European Parliament

Briefing

LEGAL AFFAIRS

Brussels IIa: Towards a Review (2)

Main Recommendations from External Experts to the European Parliament

Applied since 2005 in all EU Member States except Denmark, Council Regulation (EC) No 2201/2003 ('**Brussels IIa**'), has raised concerns among citizens, practitioners and academics. The European Parliament has received many recommendations for amendments from experts commissioned by the Policy Department for Citizen's Rights and Constitutional Affairs. This briefing note presents a reasoned summary of these recommendations in view of the consultation of the EP on the recently published European Commission "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 recommendations do not represent the views of the European Parliament or the Policy Department, nor can they prejudge the position of the European Parliament.

STRUCTURE OF BRUSSELS IIA

Brussels IIa covers two subject matters, matrimonial issues and parental responsibility, for which it sets rules in two private international law areas - namely jurisdiction and the recognition and enforcement of judgments, both related to matrimonial and parental responsibility matters, as well as cooperation between central authorities in respect to the latter only. It does not however include any rule on applicable law. Given the subsequent and separate adoption of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ('Rome III'), experts emphasized the need to separate the two subject matters. They recommended that all private international law issues related to parental responsibility be regulated in one **autonomous legislative act** (CARPANETO, p. 56; SWISS INSTITUTE 2010, pp. 23, 244-245), including the question of the **law applicable.** The possibility for a choice of law should also be considered, on the basis of either the existence of a close link between the child and the State of the chosen law or the best interests of the child (SWISS INSTITUTE 2010, pp. 25, 246-247).

Alternatively, a **chapter on the law applicable** to parental responsibility issues within the framework of the Brussels IIa could be included, referring to the provisions of the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children to which all EU Member States are party. According to Chapter III (Articles 15 to 22) of the latter, the applicable law should be the law of the State of the child's new habitual residence (VAN LOON, pp. 200-201).

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SCOPE (ARTICLE 1)

The scope of the Regulation should be enlarged in order to cover cases where the deprivation of the liberty of the child is ordered as a placement measure. The term "**placement**" should be replaced with the more comprehensive term "alternative care" and it should be clarified if family arrangements are included. The kafalah, a child protection measure applied in legal systems of Muslim tradition, and analogous institutions should be added, in line with the scope of the 1996 Hague Convention (CARPANETO, pp. 57-59).

DEFINITIONS (ARTICLE 2)

New or clearer definition of certain terms should be adopted.

In light of recent European Court of Human Rights case-law and of the development of national legislations across the EU, an explanation of the term "**spouses**" should be added in order to define whether the Regulation encompasses marriage in the broadest sense, by precisely determining which types of unions are considered, such as same-sex marriages or civil partnerships (BORG-BARTHET, pp. 36-37).

A new provision should address the definition of the term "**child**", which should be considered as every person under the age of 18 (CARPANETO, pp. 59-60).

The term "**habitual residence**" should be explicitly included amongst the definitions listed in Article 2 (FENTON-GLYNN, p. 56), reflecting relevant judgments of the Court of Justice of the European Union ('CJEU') and awarding it an autonomous meaning under EU law. The Court recognised that this concept depends on various *de facto* circumstances (e.g. the amount of time and the habitual character of the residence, the physical presence, the intention of the parties as regards where to establish their household, the state of mind of his/her primary attachment figure, the degree of integration into a social and family environment). All these factors relate to the nature and quality of that residence (SWISS INSTITUTE 2015, pp. 61-63).

With regard to rights of custody, some national laws differentiate the right to determine the child's place of residence and rights relating to the care of the person of the child. It follows that under **paragraph 9**, the term "**rights of custody**" should be specified by including both the duty to care and the right to house the child in his/her primary residence (SWISS INSTITUTE 2015, pp. 24 and 63).

The Swiss Institute on Comparative Law (SWISS INSTITUTE 2015, pp. 18-19, 24, 55 ff.) further recommended the replacement of the term "**wrongful removal or retention**" in **paragraph 11** with the term "**child abduction**", on the one hand, and the addition of the definition of the term "**illegal transfer of a child's residence**", on the other hand. The proposed distinction relies on the view that the immediate return of the child to his/her original habitual residence only makes sense as a reaction to a kidnapping, i.e. when the child is immediately brought back to his/her habitual residence from which s/he was illegally removed. In other cases, from the assessment of the circumstances the return mechanism may not always amount to a "return", but to a "new transfer" or a "forced re-transfer of residence". Judges need to evaluate the overall situation and to pronounce a decision based on the best interests of the child. The term "**illegal transfer of a child's residence**" should refer solely to cases of change of the primary residence of a child by the parent having a right of custody in breach of rights of another holder of parental responsibility. As an answer, experts suggest to promote and regulate mediation and cooperation between courts in case of transfer of a child's residence (also including child abduction cases) by inserting a new article between Articles 2 and 3. A specific provision on the procedure concerning the lawful transfer of the child's residence could be added between Articles 9 and 10.

JURISDICTION ON DIVORCE, LEGAL SEPARATION AND MARRIAGE ANNULMENT (ARTICLES 3-7)

In order to complete the rules on jurisdiction in matrimonial matters set forth in **Articles 3 to 7** and to bring them in line with more recent private international law instruments in civil matters, a new provision on the **choice of court** should be added to Brussels IIa. The principle of party autonomy in private law is seen as pervasive and should be introduced in family matters as well. An informed consent to an agreement concerning the resolution of arising matters in case of divorce, legal separation or marriage annulment should be possible. In any case, the faculty to choose the *forum* should be restricted in order to protect the vulnerable party from its abusive use (BORG-BARTHET, pp. 13-18, 33-35).

Under **Article 7**, jurisdiction should be determined by the **residual rules of jurisdiction** of the Member States in case no court is competent pursuant to Articles 3 to 5. However, clarity is requested about the application of the *lis pendens* rule in respect of third States and on the limits to the use of procedural devices such as *forum non conveniens* according to which the court of a third State could be deemed competent if it is better suited to hear the cases (BORG-BARTHET, pp. 18-19, 36).

Furthermore, the possibility of **transferring jurisdiction to a court better placed to hear the case**, which exists for parental responsibility (Art. 15) should be open with respect to matrimonial disputes. Indeed, costs, delays and emotional distress could be tackled by empowering courts to limit bifurcation of proceedings (BORG-BARTHET, pp. 20-22, 35-36).

GENERAL JURISDICTION ON PARENTAL RESPONSIBILITY (ARTICLE 8)

Article 8(1) states the **general jurisdiction** of the court of the State of origin if it was seized before the child lawfully moved to another Member State by virtue of the principle of *perpetuatio fori*. However, it does not cover cases of transfer of habitual residence to a third State bound by the 1996 Hague Convention. In line with the Convention (namely its Art. 5(1)), an amendment should be adopted in order to specify that when the situation concerns a change of the child's habitual residence, the court of the new Member State is competent, except in child abduction cases (VAN LOON, p. 192).

The possibility of adding a new article providing for the **relocation** of a child should be evaluated. The term "relocation" should refer solely to cases of lawful permanent move of the child, usually with the primary carer, to a new country. Within the relocation proceedings, the best interests of the child should be the primary criterion, the right of the child to be heard should be granted, and the possibility to find a solution through **mediation** should be provided (VAN LOON, pp. 192-193).

JURISDICTION IN CASES OF CHILD ABDUCTION (ARTICLE 10)

The replacement of the term "**wrongful removal or retention**" with "**child abduction**" in **Article 10** is proposed in line with the abovementioned amendments to Article 2 (SWISS INSTITUTE 2015, pp. 18-19, 24, 26).

A new paragraph in **Article 10** should be added in order to specifically address the opportunity for the court of refuge to adopt **urgent measures** that are deemed necessary for the protection of the person or property of the child. This amendment would reflect the similar provisions included in the 1996 Hague Convention (Articles 7(3) and 11) that allow the courts of the State where the child is present to take any protective measures in case of return orders. These measures are recognised by operation of law and are effective until the court of the State of origin has taken the measures required by the situation. Likewise, **Article 20** of Brussels IIa on **protective measures** should be amended accordingly and moved after Article 15 (VAN LOON, pp. 193-195).

RETURN OF THE CHILD (ARTICLE 11)

Article 11 on the return of the child should be supplemented with different procedures that would reflect the substantial differences between cases of child abduction and illegal transfer of a child's primary residence (see above in relation to Art. 2). In particular, in the latter case, the child loses significant contacts with members of his affective environment and its right to maintain contacts should be protected in order to guarantee the right/duty of both parents to participate in the upbringing of the child. As to child kidnapping, the right of the other parental responsibility holder is involved because it entails the deprivation of the child's primary caregiver(s). A **two-track strategy** is therefore proposed, based on the distinction between cases where the best interests of the child to immediate return may be presumed (fast track) and cases where an *in concreto* analysis and prevention of implicit discrimination based on nationality are required (SWISS INSTITUTE 2015, pp. 18-19, 24-27, 55-87, 101-102).

In the context of abduction proceedings, **Article 11(2)** provides for the **hearing of the child**. The provision should be completed by specifying that in cases where the parents cannot represent the child, a special representative should be appointed in order to assist him/her. Such proposal would be in line with the European Convention on the Exercise of Children's Rights (VAN LOON, p. 195). **Common minimum standards** should also be identified with regard to the hearing of the child, which would eliminate barriers to the circulation of decisions and would be in line with the European Charter of Fundamental Rights (SWISS INSTITUTE 2010, pp. 24 and 246.)

As to the **length of the proceedings**, **Article 11(3)** states that the court should pronounce its decision within six weeks. However, this provision should be modified by inserting a clause establishing that in case of appeal proceedings its length should be enlarged to twelve weeks. This amendment would take into consideration the various procedural instances established under national laws (incl. **mediation)**. (VAN LOON, pp. 195-197).

As to **Article 11(4)**, clarity is needed with regard to the proof of existing **adequate arrangements** in return proceedings. To this end, the use of European Judicial Network in order to control the adequate arrangements that have been made to secure the protection of the child after his/her return is recommended (VAN LOON, pp. 197-198).

Article 11(4) should also be modified by providing the **right to self-defence** as a well-founded reason for refusing the return of a child, as in some situations the removal or retention of the child is linked to domestic violence (SWISS INSTITUTE 2015, pp. 19-20, 63-67).

Having regard to return proceedings, **Article 11(6-7)** provides that the requested court (court of refuge) shall immediately inform the court of origin of its refusal ("where the child was habitually resident"). It should be clarified that the court of origin should receive all the relevant documents exclusively in order to facilitate its decision on custody. Indeed, the Regulation establishes a **role of judicial review upon the court of origin**. However, this competence should only cover custody issues, and not the merits of the return refusal adopted by the court of refuge. In this context, the main concern relates to the principle of mutual trust given that the judicial review is entrusted to a court (of first instance) of another Member State. It follows that also **Article 11(8)** should be modified by specifying that "any subsequent judgment" is only related to the "question of custody" (VAN LOON, pp. 198-200).

Further, the Swiss Institute recommends the deletion of **Article 11(8)**, and its replacement with a new provision. Different mechanisms could be proposed in relation to return requests or transfer of the child's residence requests. In both cases, the courts should adopt interim decisions on the temporary residence of the child. As to the return request, the court seized should cooperate with central authorities and a **bi-national committee of mediators** should be engaged. In case of its failure, the courts involved should adopt a joint ('**bi-national**') **decision**; otherwise, a proposed General Court of the European Union should solve the case (SWISS INSTITUTE 2015, pp. 98-99, 102-103).

PROROGATION OF JURISDICTION (ARTICLE 12)

In cases where non-EU States that are not contracting parties to the 1996 Hague Convention are involved, measures should be adopted in order to avoid conflicts between an EU Member State decision and another one from a third country. Under **Article 12(4)** the prorogation of jurisdiction of the courts of a Member State is provided even when the child's habitual residence is in a third State (that is not a contracting party to the 1996 Hague Convention). However, it is inadequate to cope with cases of international *lis pendens*, when proceedings are initiated also in the third State. National laws would apply and different solutions could be envisaged. Thus, it is recommended to adopt an **international *lis pendens* mechanism** at EU level involving third States especially those that are not parties to the 1996 Hague Convention (SWISS INSTITUTE 2010, pp. 24 and 246).

RECOGNITION AND ENFORCEMENT (ARTICLES 21-52)

Further to the recommendations to amend Article 11(8) by introducing "any subsequent judgment on the question of custody", **Article 42** should be deleted. According to this article, the return order entailed by an enforceable **judgment certified** in the Member State of origin (in respect of the requirements set forth in paragraph 2) should be recognised and enforceable without any *exequatur* proceedings. However, this provision may lead to some conflicts between the decisions of the courts of origin and the courts of refuge already recognised by the CJEU. Thus, a clarification on the judgment that can be certified is required, i.e. it should address the custody issue (VAN LOON, pp. 202-203).

Similarly to the access rights and return decisions respectively under Articles 41 and 42, it is submitted that the **abolition of *exequatur*** should also be granted to **placement orders**, otherwise new rules should be provided. For instance, as established in the Regulation 606/2013 on mutual recognition of protection measures in civil matters, a certificate limited in time (12 months) could be introduced. Having regard to the nature of these measures, their duration varies in accordance with the situation of the child considered. The adoption of the most suitable solution with regard to the duration of the placement should be based on the best interests of the child primarily and suit purposes of procedural economy at a second level (CARPANETO, pp. 70-73).

Automatic recognition should be extended in order to cover not only visitation rights and the orders of return of a child, but also decisions that attribute **custody**. This amendment would rectify situations in which the courts of a Member State, which recognised by operation of law a visitation decision, would be obliged to render its own custody decision. Indeed, in doing so, it would comply with the visitation judgment already adopted by another Member State; even if it is often impossible (SWISS INSTITUTE 2010, pp. 23 and 246).

COOPERATION BETWEEN CENTRAL AUTHORITIES IN MATTERS OF PARENTAL RESPONSIBILITY (ARTICLES 53-58)

Cooperation on cases specific to parental responsibility (Article 55)

As far as judges and central authorities are concerned, a **guide to good practices** drawn up at EU level should provide guidance to Member States and Central Authorities regarding applying Brussels IIa on how to deal with cross-border cases. I would give information on how child protection works in the different Member States, how Article 15 should be applied, and in general how Brussels IIa should work in practice (FENTON-GLYNN, p. 56).

A **duty to inform** foreign authorities of child protection proceedings should also be included, unless different conditions are required for the safety of welfare of the child (FENTON-GLYNN, p. 56).

As pointed out under Article 11(3), the need for expeditious procedures should also be referred to central authorities involved under the 1980 Hague Convention on the civil aspects of international child abduction. Therefore, **Article 55** on the **cooperation** between central authorities should be amended by introducing a period of six weeks for these return proceedings (VAN LOON, p. 203).

Placement of a child in another Member State (Article 56)

In general, cooperation should be reinforced in cases of **placement** of a child in another jurisdiction under **Article 56** and clear rules should be established on which cases the placement should be ordered (FENTON-GLYNN, p. 56).

A **recital** should be added in order to ensure that when Member States are cooperating in the field of cross-border **placement** of children the principles stated by the UNCRC, the UN Guidelines and the Council of Europe are respected with a view to guarantee children' rights and the quality of the solutions of placement abroad (CARPANETO, pp. 61-63).

As to placement orders, differences between **short-term** and **long-term** placements should be assessed. In this sense, a definition of long-term placement under **Article 56** should be provided, as well as the prescription of periodical evaluations on long-term placement should be added (CARPANETO, pp. 60-61).

From the practical operation of **Article 56**, it appears that **confidential information** in respect of the child may been exchanged without due protection. Therefore, the introduction of a general confidential clause should be considered in all proceedings related to the child or a specific duty of confidentiality should be added with regard to the procedure under Article 56 (CARPANETO, p. 64).

Article 56 should also include a provision on the **transfer of jurisdiction** in cases of long-term cross-border placement. Pursuant to the principles of the best interests of the child and proximity, the courts of the Member State of origin could retain jurisdiction during the first year period. After that, the receiving State should be recognised as having jurisdiction (CARPANETO, pp. 64-66).

As to cross-border proceedings, the main concern regards the weakness of the **procedure** under **Article 56** carried out by the central authorities involved. This article should be replaced with a new provision that would outline a mechanism based on the exchange of standard forms and within precise time limits. This is in line with the above-recommended abolition of *exequatur* in relation to placement orders. It would also ensure the balance of tasks between authorities of the Member States involved, governing the consent for the placement, having specific rules for measures concerning deprivation of liberty and, finally, containing a reference to the provisional measures laid down in Article 20 (CARPANETO, pp. 66-71).

Since decisions regarding children are adopted at a certain, specific and particular moment, a mechanism of **adjustment** of cross-border placement orders should be introduced in Article 56 (CARPANETO, p. 74).

In case of **appeal** pending against the placement decision, the opportunity to allow the urgent enforcement of the placement order without **suspension** if it is deemed necessary should be evaluated, otherwise the suspension should expire the relevant appeal period (CARPANETO, pp. 74-75).

A regime on **costs** should also be established, introducing the general rule that each authority should bear its own costs, but also providing for the possibility of both Member States to reach an agreement (CARPANETO, p. 75).

Furthermore, the obligation to cooperate under **Article 56** should be strengthened with new obligations of information and assistance among the competent authorities, given the difficulties arising in cases of "**runaway child**", i.e. where a child escapes from a placement (CARPANETO, pp. 75-76).

GENERAL RECOMMENDATIONS

Regarding child protection measures, it is pointed out that a greater understanding of the different approaches in different Member States is needed and should be achieved through more **research** and **exchange of information** (FENTON-GLYNN, p. 56).

Preventing family litigation involves setting up specific **training to practitioners**, mainly to lawyers and judges who work in cross-border proceedings, favouring the communication between them and their ability to cooperate, and developing **mutual trust**. In this context, Member States should also be encouraged to centralise child abduction cases in **specialised courts** (SWISS INSTITUTE 2015, p. 22).

A specific **database** in order to collect statistics on high-conflict dissolutions of unions between parents of children in cross-border cases based on data provided by the national authorities should be created at EU level. This would provide a deeper knowledge of sociological phenomena and would in turn, better ground the development of a **strategy to prevent** high-conflict dissolution of families (SWISS INSTITUTE 2015, p. 21).

Finally, beyond above-mentioned suggested references in various articles, **mediation** is generally viewed as a strong option to minimize conflicts and an alternative to judicial resolution, particularly in cases of relocation ((VAN LOON, pp. 192-193, 196-197). The reinforcement of access to international family mediation is recommended, with the setting up of a mediation scheme allowing to organise a licit transfer of the child's residence from one Member State to another and the creation of a network of EU-trained or authorised mediators for transnational proceedings concerning children, which could act under the auspices of the European Parliament mediator for parental child abduction (SWISS INSTITUTE 2010, pp. 25-26; SWISS INSTITUTE 2015, p. 22).

EUROPEAN PARLIAMENT PUBLICATIONS INCLUDING RECOMMENDATIONS ON BRUSSELS IIA

- BORG-BARTHET, J., Jurisdiction in matrimonial matters - Reflections for the review of the Brussels IIa Regulation, PE 571.361, 2016.
- CARPANETO, L., Cross-border placement of children in the European Union, PE 556.945, 2016.
- FENTON-GLYNN, C., Adoption without Consent, Update 2016, PE 556.940, 2016.
- SWISS INSTITUTE OF COMPARATIVE LAW, Cross-border Parental Child Abduction in the European Union, PE 510.012, 2015.
- SWISS INSTITUTE OF COMPARATIVE LAW, The parental responsibility, child custody and visitation rights in cross-border separations, PE 425.615, 2010.
- VAN LOON, J.H.A., "The Brussels IIa Regulation: towards a review?" in Cross-border activities in the EU - making life easier to citizens, PE 510.003, 2015 (pp. 177-207).

For a general presentation of Brussels IIa and bibliography, see also the briefing on Brussels IIa: Towards a review, PE 536.451

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