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NOTE

From:	Presidency
To:	Council
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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

I. State of play

1. The Council has regularly examined the proposed recast of the Brussels IIa Regulation since it was seized of the Commission proposal in 2016. The (JHA) Council has held policy debates on the following aspects: the hearing of the child in June 2017, the abolition of *exequatur* in December 2017 and the role of central authorities in March 2018.

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.¹
3. The European Economic and Social Committee delivered its opinion on the Commission proposal on 26 January 2017. The European Parliament delivered its opinion on the Commission proposal on 18 January 2018.²
4. The Brussels IIa Recast Regulation is one of the priorities of the Bulgarian Presidency, which has devoted 12 Working Party meeting days to the file. The Presidency has also decided to add another day on 8 June 2018.
5. The informal JHA ministerial meeting in Sofia on 25 and 26 January 2018 discussed the main challenges as regards mutual trust between Member States in the context of the Brussels IIa Regulation and possible ways to overcome them. This discussion contributed to progress in the negotiations on the recast of the Brussels IIa Regulation.
6. During the policy debate at the (JHA) Council in March 2018, ministers agreed to take a step towards strengthening the role of central authorities by ensuring adequate human and financial resources for them, taking into account the subsidiarity principle. Additionally, the importance of improving the cooperation among central authorities was highlighted in order to further enhance their key role.

¹ Furthermore, in accordance with Articles 3 and 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.

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.

² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0017+0+DOC+XML+V0//EN&language=EN>.

7. The Presidency, supported by its Trio partners Estonia and Austria and in close cooperation with the Commission, presented the revised text of Chapters I, II and III, which enabled the Working Party to achieve considerable progress on many substantial and technical issues. The Presidency also tackled Chapter IV, the main challenge of the recast. Delegations discussed a first revised text of the rules on recognition and enforcement of decisions in matters of parental responsibility, including authentic instruments and agreements, which received a positive welcome. On the basis of these discussions, the aim of the Presidency is to prepare a revised text of this chapter jointly with the incoming Austrian Presidency, in order to facilitate the third examination of this complex chapter.
8. Taking into account the current state of play of the file and the discussions in the Working Party, the Presidency is of the view that the following key issues would benefit from political guidance in order to make as much progress as possible:
- the circulation of provisional, including protective, measures;
 - the placement of a child in another Member State;
 - the way forward on how to complete the abolition of *exequatur*.
9. These three topics, together with the other parts already discussed by the (JHA) Council, will contribute to achieving a broad package in the future, bearing in mind the *unanimity requirement* and the principle that *nothing is agreed until everything is agreed*.

II. Need for a swift finalisation of the recast

10. Given the importance of this file for all citizens and especially children, the Presidency considers that every effort should be made to ensure that, after a thorough examination, the Council adopts its position on the proposed Regulation as expeditiously as possible.

11. Ministers are invited to express their views in order to provide guidance for future work of the Working Party in line with the Presidency's suggestions, taking into account the fact that the Council is committed to achieving a broad political agreement on the file by the end of 2018.

III. Guidance for further work on some specific issues in the recast

a) Provisional, including protective, measures

12. Under the Brussels IIa Regulation, the court of the Member State which has jurisdiction as to the substance of the matter can order provisional, including protective, measures which circulate within the territory of the Union. In urgent cases, the court of another Member State may take such provisional, including protective, measures in order to protect the child (Article 20). These measures, however, have territorial effect only in the Member State in which they are ordered and cannot travel with the child under the Regulation.
13. In order to make the Regulation more efficient and increase the protection of children, the Commission proposed that the provisional, including protective, measures ordered in urgent cases by the court of a Member State not having jurisdiction over the substance of the matter should also travel with the child and be recognised and enforced in all other Member States until they are replaced or lifted by other measures taken by the Member State having jurisdiction under the Regulation.
14. Based on the discussions in the Working Party, the Presidency suggests that provisional, including protective, measures taken outside the Member State which has jurisdiction over the substance of parental responsibility should circulate only in cases where a concrete need has been identified, in order to minimise the risk of undermining the jurisdiction rules in the Regulation. Such a concrete need exists in child abduction cases where provisional, including protective, measures may be necessary to facilitate the return of the child and where he or she would be at grave risk of harm upon return if such measures were not taken. These protective measures could include, for instance, a provision that the left-behind parent may not see the child alone, but only under supervision.

Question 1

15. **Ministers are invited to express their views on whether provisional, including protective, measures ordered outside of the Member State having jurisdiction over the substance of parental responsibility should circulate under the Regulation where these measures aim to facilitate the return of an abducted child.**

b) Placement of a child in another Member State

16. Where it is in the best interests of the child and the circumstances so require, the authorities of a Member State might contemplate placing him or her in a foster family or institutional care in another Member State. Under the Brussels IIa Regulation, the prior consent of the receiving Member State is necessary only where the intervention of a public authority is required in that Member State for the domestic placement of children.
17. The Commission explained that, in practice, it can take several months for it to be established whether consent is required in a particular case under the current Regulation. Where consent is required, proceedings often last six months or more, as there is no deadline for the requested authorities to provide or refuse consent.³ As a result of the length of proceedings, it seems that many children are placed in the receiving Member State while the consultation procedure is still pending or even before it is initiated.⁴ The Commission, along the lines of Article 33 of the 1996 Hague Convention,⁵ proposed that an autonomous consent procedure be established for all cross-border placements.

³ Commission proposal, p. 11.

⁴ Commission proposal, p. 4.

⁵ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

18. Discussions in the Working Party showed that there is broad support for requiring consent for all placements of a child in a foster family or institutional care in another Member State, regardless of whether public authority intervention is required in that Member State for domestic cases of such child placement. Taking into account that time is of the essence in these cases, the procedure for granting consent should be conducted swiftly. As in the current Regulation, a lack of consent would prevent the placement of a child in another Member State.

Question 2

19. **Ministers are invited to express their views on whether consent should be required for all placements of a child in another Member State, regardless of the role of public authorities in that Member State for domestic cases of such child placement.**
- c) One system of recognition and enforcement with specific rules for "privileged" decisions**
20. In December 2017, the (JHA) Council agreed on the abolition of *exequatur*, subject to appropriate safeguards. It further agreed that the Working Party should continue to work on finding a unanimous compromise solution. After thorough discussions on the way forward at technical level, the Presidency is of the view that the new rules in the Recast Regulation should clarify that most decisions in matters of parental responsibility will fall under a general system of recognition and enforcement, while "privileged" decisions will continue to be treated under special rules subject to the introduction of appropriate safeguards, in particular the best interests of the child and the protection of the rights of the defence.

21. Based on the discussions held in the Working Party since the beginning of the year, the Presidency is of the opinion that the revised text of Chapter IV should be based on a system which provides for specific rules to be applied to "privileged" decisions. In accordance with these rules, a "privileged" decision is a decision given in a Member State to be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition (except irreconcilability). The scope of such a decision is still to be determined at technical level (such as certain access rights and return decisions).
22. The Presidency considers that discussions at political level will facilitate future work on the practical details of the new system which will be further clarified at technical level in the Working Party and will contribute to the successful finalisation of the Recast.

Question 3

23. **Ministers are invited to express their views on whether the Recast should contain one system of recognition and enforcement of decisions in matters of parental responsibility with special rules for "privileged" decisions.**
