

**ASSEMBLY OF THE PORTUGUESE REPUBLIC**  
**EUROPEAN AFFAIRS COMMITTEE**

**Opinion**

**COM(2016)411**

**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)**

## **PART I - INTRODUCTION**

In accordance with Article 7 of Law No 43/2006 of 25 August 2006 on the monitoring, examination and pronouncement by the Assembly of the Republic on matters relating to the construction of the European Union, as amended by Law No 21/2012 of 17 May 2012 and in accordance with the Guidelines for the scrutiny of EU initiatives approved on 8 January 2013, the 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) [COM(2016)411] has been submitted to the European Affairs Committee.

In view of its subject-matter, the initiative was forwarded to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, which examined and approved the report, which is annexed to this opinion and forms an integral part thereof. However, and despite the new methodology for scrutinising European initiatives, as approved by the European Affairs Committee, the Committee has not, to date, drawn up a technical note on this initiative.

## **PART II - BACKGROUND**

1. The initiative proposes a recast of Council Regulation (EC) No 2201/2003 of 27 November 2003<sup>1</sup> concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000. The objective of the proposed recast is to further develop the European area of Justice and Fundamental Rights based on Mutual Trust by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition and to better protect the best interests of the child by simplifying the procedures and enhancing their efficiency.

It should be pointed out that the recast being proposed is the result of the assessment carried out by the Commission in 2014 and set out in a report<sup>2</sup>, which was analysed by the European Affairs Committee and on which it issued an opinion. The findings of the report referred to the fact that *'the Regulation is a well-functioning instrument that has brought important benefits to citizens. It has facilitated the settlement of increasing cross-border litigation in matrimonial and parental responsibility matters through a comprehensive system of jurisdiction rules, an efficient system of cooperation between Member State Central Authorities, the prevention of parallel proceedings and the free circulation of judgments, authentic instruments and agreements. The provisions on the return of the child complementing the 1980 Hague Convention aimed at deterring parental child abduction between Member States are regarded as particularly useful.*

*However, there are indications on the basis of data and preliminary feedback from experts that existing rules could be improved. In order to explore comprehensively the concerns identified in this report, the Commission intends to launch a further policy evaluation of the existing rules and their impact on citizens. To this end,*

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<sup>1</sup> Better known as the Brussels II-A Regulation.

<sup>2</sup> COM(2014)225 – REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

*the Commission will also launch a public consultation. On the basis of the evaluation and the replies to the public consultation, the Commission will take action as appropriate.*

Consequently, the objective of the proposal to recast the regulation is to remove the problems identified both in the above-mentioned assessment and in the public consultations and various studies carried out. It aims to create a clearer legal framework, establish uniform jurisdiction rules for divorce, separation and the annulment of marriage as well as rules for disputes about parental responsibility ‘with an international element’. At the same time, the recast proposal also aims to facilitate the free circulation of decisions in the Union by enshrining a number of provisions on their recognition and enforcement in other Member States.

Finally, it should be pointed out that the report presented and approved by the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees reflects faithfully and in detail the content of the initiative. Accordingly, it must be deemed to have been reproduced in full in order to avoid repetition of analysis and consequent redundancy.

***(a) Legal basis***

The legal basis for this initiative is Article 81(3) of the Treaty on the Functioning of the European Union (TFEU) and Article 81(1), which states that ‘the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases’.

***(b) Principle of subsidiarity***

As regards the principle of subsidiarity, it should be noted that under Article 81 of the TFEU, the Union has shared competence to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws of the Member States, which it has already exercised by enacting the Brussels II-A Regulation. Therefore, and taking into account the objective of the proposed measure, i.e. the recast of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Member States cannot sufficiently achieve this objective given its cross-border nature and the lack of clarity of the applicable legal framework. However, in view of its dimension and impact, it will be more effectively achieved at the EU level, in accordance with the principle of subsidiarity, enshrined in Article 5 of the Treaty on the European Union.

In the light of the foregoing, it is considered that this initiative complies with the principle of subsidiarity.

**PART III - OPINION**

In the light of the comments made above and in view of the report of the relevant committee, the European Affairs Committee is of the opinion that:

1. This initiative upholds the principle of subsidiarity, insofar as the objective will be achieved more effectively by means of action at European Union level.

2. This concludes the scrutiny of this initiative.

Palácio de São Bento, 30 September 2016

Rapporteur

[signed]

(Edite Estrela)

Chair of the Committee

[signed]

(Regina Bastos)

#### **PART IV - ANNEX**

Report from the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees

# **COMMITTEE ON CONSTITUTIONAL AFFAIRS, RIGHTS, FREEDOMS AND GUARANTEES**

## **REPORT**

### **COM (2016) 411 final – 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)**

#### **I Introduction**

Under Article 7(2) of Law No 43/2006 of 25 August 2006, as amended by Law No 21/2012 of 17 May 2012 on the monitoring, examination and pronouncement by the Assembly of the Republic on matters relating to the construction of the European Union, the European Affairs Committee requested that the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees issue a report on COM(2016)411 final - ‘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)’, which was accompanied by two Commission staff working documents on the impact assessment (SWD(2016)207 final) and the executive summary thereof (SWD(2016)208 final).

The purpose of the report is to analyse compliance with the principle of subsidiarity, in accordance with Protocol No 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

#### **II Objectives, content and grounds of the initiative**

COM(2016)411 final concerns 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 objective of this proposal is to recast Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (‘Brussels II-A Regulation’). The proposal would amend and replace the previous regulation.

It should be noted that the Brussels II-A Regulation is the cornerstone of judicial cooperation in family matters in the European Union. It establishes uniform jurisdiction rules for divorce, separation and the annulment of marriage as well as for disputes about parental responsibility in cross-border situations. It facilitates the free circulation of judgments, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in other Member States. It has applied since 1 March 2005 to all Member States except Denmark.

Ten years after the entry into force of the Regulation, the Commission has assessed the operation of the Regulation in practice and considered it necessary to make amendments to

the instrument in its application report adopted in April 2014<sup>3</sup>.

While the Regulation is overall considered to work well, the consultation of stakeholders and a number of studies have revealed several deficiencies in the current operation of the Regulation which should be remedied, having specific implications on issues of parental responsibility, where six shortcomings were identified that need to be addressed urgently since they cause acute problems.

These are:

- 1) child return procedure,
- 2) placement of a child in another Member State,
- 3) the exequatur requirement (procedure for declaring a decision given in another Member State enforceable),
- 4) hearing of the child,
- 5) actual enforcement of decisions, and
- 6) cooperation between Central Authorities.

The proposal for a Regulation sets out, in summary, the following amendments with a view to solving these deficiencies:

- 1) **Introduction of measures to increase efficiency and improve the functioning of the ‘overriding mechanism’, in particular the following:**
  - a. Member States shall ensure that jurisdiction for the applications for the return of a child is concentrated on a limited number of courts – see Article 22;
  - b. Where it concerns the return of a child, each instance shall give its decision no later than six weeks after the application or appeal is lodged with it – see Article 23;
  - c. Only one appeal shall be possible against the decision ordering or refusing the return of the child – see Article 25(4);
  - d. The court may declare the decision ordering the return of the child provisionally enforceable – see Article 25(3).
- 2) **Creation of an autonomous consent procedure to be applied to all cross-border placements, flanked by a time limit of eight weeks for the requested Member State to respond to the request**

To this end, the proposal provides for the following rules to be introduced:

- a. making consent of the receiving State mandatory for all cross-border placements originating from a court or authority in a Member State – see Article 65(1);
- b. introducing uniform requirements for documents to be submitted with the request for

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<sup>3</sup> COM(2014)225 final.

consent: the requesting authority has to submit a report on the child and set out the reasons for the proposed cross-border placement – see Article 65(1);

- c. introducing a rule on translation requirements: the request has to be accompanied by a translation into the language of the requested Member State – see Article 65(2);
- d. channelling all requests through Central Authorities – see Article 60;
- e. introducing a time limit of eight weeks for the requested State to decide on the request – see Article 65(4).

**3) Abolition of exequatur with appropriate safeguards to be invoked at the stage of enforcement, i.e. to challenge the recognition or enforcement of the decision given by the State of origin or to challenge concrete enforcement measures ordered by the State where enforcement is sought, in one and the same procedure in the State where enforcement is sought**

To this end, the proposal lays down, in particular:

- a. that a decision on the matters of parental responsibility in respect of a child given in a Member State shall be enforceable in the other Member States without any declaration of enforceability being required – see Article 30;
  - b. uniform rules that define in which situations recognition and/or enforcement of the decisions on the matters of parental responsibility could be opposed, thereby anticipating in particular the situation where a change of circumstances occurred.
- 4) Introduction of an obligation to give the child an opportunity to express his or her views**

To this end, the proposal enshrines the right of the child to express his or her view – see Article 20. Therefore, the authorities of the Member States shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings. These views are to be taken into account in accordance with the child's age and maturity.

**5) Introduction of targeted measures to improve the efficiency of actual enforcement**

To this end, the proposal enshrines the following in particular:

- a. that the application for enforcement has to be made to a court in the Member State of enforcement while leaving the procedure generally, the means of enforcement and their modalities up to the law of the Member State of enforcement, e.g. which specific enforcement measure should be ordered under which circumstances; that where a decision from another Member State needs to be further detailed or adapted in order to be enforced under the national law of the Member State of enforcement, the competent court of that Member State should make the necessary specifications or adaptations while respecting the essential elements of the decision – see Articles 32 and 33;
- b. an indicative time limit for the actual enforcement of a decision;

where enforcement does not occur within six weeks from the moment the enforcement proceedings were initiated, the court of the Member State of enforcement shall inform the requesting Central Authority in the Member State of origin, or the applicant, if the proceedings were instituted without Central Authority assistance, about this fact and the reasons for the delay – see Article 32(4);

- c. that the court of origin could declare a decision provisionally enforceable even if this possibility does not exist in its national law – see Article 30(2).

**6) Clarification of the Central Authorities' and other requested authorities' tasks plus addition of an article on adequate resources**

To this end, the following amendments are introduced:

- a. Central Authorities are expected to cooperate with each other in providing assistance to national authorities as well as to holders of parental responsibility. Such assistance should in particular include locating the child, either directly or through other competent authorities, where this is necessary for carrying out a request under this Regulation, and providing child-related information required for the purpose of proceedings – see Article 63;
- b. where Central Authorities initiate or facilitate the institution of court proceedings for the return of children under the 1980 Hague Convention, they should ensure that the file prepared with a view to such proceedings is complete within six weeks, save where exceptional circumstances make this impossible – see Article 63(1)(g);
- c. an authority of a Member State contemplating a decision on parental responsibility should be entitled to request the communication of information relevant to the protection of the child from the authorities of another Member State if the best interests of the child so require. Depending on the circumstances, this may include information on proceedings and decisions concerning a parent or siblings of the child, or on the capacity of a parent to care for a child or to have access to the child – see Article 64;
- d. the Member States must ensure that Central Authorities in matters of parental responsibility have adequate financial and human resources to enable them to carry out the obligations assigned to them under this Regulation – see Article 60.

It should be pointed out that, for the purposes of the Regulation, a ‘child’ is to be understood as any person below the age of 18 years – see Article 2(7).

**o Principle of subsidiarity**

For the purposes of Article 5(1) and (2) of the Treaty on the European Union and Article 69 of the Treaty on the Functioning of the European Union, and Protocol 2 annexed to it, on the application of the principles of subsidiarity and proportionality, we have ascertained that achieving the proposed objective (i.e. to recast 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) can be done only at the European Union level.

We therefore conclude that the proposal in question complies with the principle of



subsidiarity.

### **III Conclusions**

In view of the above, the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees has hereby reached the following conclusion:

- a) that COM(2016)411 final *'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)'* does not breach the principle of subsidiarity.
- b) This report should be sent to the European Affairs Committee

Palácio de São Bento, Thursday 8 September 2016

Rapporteur

[signed]

(Fernando Negrão)

President of the Committee

[signed]

(Pedro Bacelar Vasconcelos)