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NOTE

From: Presidency
To: Permanent Representatives Committee/Council

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. Introduction

1. The Working Party on Civil Law Matters (Brussels IIa) has regularly examined the proposed Brussels IIa Recast Regulation since the reception of the Commission's Proposal in 2016. The Council had a policy debate on the hearing of the child in June 2017.

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 Union¹.
3. The Council asked the European Parliament for an Opinion. The Opinion on the Commission proposal is not yet available.
4. The Opinion of the European Economic and Social Committee was given on 26 January 2017.
5. In light of discussions in the Working Party, in particular on 7, 15-16 November 2017 and the JHA Counsellors meeting on 23 November 2017, the Presidency is of the opinion that a policy debate at ministerial level on the key issue of the abolition of *exequatur* is necessary for future work at expert level. The Working Party shall continue to work on all other elements of the proposed Brussels IIa Recast Regulation.

II. Nothing is agreed until everything is agreed

6. The Presidency is aware that the key principles of the abolition of *exequatur* will constitute an indivisible package, a global compromise which, given the subject matter, will not hold if certain elements are added or removed.

¹ In accordance with Articles 3 and 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.
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.

7. In light of this, the Recast Regulation text needs to be developed further at technical level in future Working Party meetings taking into account what the Council will suggest. Later, the outcome will be presented to the Council for confirmation as a package together with other relevant parts of the Recast Regulation, bearing in mind the *unanimity requirement* and the principle that *nothing is agreed until everything is agreed*.
8. Certain issues also relevant to the negotiations are not covered in this document, such as enforcement of decisions in matters of parental responsibility. These issues still need further discussions at technical level.

III. Abolition of *exequatur* for the remaining decisions in matters of parental responsibility

9. Almost twenty years ago, when the European Council met in Tampere in 1999, the principle of mutual recognition of decisions was set as the cornerstone of judicial cooperation in civil matters. This principle implies that decisions in family matters should be "automatically recognised throughout the Union without any intermediate proceedings".
10. The Brussels IIa Regulation was the first EU instrument to implement this principle in 2002 by abolishing *exequatur* for certain decisions on access rights and return of a child, thus giving these decisions a "privileged" status in comparison with other decisions in matters of parental responsibility.
11. The Presidency considers this file to be of particular importance, as it deals with matters that affect the lives of European citizens at the most fundamental level and the protection of the best interests of the child, which is a well-established principle in all Member States.

12. In accordance with the mandate given by the Tampere **European Council**, and on the basis of the first step made in the Brussels IIa Regulation, a majority of delegations shared the aim of the Commission to abolish *exequatur* for all remaining decisions in matters of parental responsibility, subject to the introduction of appropriate safeguards.
13. In a vast majority of cases (more than 90%), the *exequatur* procedure is a pure formality as there are no reasons to refuse recognition and the declaration of enforceability of a foreign decision. Appeals against the decisions to grant *exequatur* are rarely successful. 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.
14. ***The Council is invited to confirm the abolition of exequatur for all remaining decisions in matters of parental responsibility, subject to the introduction of appropriate safeguards.***

IV. Achieving the complete abolition of *exequatur* in matters of parental responsibility

15. Discussion in the Working Party showed that, while a majority of delegations agree on the aim, they have divergent views on how to complete the abolition of *exequatur* in matters of parental responsibility. These views are diverging on the model to be chosen: for example, some delegations would prefer to keep the privileged status of certain decisions on access right and return of the child in the current Brussels IIa Regulation (Articles 41 and 42), while other delegations would prefer to use the Brussels I Recast Regulation model of abolition of *exequatur* for all decisions on parental responsibility (see point 17).

16. In the current Brussels IIa Regulation system the "privileged" decisions, which are enforceable in the Member State of origin and accompanied by a certificate, are directly recognised and enforceable in any Member State subject to only one challenge (irreconcilable decision). The issuance of this certificate is subject to certain procedural safeguards contained in the Regulation.
17. Brussels I Recast Regulation model: Based on this model, a decision in parental responsibility matters which is enforceable in the Member State of origin should be directly enforceable in the Member State of enforcement without the need for a declaration of enforceability (*exequatur*) in the future Brussels IIa Recast Regulation. A limited number of challenges against the recognition and/or enforcement of the decision, safeguarding the right of defence, may be raised in the Member State of enforcement. These grounds could include, for instance, public policy, the opportunity of the child to be heard, the right of defence (service of procedural documents) and the irreconcilability of the decision with a subsequent decision.
18. Several models of abolition of *exequatur* have been discussed at technical level without reaching an agreement. It has become clear that it is unlikely that unanimity can be reached on either of these models.
19. ***The Council is invited to agree that the Working Party will continue to work further on finding a compromise solution and that the progress that all Member States want to accomplish can only be achieved on the basis of a compromise solution which would take into account the relevant case-law of the CJEU on the protection of the right of defence. Ministers are invited to express their views, if any, on a possible compromise solution.***
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