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Mutual recognition of decisions on parental responsibility

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1. EXECUTIVE SUMMARY

The Community has set the objective of creating a genuine judicial area where decisions taken in a Member State are recognized and enforced throughout the European Union.

In the family law area, this free circulation of decisions has a direct impact on the daily life of people. All the more so nowadays that family links are increasingly formed between nationals or residents of different Member States and family members increasingly choose to live in different parts of the European Union following family breakup. *Council Regulation 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses* (the Brussels II Regulation) provides for the mutual recognition of certain judgments issued at the time of divorce or separation. However, first, its scope is limited, and second, the *exequatur* procedure is still required before a judgment rendered in one Member State can be enforced in another.

The Justice and Home Affairs Council meeting on 30 November 2000 adopted an ambitious program aimed at the abolition of the *exequatur* procedure in the civil and commercial law area. In the family law area the program includes, already at its first stage, an extension of the scope of the Brussels II Regulation coupled with a specific project for the abolition of *exequatur* for rights of access.

On the same occasion, the Council concluded that work on a French initiative for the abolition of *exequatur* for rights of access could proceed only in parallel with the extension of the scope of the Brussels II Regulation. This will guarantee equality of treatment for all children, thus taking into account social realities, such as the diversification of family structures.

This working document sets out a number of preliminary considerations for implementing the first stage of the program of mutual recognition in the family law area as well as for allowing work to continue on the initiative on rights of access. Section 2 traces the development of judicial cooperation in matters of parental responsibility under the EC Treaty, while Section 3 gives an overview of the international framework and discusses in particular the implications of a Community accession to the 1996 Hague Convention on parental responsibility. Section 4 discusses the extension of the scope of the Brussels II Regulation, the requisite rules on jurisdiction, and a number of related issues and substantive considerations. Some final remarks situating the extension of the Brussels II Regulation in the context of the Commission's work in the area are provided in Section 5.

The aim is to present a Commission proposal for a regulation on parental responsibility.

2. MILESTONES IN THE DEVELOPMENT OF JUDICIAL COOPERATION IN MATTERS OF PARENTAL RESPONSIBILITY UNDER THE EC TREATY

December 1998 – Vienna Action Plan

The Member States had already recognized with the Treaty of Maastricht that justice and home affairs are matters of common concern. But, measures in this area were to take at the time the form of international conventions that had to be agreed unanimously by the Member States and ratified by national parliaments.

The European Council meeting in Vienna in December 1998 endorsed an action plan on establishing an area of freedom, security and justice to prepare for the entry into force of the provisions of the Treaty of Amsterdam relating, *inter alia*, to judicial cooperation in civil matters. The Vienna action plan was aimed at giving people throughout the EU a common sense of justice through the easy identification of the competent jurisdiction, the clear designation of the applicable law, and the availability of speedy and fair proceedings and effective enforcement procedures.

May 1999 - Treaty of Amsterdam

The Treaty of Amsterdam, which entered into force on 1 May 1999, represented a breakthrough in providing for the use of Community mechanisms for certain key policies in the area of justice and home affairs, including judicial cooperation in civil matters. This transfer of the area of judicial cooperation in civil matters from the third to the first pillar opened new possibilities for accelerating and deepening work in the area.

In order to establish progressively an area of freedom, security and justice, the Council adopts measures in the field of judicial cooperation in civil matters having cross-border implications and insofar as necessary for the proper functioning of the internal market.¹ These measures include improving and simplifying the recognition and enforcement of decisions in civil and commercial cases as well as promoting the compatibility of the applicable rules in the Member States concerning the conflict of laws and of jurisdiction.²

October 1999 - Tampere milestones

The European Council meeting at Tampere in October 1999 set out a series of milestones for the creation of a genuine area of freedom, security and justice in the European Union. The European Commission was requested to keep a ‘scoreboard’ listing the objectives and action planned and taken on each point. For the establishment of a genuine judicial area, the European Council endorsed the principle of mutual recognition of judicial decisions, which “should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union”,³ and advocated greater convergence in civil law. In particular,

¹ *Treaty establishing the European Community* (“EC Treaty”), Title IV (visas, asylum, immigration and other policies related to free movement of persons), Articles 61(c) and 65. The application of this Title is subject to Protocols on the position of the United Kingdom, Ireland and Denmark (Article 69).

² During a transitional period of five years after the entry into force of the Treaty of Amsterdam, the Council acts unanimously on a proposal from the Commission or on the initiative of a Member State after consulting the European Parliament (Article 67). Unanimity for measures in the family law area will continue to apply after the entry into force of the Treaty of Nice.

³ Conclusions of the Tampere European Council, Point 33.

“In civil matters, the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgments in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.”⁴

May 2000 – The Brussels II Regulation

The Brussels II Regulation sets out rules on jurisdiction, automatic recognition and simplified enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses (*see* Annex 1).⁵ The latter were added only at a later stage in the deliberations to take into account the jurisdiction of the divorce court for matters of parental responsibility in many Member States.

With respect to parental responsibility, the scope of the Brussels II Regulation is limited to judgments on parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. This means that the Regulation applies neither to family situations arising through relationships other than marriage nor to judgments other than those taken at the time of the divorce or separation. Moreover, the *exequatur* procedure is still required before a judgment rendered in one Member State can be enforced in another.

July 2000 – French initiative on rights of access

Building on the Brussels II Regulation, France presented on 3 July 2000 an initiative aimed at facilitating, through the abolition of *exequatur*, the exercise of cross-border rights of access in the case of children of divorced or separated couples.⁶ In its original version, the initiative applied to judgments falling under the Brussels II Regulation granting cross-border rights of access to one of the parents to one of the children under 16 years of age.

This initiative for a regulation is based on the principle of the mutual recognition of the enforceability of certain judgments relating to rights of access, which should be distinguished

⁴ Conclusions of the Tampere European Council, Point 34.

⁵ *Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses*, OJ 2000 L160/19. The Council had drawn up on 28 May 1998 a *Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters* and recommended it for adoption by the Member States (OJ 1998 C221/1) under Article K.3 of the Maastricht Treaty. However, the Member States could no longer ratify this Convention, as this would amount to a breach of their duty of Community loyalty in view of the entry into force of the Treaty of Amsterdam and especially since a proposal for a Community instrument was already on the table. As a result, the content of the Brussels II Regulation, including its limited scope, has to a large extent been taken over from the 1998 Convention with the necessary adaptations to the new institutional framework.

Note that neither rights in property arising out of a matrimonial relationship nor wills and successions have been covered by a Community instrument to date.

⁶ *Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children*, OJ 2000 C234/7. The French initiative is based on Articles 61(c) and 65 of the EC Treaty. The United Kingdom and Ireland have indicated their intention to participate in the initiative.

from enforcement itself. In fact, the abolition of *exequatur* means that a special procedure in the Member State of enforcement is no longer required before proceeding to enforcement itself. Thus, the initiative does not affect enforcement, which is carried out under the law of the Member State of enforcement.

To balance the direct enforceability of these judgments in all Member States, the initiative introduces the following guarantees:

- an emergency procedure before the courts of the Member State of the child's habitual residence enabling enforceability to be refused in exceptional circumstances (that is, where enforcement would put the child's interests at serious risk or where there is another enforceable judgment which is irreconcilable); and
- a guarantee that the child will return after its stay abroad (this means, firstly, that apart from any urgent need to protect the child, the authorities of the Member State where the child is staying may not assume jurisdiction during the child's stay to amend the foreign judgment that is being enforced and secondly, that they should have circumscribed powers to order the child's return).

A strengthening of cooperation mechanisms already in place under the Hague Conventions discussed in Section 3 is provided for the purpose of exchanging information, encouraging the voluntary exercise of rights of access, as well as ultimately guaranteeing the enforcement of these rights by recourse to coercive means.

The initiative represents the first endeavor to abolish *exequatur* in a limited, albeit sensitive, field. However, the Justice and Home Affairs Council meeting on 30 November 2000 concluded that, due to its limited scope, the initiative should be pursued further only in parallel with work on extending the scope of the Brussels II Regulation so as to allow for equality of treatment for all children.⁷ The Swedish Presidency has indicated that work will continue in both directions.

December 2000 – Program of mutual recognition

In accordance with the Tampere conclusions, the Council and the Commission adopted in December 2000 a program of measures to implement the principle of mutual recognition in four areas of work.⁸ For each area the aim is the progressive abolition of *exequatur* in three stages, which may be accompanied by the introduction of ancillary horizontal measures. As regards parental responsibility, the latter may include the harmonization of choice of law rules as well as considerations relating to the child's best interests and his or her place in the procedure.

The table below reproduces the measures included in area II of the program.

⁷ In their opinions, the European Parliament and the Economic and Social Committee also questioned the limited scope of the French initiative.

⁸ *Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters*, OJ 2001 C12/1.

Program of mutual recognition

Area II (family law covered by the Brussels II Regulation and family situations arising through relationships other than marriage)

1st stage:

- abolition of *exequatur* for judgments on rights of access
- instrument relating to family situations arising through relationships other than marriage
- extension of the scope to judgments modifying conditions under which parental responsibility is exercised, as fixed in judgments made at the time of divorce or separation

2nd stage:

- application of simplified procedures of the Brussels I Regulation
- provisional enforcement and protective measures

3rd stage:

- across-the-board abolition of *exequatur*, in some areas in the form of a European Enforcement Order that is directly enforceable in all Member States without any intermediate measures

December 2000 – Charter of Fundamental Rights of the EU

The *Charter of Fundamental Rights of the European Union* was proclaimed at the Nice European Council in December 2000.⁹ The rights contained in the EU Charter constitute a firm foundation for any future action at EU level, including future legislation on parental responsibility. In particular, Article 24 of the EU Charter sets out a number of procedural and substantive rights of the child, which have been inspired by the UN Convention mentioned in Section 3.1 (*see* Annex 4).

=> **In sum:**

- (1) The Community has embarked on an ambitious step-by-step program of mutual recognition with a two-fold aim: (1) extension to matters not covered by existing Community instruments and (2) progressive abolition of *exequatur* for all decisions in the civil and commercial law area.**
- (2) In the family law area, the first stage of the program consists of an extension to the areas not covered by the Brussels II Regulation, as well as a specific project concerning rights of access. These two aspects complement each other, the extension of the scope of the Brussels II Regulation considered by the Council as a prerequisite for the French initiative which in turn tests the ground for stages 2 and 3.**
- (3) Work is simultaneously pursued, as necessary, on horizontal measures aimed at reinforcing mutual trust and facilitating recognition.**

⁹ *Charter of fundamental rights of the European Union – solemn proclamation*, OJ 2000 C364/1 (“the EU Charter”).

3. THE INTERNATIONAL FRAMEWORK FOR MEASURES ON PARENTAL RESPONSIBILITY

3.1. International conventions on parental responsibility

The 1996 Hague Convention on parental responsibility

A new convention that has not entered into force to date, the *1996 Hague Convention on parental responsibility* (see Annex 2),¹⁰ is intended to replace, in relations between the Contracting States, the *1961 Hague Convention on the protection of minors*.¹¹ The 1996 Convention lays down rules on jurisdiction, applicable law, recognition and enforcement of judgments on parental responsibility, including rights of access. Whereas the 1961 Convention gives priority to nationality, the 1996 Convention is based on the jurisdiction of the Contracting State of the habitual residence of the child. The competent authority will in principle apply its internal law, and may transfer the case to a court better placed to hear it. Judgments benefit from automatic recognition, and Contracting States must provide a simple and rapid *exequatur* procedure. A mechanism is set out for cooperation between designated authorities.

The fact that jurisdiction follows a change in the child's habitual residence poses the risk of the use of force to establish artificial jurisdictional links with a view to obtaining custody of a child. To dissuade such tactics, both the Brussels II Regulation¹² and the 1996 Convention give precedence to the most successful *1980 Hague Convention on international child abduction*, which is in force in 36 States including all 15 Member States (see Annex 2).¹³ The objective of the 1980 Convention is the restoration of the status quo by means of the prompt return of children wrongfully removed.¹⁴ To this end, the Convention establishes a system of cooperation among authorities for the return of a child wrongfully removed as well as for the effective exercise of custody and access rights.

However, the 1980 Convention also recognizes the need for certain exceptions to the obligation to return the child, which must be narrowly construed. Thus, Article 13(b) provides an exception where there is a grave risk that return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation. The French initiative on rights of access

¹⁰ XXXIV. *Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children* (concluded October 19, 1996) ("the 1996 Convention"). To date the Netherlands are the only Member State to have signed (but not ratified) the Convention.

¹¹ *X Convention concerning the powers of authorities and the law applicable in respect of the protection of minors* (concluded October 5, 1961) ("the 1961 Convention"). In force in Austria, France, Germany, Italy, Luxembourg, the Netherlands, Portugal and Spain, as well as Poland, Switzerland and Turkey. The 1961 Convention has been the subject of criticisms concerning the existence of competing bases of jurisdiction (nationality and habitual residence), the inadequacy of cooperation between authorities and the absence of provisions on enforcement.

¹² Article 4 of the Brussels II Regulation requires courts to exercise their jurisdiction in accordance with the 1980 Convention, in particular Articles 3 and 16 thereof. This means that, following a child abduction, it is the court of the child's lawful habitual residence that continues to be entitled to exercise jurisdiction rather than the court of the child's new 'de facto' residence.

¹³ XXVIII. *Convention on the civil aspects of international child abduction* (concluded October 25, 1980). A proposal has been tabled to commence work on a protocol related to the exercise of access rights.

¹⁴ The removal or retention of a child is deemed wrongful where in breach of custody rights under the law of the State in which the child was habitually resident immediately before the removal or retention. Most importantly, these custody rights may arise, *inter alia*, by operation of law, that is do not require a judicial decision.

was in part a response to the problems encountered in practice with Article 13(b), whose application is allegedly prone to abuse.

Other related international instruments

The *European Convention on custody of children* also addresses the problem of improper removal through rules on recognition and enforcement of custody decisions (*see* Annex 3).¹⁵ A three-tier system allows a progressively greater number of grounds of refusal to return the child. The Convention has been ratified by all Member States, albeit with reservations, which effectively result in the maximum number of grounds of refusal being applicable in all cases.

The *European Convention on the legal status of children born out of wedlock* aims at progressively bringing the legal status of children born out of wedlock into line with that of children born in wedlock.¹⁶

Towards a body of substantive and procedural rights for children

In addition to the above-mentioned instruments aimed at facilitating recognition and enforcement, there is a growing trend towards recognition of children as bearers of a body of both substantive and procedural rights, as exemplified by the *1989 UN Convention on the rights of the child* (*see* Annex 4).¹⁷ As already indicated, an article on the rights of the child has been incorporated in the EU Charter.

One should also mention the on-going work in the Council of Europe on a *draft Convention on contact concerning children*.¹⁸ This draft Convention lays down a number of general principles, such as a child's right to maintain contact with both parents, and provides for appropriate safeguards and guarantees, which may include a mechanism for recognition/enforceability in advance of contact, as well as financial guarantees or undertakings. A system of cooperation between authorities is envisaged, where authorities would be empowered not only to ensure the return of the child, but also to fix or modify the conditions for the exercise of rights of access.

The basic premise behind these substantive rights is that the 'best interests of the child' should be a primary consideration in all decisions affecting him or her.¹⁹ Moreover, a child has the right to maintain regular contact with both parents, unless that is contrary to the child's best interests.²⁰ As regards the procedure, children have the right to be heard in all proceedings affecting them in accordance with their age and maturity.²¹ The *European Convention on the exercise of children's rights* (*see* Annex 3) further provides for the right of the child to apply for the appointment of a special representative, where the holders of parental responsibility are precluded from representing him or her.²²

¹⁵ *European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children* (Luxembourg, 20-5-1980).

¹⁶ *European Convention on the legal status of children born out of wedlock* (Strasbourg, 15-10-1975). In force in eight Member States.

¹⁷ *United Nations Convention on the rights of the child*, November 20, 1989 ("the UN Convention").

¹⁸ To the extent that this draft Convention affects the Brussels II Regulation, the possibility of Community accession must be envisaged.

¹⁹ Article 3 of the UN Convention and Article 24(2) of the EU Charter.

²⁰ Article 9 of the UN Convention and Article 24(3) of the EU Charter.

²¹ Article 12 of the UN Convention and Article 24(1) of the EU Charter.

²² *European Convention on the exercise of children's rights* (Strasbourg, 25-1-1996), Article 4.

3.2. Implications of a possible Community accession to the 1996 Convention

In accordance with the AETR case law of the Court of Justice on external competence,²³ Member States are no longer free to accede on their own to the 1996 Convention to the extent that its provisions on jurisdiction and enforcement affect Community rules (that is, the Brussels II Regulation).²⁴ As a result, the Convention is a mixed agreement to which the Member States and the Community can only both accede.

Consultations took place during their negotiation aimed at ensuring the harmonious interplay between the 1996 Convention and the future Brussels II Convention concluded in 1998 after which the Brussels II Regulation was subsequently tailored. First, in addition to the habitual residence of the child, a concurrent basis of jurisdiction of the divorce court was introduced in Article 10 of the 1996 Convention, which essentially corresponds to Article 3(2) of the Brussels II Regulation.²⁵ Second, Article 52 of the 1996 Convention, the so-called disconnection clause, authorizes Contracting States to conclude agreements in respect of children habitually resident in any of the States parties to such agreements.²⁶

As regards a possible Community accession to the 1996 Convention, the following options may be envisaged:

- (a) accession to the 1996 Convention

This option recognizes the effort already put in the negotiations and the value of a coherent international framework to address problems of parental responsibility that often transcend the boundaries of the EC.²⁷ However, the Community as such was not involved in these negotiations, whose aim was to reconcile two international conventions (Brussels II was at the time a third pillar instrument). Although care was admittedly exercised to take into account the then existing state of development of EU law, the 1996 Convention effectively limits the scope of future Community action with respect to children non-resident in the EC. And should the Community, after accession, wish to cover non-resident children as it further develops its policy in the area (*see* Section 4.3 on this issue), it may be placed in the delicate position of having to

²³ Case 22/70, *Commission v. Council* (1971) ECR 263. In a series of cases beginning with the AETR case, the Court of Justice developed the theory of implied external competence, namely that when the Community has acted to implement a common policy, the Member States no longer have the right to take external action in an area which would affect that common policy. Where competence is shared between the Community and the Member States, the international agreement is a ‘mixed agreement’, which will apply in its entirety only if both become parties.

²⁴ The Brussels II Regulation mandates the recognition of all judgments, including those based on residual jurisdiction under Article 8, but also takes into account any international commitments of the Member State of recognition: Article 15(f) provides that a later judgment in the non-Member State of the habitual residence of the child constitutes a ground of non-recognition if it fulfils the conditions for recognition in the Member State of recognition. In addition, Article 16 provides that, on the basis of an international agreement, a Member State may not recognize a judgment founded on residual jurisdiction.

²⁵ Note that Article 10 of the 1996 Convention introduces two additional requirements: the consent of a third person having parental responsibility, and one parent being habitually resident in the divorce State at the commencement of proceedings.

²⁶ To such agreements are assimilated uniform laws based on special ties of a regional or other nature.

²⁷ The need to reinforce judicial co-operation in matters of parental responsibility also arises in the context of relations with countries which do not participate in the Hague framework, and may be addressed in the relevant regional fora, for instance in the Barcelona process for the Mediterranean countries.

denounce the Convention, if its provisions can no longer be reconciled with future Community policy.

Given that the Community is not a member of the Hague Conference at present, this option also assumes that the technical difficulties associated with accession can be overcome, for instance by means of a protocol to the Convention.

– (b) re-negotiation of the 1996 Convention

The Community may request a reexamination of the provisions of the Convention before it commits itself. Two options are possible: (1) Such re-negotiation may be limited to Article 52, so as to allow for immediate commitment of the Community internationally on the basis of the agreed text, while leaving policy development at Community level unhindered. Alternatively, (2) the Community may seek to renegotiate the substantive provisions of the Convention to the extent that these rules do not adequately address the Community concerns.

A reexamination of the substantive provisions of the 1996 Convention would entail an assessment of whether the simplicity of a rule based solely on the habitual residence of the child may in certain cases produce results considered unsatisfactory. For example, consider the case where a child who has been raised by his parents in a Member State (which is also the Member State of their nationality) has recently moved with his or her grandparents retired in a third country, and as a result the Member State concerned is deprived from assuming jurisdiction even for measures of parental responsibility which will be exercised in its territory.

To the extent that a reexamination of either Article 52 or the substantive provisions of the Convention is no longer possible or does not produce a successful outcome, this option would preclude accession to the 1996 Convention. This would also raise the issue of the continued application of the 1961 Convention in half of the Member States.²⁸

A final caveat: Irrespective of the position to be taken on accession by the Community to the 1996 Convention, one should bear in mind that such accession cannot suffice in itself neither for guaranteeing equality of treatment for all children as mandated by the Council nor for attaining the requisite degree of simplification of recognition and enforcement in a common judicial area. The 1996 Convention may nonetheless serve as an inspiration for Community rules on jurisdiction (*see* Section 4.3).

=> In sum:

- (1) The Community has exclusive competence for those matters in the 1996 Convention which are covered by the Brussels II Regulation. As a result, the 1996 Convention can only be a mixed agreement.**
- (2) Given the limits it would place on future Community action, the implications of a possible Community accession to the 1996 Convention must be carefully considered.**

²⁸ If the Community does not accede to the 1996 Convention, the 1961 Convention will remain in force for those Member States that have ratified it. To the extent, however, that the application of the Convention is not limited to children who are habitually resident in a Contracting State, the priority to the Member State of a child's nationality may not be consistent in certain cases with the Brussels II Regulation.

- (3) In principle, it should be both feasible and desirable for an international instrument to co-exist with a more ambitious Community instrument.**
- (4) In any case, Community accession to the 1996 Convention shouldn't prejudge a more ambitious Community instrument in the area.**

4. THE WAY FORWARD

4.1. Mandate of the Justice and Home Affairs Council of 30 November 2000

The Justice and Home Affairs Council adopted in November 2000 the program of mutual recognition, which clearly identifies the end result, that is the abolition of *exequatur* for the Brussels II Regulation as extended to family situations not already covered and to judgments modifying an original judgment. On the same occasion, it became clear that views differed on the next step towards this agreed end result. In particular, the Council expressed strong reservations on the abolition of *exequatur* for decisions on rights of access as provided in the French initiative, if this were not accompanied by an extension of the scope of the Brussels II Regulation so as to ensure equality of treatment for all children.

A revised version of the French initiative presented in December 2000 leaves its scope open pending completion of work on extending the scope of the Brussels II Regulation. Hence the need to accelerate our work in this area. To this end, a number of preliminary considerations are set out below.

4.2. Preliminary considerations for extending the scope of the Brussels II Regulation

=> by means of an amendment to the Brussels II Regulation or a new regulation?

As regards the question of form, there are obvious merits to a single instrument bringing together all aspects relating to parental responsibility. In any case, the degree of mutual recognition already achieved in the Brussels II Regulation should apply as a minimum to all decisions forming part of the extended scope.

Setting for the time being the purely formal question of whether the agreed extension should take the form of an amendment to the Brussels II Regulation or the adoption of a new regulation (that would build on the Brussels II Regulation provisions on parental responsibility), as well as how the initiative on rights of access would then be positioned, the following elements should be addressed:

=> what types of decisions should be covered? (form of decisions)

The term 'civil proceedings' in the Brussels II Regulation encompasses not only judicial proceedings, but also proceedings before all competent authorities in conformity with the law of the Member State where the proceeding takes place.²⁹ In addition to decisions of judicial or administrative authorities, the Brussels II Regulation considers as equivalent to 'judgments' (1) documents that have been formally drawn up or registered as authentic instruments and are enforceable in one Member State, and (2) settlements that have been approved by a court in the course of proceedings and are enforceable in the Member State where they were concluded.³⁰

Query whether the extension of the scope to decisions on parental responsibility de-linked from the matrimonial proceedings mandates in favor of taking into account other types of private agreements, whether or not sanctioned by authority, as long as they are enforceable in the Member State where they were concluded.

²⁹ Article 1 of the Brussels II Regulation.

³⁰ Article 13(3) of the Brussels II Regulation.

=> what matters should be covered? (content of decisions)

With respect to the content of decisions, the scope cannot be extended only for purposes of the French initiative (that is, decisions on rights of access of one parent). Instead, the mechanisms of the Brussels II Regulation should become available for all decisions on parental responsibility, as planned for the first step in the mutual recognition program.

Also, a number of options are possible with a view to abolishing the link made in the Brussels II Regulation between the decision on parental responsibility and the matrimonial proceedings, ranging from the broadest to the more specific:

- all decisions (whether or not related to family breakup)
- decisions related to family breakup (whether after or at the time of breakup)
- decisions taken on the occasion of divorce or separation (the Brussels II Regulation) and decisions modifying these decisions³¹
- decisions taken at the time of divorce or separation (the Brussels II Regulation)

The first option would presumably best serve the aim of the program of mutual recognition to de-link the decision on parental responsibility from the matrimonial proceedings.

=> which children should be covered?

The provisions of the Brussels II Regulation apply to children of both spouses, while the French initiative is further limited to children under 16 years of age. The age limit issue is a substantive consideration addressed in the context of the recognition of a child's autonomy (*see* Section 4.5 below).

On the first matter, if the scope is limited to 'decisions related to family breakup', these could conceivably involve only 'children of the family', including e.g. the children of one spouse from a previous marriage. However, the mandate of the Council is unequivocal on this point. The regulation should cover all children, irrespective of their family situation and background. Once the judgment on parental responsibility has been fully de-linked from the matrimonial proceedings, the extension to children of one of the spouses is better dealt with as part of the question concerning the persons exercising parental responsibility or granted access rights (*see* below).

=> who may exercise parental responsibility or be granted access rights?

This issue is not expressly addressed in the Brussels II Regulation,³² while the French initiative was limited to rights of access exercised "by one of the parents". However, some Member States

³¹ The present reflection document deals solely with decisions on parental responsibility. A possible extension of the scope of the Brussels II Regulation to take into account the breakup of family structures other than marriage (the degree of recognition of such structures may differ considerably from one Member State to another) is therefore not under consideration. In fact, once the decision on parental responsibility has been de-linked from family breakup, it is not necessary to consider other forms of family breakup (which may not be covered under the Brussels II Regulation) for present purposes. Property aspects (area 3 of the program of mutual recognition) are similarly not considered.

³² Although the language of Article 15(2) as well as the link to the matrimonial proceedings in the Regulation in general may suggest a limitation to one of the spouses, the scope of the Regulation is not in any way limited in this respect.

have pointed to the need for recognition of decisions granting rights of access to third persons, for instance to a former spouse of one of the parents. In this context, the following possibilities may be considered:

- no provisions limiting the range of persons who may exercise parental responsibility or be granted rights of access
- one of the parents + member of the former ‘family’ of the child (for instance, a former spouse)
 - this option may be suitable for a scope linked to family breakup³³
- one of the parents (as per the French initiative)

Query the justification for introducing any additional (that is, in addition to those already existing under the applicable national law) substantive limitations in a Community instrument on mutual recognition. It may instead be envisaged that, although no limitations are provided when extending the scope of Brussels II, the abolition of *exequatur* for rights of access is coupled with a limitation on the range of persons who may be granted such rights. This issue is closely linked to the relationship between ‘parental responsibility’ and ‘rights of access’ discussed below.

Besides the possibility of limiting the range of persons exercising parental responsibility or granted access rights, some Member States have suggested including a positive obligation to consider rights of access for certain categories of persons. This point is examined in Section 4.5 below.

=> should definitions be provided for the terms ‘parental responsibility’, ‘rights of custody’, ‘rights of access’ and ‘family’ or ‘household’?

The Brussels II Regulation does not include a definition of parental responsibility, thus leaving the matter to national law. A certain convergence may nonetheless develop by virtue of the applicable international instruments (*see* for instance the definition of ‘parental responsibility’ in the 1996 Convention).³⁴ Query whether a definition of ‘parental responsibility’ should be included, and its relationship with ‘rights of custody’ and ‘rights of access’ clarified.

A definition of ‘family’ (or ‘household’) may also be useful if the scope is linked to family breakup.

4.3. Rules on jurisdiction for the new situations

The extension of the scope requires rules on jurisdiction to cover these new situations.

³³ The draft European Convention on contact concerning children discussed in section 3.1 recognizes the right of a child to contact not only with his or her parents, but also with persons with whom the child has family ties, and possibly other persons subject to his or her best interests. In this context ‘family ties’ are defined as a “a close relationship such as between a child and his or her grandparents or siblings, arising from a blood relationship or by operation of law or alternatively from a *de facto* family relationship”.

³⁴ Article 1 of the 1996 Convention refers to the authority of “parents, guardians or other legal representatives”, and the measures benefiting from recognition and enforcement expressly include rights of custody, including the right to determine the child’s place of residence and rights of access, as well as placement of the child in a foster family or in institutional care (Article 3). Article 3 of the 1980 Convention refers to “rights of custody attributed to a person, an institution or any other body”.

=> With respect to children who are habitually resident in the Community

A straightforward solution would be to provide for the jurisdiction of the Member State of the child's habitual residence, while maintaining the jurisdiction of the divorce court as provided in the Brussels II Regulation.

There are situations however where, although the child happens to be habitually resident in one Member State, a sufficiently close connection with another Member State exists so as to justify the exercise of jurisdiction. To this end, the new legislation may:

- (a) rely on a mechanism for the transfer of jurisdiction to another Member State (similar to the one provided in the 1996 Convention) at the discretion of the Member State of the child's habitual residence, or
- (b) provide, in addition to the habitual residence of the child, alternative bases of jurisdiction (the habitual residence of both parents, the child's former habitual residence, or their common nationality are possible connecting factors). For instance, the alternative bases of jurisdiction set out in Article 2(1) of the Brussels II Regulation in the case of divorce, separation or marriage annulment together with the guarantees provided in Article 3(2) for non-resident children may be equally appropriate for decisions on parental responsibility in the case of other forms of family breakup.

The first option may prove ineffective in practice as it relies solely on the discretion of the Member State of the habitual residence of the child as well as requires commencing proceedings in that Member State, while the second risks to unduly complicate the jurisdictional regime.

Also, some consideration should be given to what extent (1) the Member State of the original decision may, for a limited time period, continue to exercise jurisdiction to modify it, and (2) the Member State of enforcement may exercise jurisdiction to fix the modalities of its implementation.

=> With respect to children who are habitually resident outside the Community

In the case of children who have a substantial connection with, but are not habitually resident in a Member State, the following options may be considered:

- (a) no provisions

As a result, Member States would exercise jurisdiction in accordance with their national law, but these decisions would not always benefit from recognition throughout the EC.³⁵ Moreover, should an affirmative decision be taken on accession to the 1996 Convention, Member States would be prevented from exercising jurisdiction on children habitually resident in another Contracting Party.

- (b) residual application of internal law, coupled with full or limited recognition

Similarly to the Brussels II regime, decisions based on a residual jurisdictional basis under national law for children non-resident in the EC would benefit from full recognition in other Member States. This recognition may be limited, as appropriate, in accordance with existing

³⁵ Of course, decisions on parental responsibility for non-resident children falling under Article 8 of the Brussels II Regulation would continue to benefit from recognition throughout the EC to the extent allowed under Article 16 of the Brussels II Regulation.

international agreements binding the Member State of recognition or future agreements negotiated at Community level. And accession to the 1996 Convention would preclude jurisdiction in the case of children habitually resident in another Contracting Party.

- (c) enumeration of alternative bases of jurisdiction in the Regulation

As within the EC, this option recognizes that there are situations where, although the child is not habitually resident in a Member State, a substantial connection exists so as to justify the exercise of jurisdiction.

However, the added value of enumerating bases of jurisdiction (thus benefiting from full recognition) is further limited in the extra-Community context as these provisions would be useful only in situations where close connections with three countries exist (the Member State of the decision, the third country of the habitual residence of the child, and the Member State where recognition is sought). Query therefore whether the limited added value of such a provision would justify deviating from the simple rule of the habitual residence of the child.

Clearly, in elaborating rules concerning children non-resident in the Community, the question of accession to the 1996 Convention must also be addressed.

=> define ‘habitual residence’ in the Regulation?

Query whether a definition of ‘habitual residence’ derived from the case law of the Court of Justice should be provided.

4.4. Other related issues

=> applicable law

The question of applicable law is not addressed in the Brussels II Regulation. The 1996 Hague Convention refers to the forum’s internal law (unless exceptional circumstances mandate the application of the law of another State with a close connection), and precludes the use of *renvoi*.

As a general matter, the program of mutual recognition does not prejudge the question of applicable law. At present, the issue is open as to whether the harmonization of choice of law rules on divorce and parental responsibility as a means of facilitating mutual recognition should be further pursued.³⁶

=> cooperation between authorities

Irrespective of whether a Community mechanism will be established in the new legislation or whether cooperation will continue to rely on existing mechanisms, the competent national authorities will be able to participate as contact points in the European Judicial Network for civil and commercial matters, which is currently being created.

The necessity of provisions reinforcing cooperation between authorities (for instance, in the form of provisions on return in the French initiative) depends on whether existing cooperation

³⁶ Following a questionnaire to the Member States on this issue which produced mixed reactions, the Commission plans to launch a study on the practical issues arising from the divergence of choice of law rules on divorce in 2001.

mechanisms (such as under the 1980 Convention) are considered satisfactory.³⁷ For example, it has been suggested including a time limit within which the return of the child must be effected.

In addition, the Justice and Home Affairs Council meeting of 30 November 2000 stressed the importance of promoting mediation for the resolution of family conflicts. To this end, further thought should be given to a more active role to be played by authorities.

=> additional safeguards

Although the present reflection centers on the extension of the Brussels II Regulation and does not touch upon the technical aspects of abolishing *exequatur*, a few words on safeguards are warranted.

On the one hand, concerns have been expressed as to the need for the authorities of the Member State of enforcement to intervene in exceptional circumstances. To this end, the French initiative sets out an emergency procedure for suspending enforcement on a number of grounds (limited compared to the grounds for non-recognition in the Brussels II Regulation), as well as where a judgment on non-recognition has become *res judicata*. In this context, it is worth noting that the Brussels II Regulation allows in any case for the jurisdiction of the authorities of the Member State of the presence of the child to take protective measures.³⁸

On the other hand, the French initiative acknowledges that if the exercise of access rights is to be facilitated, then the parent who has custody should be better protected through further limitations on the ability of the parent who has access to invoke the ‘grave risk’ exception of Article 13(b) the 1980 Convention for the purpose of blocking the return of the child. Query the necessity to provide a new formulation, rather than rely on a narrow interpretation of the 1980 Convention. Alternatively, it has been proposed to put safeguards in place before the rights of access are exercised, by applying for a declaration of the recognition of the custody decision or by obtaining an undertaking to this effect from the authority of the Member State of access or from the person who has access rights. This more pro-active approach appears to have inspired the draft European Convention on contact concerning children (*see* Section 3.1).

The necessity of providing safeguards to counter balance the ease of enforcement hinges on the effectiveness of cooperation and the level of trust, which has been built between authorities in the Member States. To reinforce this trust, the Commission is envisaging work on a number of horizontal measures, including minimum standards on enforcement.

=> minimum standards on enforcement

To the extent enforcement continues to be carried out under national laws, which may differ considerably from one Member State to another, it remains possible to some extent to ‘modify’ in practice a judgment at enforcement level. In some cases, the same reason, which can no longer prevent recognition of a judgment will ultimately frustrate its enforcement. It may therefore be worthwhile to examine the practical problems arising from divergences in the national enforcement laws in the family area, and to consider whether a certain degree of harmonization or a set of minimum standards may be appropriate. This work has been included in the horizontal measures in the program of mutual recognition, and may take place in parallel with consideration of the new legislation on parental responsibility.

³⁷ The cooperation mechanism of the 1980 Convention will be the subject of review in a Special Commission meeting at the Hague in March 2001.

³⁸ Article 12 of the Brussels II Regulation provides that the authorities of a Member State may take provisional, including protective measures, in respect of persons or assets in that State.

Finally, the Commission is working on a number of other ‘procedural’ measures aimed at facilitating the free circulation of decisions within the Community. Following the adoption of a Regulation aimed at facilitating the transmission of documents in May 2000, work continues towards harmonizing the rules on service of documents.

4.5. Substantive considerations

=> the place of the child’s views in the proceedings

Some Member States have suggested that the new legislation should strengthen the child’s involvement in the decisions affecting him or her. This means going beyond the requirement in the Brussels II Regulation to give the child the opportunity to be heard and to consider his or her views bearing in mind his or her age and maturity. For example, the Regulation may mandate that the child should have an unconditional right to be heard, or even that his wishes should be respected, provided that he or she has reached a certain age. One should nonetheless bear in mind that this right has traditionally been qualified (by reference to the child’s age and maturity) for an important purpose, namely to protect the child from his inexperience or from manipulation by others, and to allow the judge to exercise his discretion in this sensitive matter.

=> holders of rights of access

Contrary to the Brussels II Regulation which leaves the issue to national law, it has been suggested that new legislation should delve into the regulation of the exercise of access rights, for instance by mandating that any former member of the child’s family, such as a former spouse of one of the parents, has the right of access or the right to apply for such rights.

As a general matter, these substantive considerations relating to the child’s involvement in the proceedings and to the holders of rights of access may be framed as requirements, which would have to be fulfilled for the judgment to benefit from recognition in other Member States. On the one hand and to the extent that such matters are core considerations in their national legal traditions, certain Member States may be reluctant to further facilitate recognition without these requirements. On the other hand, there is a real risk that their inclusion would allow to go down the slippery slope of review of the substance of the judgment by the Member State of recognition, which would frustrate the very objective of mutual recognition.

=> In sum:

- (1) An extension of the Brussels II mechanism to all decisions on parental responsibility, irrespective of their subject matter, the children affected, or the persons who may exercise parental responsibility, would best fulfil the mandate of the Justice and Home Affairs Council of 30 November 2000 and implement the first stage of the program of mutual recognition.**
- (2) This extension of the scope of the Brussels II Regulation requires rules on jurisdiction to cover the new situations. In addition to the habitual residence of the child, which is the obvious starting point, these rules may also provide alternative bases of jurisdiction. In the case of children resident within the Community, a mechanism for transfer of the case to another Member State or special rules on jurisdiction may be envisaged. In the case of children resident in a third country, the residual jurisdiction of a Member State as provided under its national law is an option to consider. In the latter case, the question of accession to the 1996 Convention must be addressed.**

- (3) **In this context, a number of related procedural and substantive issues must also be considered.**

5. FINAL REMARKS

- (1) This working document aims at structuring further discussion in view of presenting a Commission proposal for a regulation on parental responsibility. The Commission is fully conscious of the need to accelerate work in this direction, which was considered by the Justice and Home Affairs Council of 30 November 2000 as a prerequisite for the French initiative on rights of access. In the light of the Council's mandate for the equal treatment of all children, the Commission considers that the scope of the Brussels II Regulation should now be extended to encompass all decisions on parental responsibility. As regards jurisdiction, this working document opens the debate as to whether a simple rule based on the child's habitual residence would be adequate for this purpose.
- (2) This work is situated in the framework of the program of mutual recognition, whose final objective is the abolition of *exequatur* in the civil and commercial law area. The extension of the scope of the Brussels II Regulation figures in the first stage of measures in the family area, together with the abolition of the *exequatur* for decisions on rights of access. The latter is one of two specific projects for the abolition of *exequatur* in limited fields currently under way (the other targeting the area of uncontested claims in the commercial ("Brussels I") law area as discussed in the informal Justice and Home Affairs Council meeting on 8 February 2001).
- (3) However laudable the objective of abolishing *exequatur* within the Community, issues of parental responsibility often transcend the boundaries of the EC and solutions must therefore be sought at international level. As discussed, the issue of a possible Community accession to the 1996 Hague Convention on parental responsibility must be addressed in parallel to elaborating Community legislation. To the same end, a dialogue with countries which do not participate in the Hague framework must be sought in other regional fora, for instance as part of the Barcelona process with our Mediterranean partners. A coherent Community framework within the EC can only move this international dialogue forward.

Selected provisions on parental responsibility in the Brussels II Regulation

Scope	<ul style="list-style-type: none"> – civil proceedings relating to <u>parental responsibility for the children of both spouses on the occasion of divorce, legal separation or marriage annulment proceedings</u> (Article 1(1)(b)) – Denmark excluded (Article 1(3))
Jurisdiction	<ul style="list-style-type: none"> – time-limited <u>jurisdiction of the divorce court</u> (1) where the child is habitually resident in that Member State; (2) where the child is habitually resident in one of the Member States, and at least one of the spouses has parental responsibility, and jurisdiction has been accepted by the spouses and is in the best interests of the child (Article 3) – must be exercised in accordance with the 1980 Hague Convention on international child abduction (Article 4) – exclusive against spouses who are nationals or habitual residents of a Member State (Article 7); <u>residual jurisdiction</u> by reference to national law (Article 8), but judgment may not be recognized on the basis of an international agreement (Article 16)³⁹ – possibility to adopt provisional, including protective, measures under national law to protect persons and property located in a Member State (Article 12) – <i>lis pendens</i>: court second seized stays proceedings until jurisdiction of the court first seized is established (Article 11)
Recognition	<ul style="list-style-type: none"> – <u>automatic recognition</u> (that is, without any special procedure); may apply for a decision on recognition (Article 14); may stay proceedings for recognition if judgment is subject to appeal (Article 20) – exhaustive list of mandatory <u>grounds of non-recognition</u>: public policy taking into consideration the best interests of the child; rights of defense; faulty service for judgments in default; right of the child or other person to be heard; irreconcilable later judgment (Article 15)
Enforcement	<ul style="list-style-type: none"> – <u>unilateral, ex parte procedure for a declaration of enforceability (exequatur)</u> subject to appeal by both parties under strict time limits (Article 26); application may be refused only on non-recognition grounds (Article 21) and on the basis of an international agreement (Article 16) – enforcement procedure under national law
Member State agreements	possibility for agreements between Member States to amplify the Regulation or to facilitate its application (Article 39) ⁴⁰
Relation with international conventions	takes precedence over, <i>inter alia</i> , the 1961 Hague Convention on the protection of minors, the 1996 Hague Convention on parental responsibility, and the 1980 European Convention on custody of children (Article 37)
Entry into force	1 March 2001 (Article 46)

³⁹ Article 16 refers to pre-existing international agreements concluded by individual Member States as well as to any future agreements negotiated by the Community.

⁴⁰ Note that Article 39 is limited to practical time-limited arrangements among Member States, which may not derogate from Chapters II and III of the Regulation, and for which a Community implementing instrument has not been possible.

1996 Hague Convention on parental responsibility

Scope	<ul style="list-style-type: none"> – children < 18 years (Article 2) – parental responsibility includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child (Article 1(2)); includes <u>rights of access</u> incl. the right to take the child for a limited period of time to a place other than the child's habitual residence (Article 3(b))
Jurisdiction	<ul style="list-style-type: none"> – of the judicial or administrative authorities of the Contracting State of <u>the habitual residence of the child</u> (Article 5); exception for certain cases of wrongful removal (Article 7) – <i>forum non conveniens</i>: possibility of transfer to another Contracting State “better placed” to hear the case (Articles 8 and 9) – <u>concurrent jurisdiction of the court of divorce, legal separation or annulment</u> in line with the Brussels II Regulation (additional requirements of consent of third person having parental responsibility and one parent habitually resident in the divorce State at commencement of proceedings) (Article 10) – concurrent jurisdiction of State of child's presence or location of his property in cases of urgency and for provisional measures of limited territorial effect (Articles 11 and 12) – conflicts of concurrent jurisdiction (Article 13)
Applicable law	<ul style="list-style-type: none"> – forum law; may exceptionally apply law of another State with a substantial connection (Article 15) – <i>renvoi</i> excluded (Article 21) – public policy exception, taking into account the best interests of the child (Article 22)
Recognition	<ul style="list-style-type: none"> – by operation of law (Article 23(1)) – list of non-compulsory grounds for refusal; compared to the Brussels II Regulation also includes review of jurisdiction (Article 23(2))
Enforcement	<ul style="list-style-type: none"> – application for declaration of enforceability or registration for purposes of enforcement; must provide “simple and rapid” procedure; may be refused only on grounds of non-recognition (Article 26) – enforcement under law of the requested State “to the extent provided by such law, taking into consideration the best interests of the child” (Article 28)
Cooperation between central authorities	<ul style="list-style-type: none"> – mutual assistance incl. in the exercise of rights of access and right to maintain direct contact on a regular basis (Article 35(1)) – certificate of suitability for parent requesting access rights (Article 35(2)) – international certificate on custody rights (Article 40)
The co-called ‘disconnection clause’	<ul style="list-style-type: none"> – Contracting States authorized to conclude agreements <u>in respect of children habitually resident in any of the State parties to such agreements; also applies to uniform laws on special ties of a regional or other nature</u> (Article 52)
Relation with other instruments	replaces 1961 Hague Convention on the protection of minors; primacy of 1980 Hague Convention on international child abduction (Article 50)
Entry into force	has not yet entered into force; the Netherlands is the only MS having signed (but not ratified) the Convention

1980 Hague Convention on international child abduction

Scope	<ul style="list-style-type: none"> – any child < 16 years habitually resident in a Contracting State immediately before any breach of custody or access rights (Article 4) – ‘wrongful’ removal or retention where <u>in breach of custody rights under the law of the State in which the child was habitually resident</u> immediately before the removal or retention, which were actually exercised or would have been exercised but for the wrongful removal or retention; custody rights may arise <u>by operation of law</u>, by judicial or administrative decision or by agreement having legal effect (Article 3) – ‘rights of custody’; ‘rights of access’ (Article 5)
Cooperation between central authorities	<ul style="list-style-type: none"> – <i>inter alia</i> to initiate proceedings for the return of the child and to arrange for the effective exercise of rights of access (Article 7) – application for assistance for the return of the child (Article 8) or for arranging the effective exercise of rights of access (<u>Article 21</u>) to the central authority of the child’s habitual residence or of any other Contracting State – shall order return of the child if less than <u>one year</u> has elapsed from date of wrongful removal; otherwise shall order return unless it is demonstrated <u>that the child is now settled in its new environment</u> (Article 12)
Possible exceptions to return of the child	<ul style="list-style-type: none"> – custody rights not exercised, or consent to removal or retention (Article 13(a)) – <u>grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation</u> (Article 13(b)) – objection of child of age and maturity (Article 13) – fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20)
Relation with other instruments	<ul style="list-style-type: none"> – does not restrict application of other instruments to obtain return of a child wrongfully removed or to organize rights of access (Article 34) – Contracting States may agree to limit restrictions on return (Article 36)
Entry into force	<ul style="list-style-type: none"> – entered into force on 1-12-1983 – has been ratified by all Member States

European Convention STE 105 on custody of children

'improper removal'	<u>where in breach of a custody decision given in a Contracting State and enforceable in that State</u> , including failure to return a child at the end of a period of the exercise of the right of access (Article 1(d))
Cooperation between central authorities	
Recognition and enforcement	<ul style="list-style-type: none"> – recognition of custody decisions given in a Contracting State and enforcement if enforceable in State of origin (Article 7) – “simple and expeditious procedure” (Article 14) – the State addressed may fix the conditions for the exercise of the right of access (Article 11)
Three-tier system for restoration of custody following improper removal	<ul style="list-style-type: none"> – no grounds of refusal, if child and parents are nationals and child has habitual residence in State where decision was given, or child has not been restored at end of agreed access period, and request for restoration is made to the central authority within 6 months (Article 8) – grounds of refusal limited to procedural issues in other cases where request is made within 6 months (Article 9) – additional grounds of refusal in all other cases: fundamental principles of law, change in circumstances (incl. Ascertaining the child’s views), connection of the child with the State addressed or existence of incompatible decision (Articles 10 and 15) – reservations possible for Articles 8 and 9 referring to additional grounds of Article 10 (Article 17)
Relation with other instruments	Contracting States are free to apply, between themselves, their uniform laws on custody or special system of recognition/enforcement (Article 20)
Entry into force	– 1 September 1983; in force in all Member States, but subject to widespread use of the reservations under Article 17

European Convention STE 160 on the exercise of children’s rights

Scope	children < 18 years (Article 1)
Procedural rights of the child	<ul style="list-style-type: none"> – right of the child to be informed and to express his/her views in procedures which concern him/her (Article 3) – right of the child to apply for appointment of a special representative (Article 4)
Relation with other instruments	does not preclude the application of other instruments (Article 15)
Entry into force	1 July 2000; in force only in one Member State (Greece)

Charter of Fundamental Rights of the European Union

Article 24 – The rights of the child

- (1) Children shall have the right to such protection and care as is necessary for their well being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

1989 United Nations Convention on the rights of the child

Article 1	'child': every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier
Article 3	'best interests of the child' is primary consideration
Article 9	<ul style="list-style-type: none"> – right of the child not to be separated from his/her parents against their will, except upon determination that such separation is in his/her best interests – right of the child who is separated to maintain personal relations and direct contact with both parents on a regular basis, except if contrary to the child's best interests
Article 11	measures to combat the illicit transfer and non-return of children abroad
Article 12	<ul style="list-style-type: none"> – right of the child to have his/her views given due weight in accordance with his/her age and maturity – right of the child to be heard in any judicial and administrative proceedings affecting his/her in accordance with national procedural law; such 'family proceedings' include proceedings involving the exercise of parental responsibility, and particularly residence and access issues
Article 18	<p>joint responsibility of both parents for the child's upbringing and development</p> <ul style="list-style-type: none"> – entry into force on 2-9-90 – ratification by all Member States