital 19 of the current Brussels IIa Regulation.

² Article 23(b) of the current Brussels IIa Regulation.

³ Article 53 of the Proposed Brussels IIa Recast Regulation.

B. SUGGESTED POLICY APPROACHES FOR FUTURE WORK

13. As already proposed by the European Commission in the recast of Brussels IIa and as generally supported by many delegations during the Working Party discussions, a separate provision to provide the child with the additional opportunity to be heard in all proceedings on matters of parental responsibility should be included in the Regulation. This new provision would then be referred to in the other relevant Articles of the Regulation, which would provide for a clearer framework as regards the hearing of the child in the proceedings covered by the recast, including proceedings for the return of a child under the 1980 Hague Convention in conjunction with the Regulation, and in the grounds for refusal.
14. *The Presidency therefore invites the Council to confirm that a provision providing the child with a right to be heard in proceedings covered by the Recast Brussels IIa, including proceedings for the return of a child, should be included in the Regulation.*
15. The Regulation should leave the question of *who* will hear the child and *how* the child is heard to be determined by the national legislation of the Member States. While remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child in each individual case. This obligation should be built on minimum common criteria. The aim of establishing minimum common criteria is to overcome the current difficulties where different national standards are used for refusing recognition and enforcement of judgments. Article 12 of the UNCRC and its guidelines for interpretation as given by the UN Committee on the Rights of the Child could represent a source of inspiration in this regard.⁴
16. *The Presidency invites the Council to confirm that the provision providing for the right of the child to be heard should be inspired, at a minimum, by Article 12 of the UN Convention on the Rights of the Child.*

⁴ General Comment No. 12 (2009), *The right of the child to be heard*.

17. The new provision providing for the right of the child to be heard would not stand alone in the Regulation. The Working Party would further discuss the conditions and modalities of achieving the best option(s) to link the consequences of the new provision and criteria based on the UNCRC with the provisions from the Chapter on recognition and enforcement, taking into account the case-law of the European Court of Justice according to which the decision of the court of origin enjoys a certain degree of discretion that cannot be re-examined or reviewed by the court of enforcement.
18. *The Presidency invites the Council to agree that the Working Party will explore in particular whether or not the absence of the opportunity of the child to be heard should be included as a ground for refusal of recognition and enforcement of decisions, and, if the inclusion of such a ground would be considered appropriate, conditions and modalities thereof.*
19. *Finally, the Presidency invites the Council to agree that when hearing children, Member States should remain free to go beyond the requirements on the hearing of the child which will eventually be laid down in the Regulation, without prejudice to the possibly construed minimum common criteria for the hearing of the child.*
