EUROPEAN
COMMISSION

Brussels, 7.6.2016
COM(2016) 368 final

2016/0169 (NLE)

Proposal for a

COUNCIL DECISION

authorising certain Member States to accept, in the interest of the European Union, the accession of Kazakhstan to the 1980 Hague Convention on the Civil Aspects of International Child Abduction

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The aim of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter: "the 1980 Convention"), to date ratified by 93 countries, including all EU Member States, is to restore the status quo by means of the prompt return of wrongfully removed or retained children through a system of cooperation among central authorities appointed by its Contracting Parties.

As the prevention of child abduction is an essential part of the EU's policy to promote the rights of the child, the European Union is active at international level to improve the application of the 1980 Convention and encourages third States to accede to it.

Kazakhstan deposited the accession instrument to the 1980 Convention on 3 June 2013. The Convention entered into force in Kazakhstan on 1 September 2013.

Article 38(4) of the 1980 Convention stipulates that the Convention applies between the acceding country and such Contracting States as will have declared their acceptance of the accession.

As the matter of international child abduction falls into the exclusive external competence of the European Union, the decision whether to accept the accession of Kazakhstan has to be taken at EU level by means of a Council Decision. Member States should thus make the declaration of acceptance concerning the accession of Kazakhstan in the interest of the European Union.

The existence of the EU exclusive competence in the matter of the acceptance of the accession of a third State to the 1980 Convention was confirmed by the Court of Justice of the European Union, which was consulted at the Commission's initiative.

On 14 October 2014, Opinion 1/13 of the Court of Justice of the European Union confirmed that *the exclusive competence of the European Union encompasses the acceptance of the accession of a third state to the 1980 Hague Convention on the Civil Aspects of International Child Abduction*.

The Court insisted on the need for uniformity on the matter at EU level, avoiding a *géométrie variable* among Member States. The objective of this decision is to make the 1980 Convention enter into force between Kazakhstan and all EU Member States.

• Consistency with existing policy provisions in the policy area

As far as parental child abduction is concerned, the 1980 Hague Convention is the international counterpart of Council Regulation No 2201/2003 (known as the Brussels IIa Regulation) which is the cornerstone of EU judicial cooperation in matrimonial matters and matters of parental responsibility[1].

One of the main objectives of the Regulation is to deter child abduction between Member States by establishing procedures to ensure the child's prompt return to the Member State of

[1] OJ L 338, 23.12.2003, p.31.

his/her habitual residence. To this end, the Brussels IIa Regulation incorporates in its Article 11 the procedure laid down in the 1980 Hague Convention and complements it by clarifying some of its aspects, in particular with respect to the hearing of the child, the time period to render a decision after an application for return has been lodged and the grounds for not returning the child. It also introduces provisions governing conflicting return and non-return orders issued in different Member States.

At the international level, the European Union supports the accession of third States to the 1980 Convention in order for its Member States to rely upon a common legal framework to deal with international child abductions.

On 21 December 2011, the Commission adopted 8 proposals for Council Decisions in order to accept the accession to the 1980 Hague Convention on International Child Abduction of 8 third countries (Morocco, Singapore, the Russian Federation, Albania, Andorra, the Seychelles, Gabon and Armenia)[2].

Between June and December 2015, 7 Decisions, based on the above-mentioned proposals, have been adopted by the Council of the European Union[3].

The present proposal takes into consideration a third country (Kazakhstan) which has acceded to the 1980 Convention after the adoption of the 2011 proposals.

- **Consistency with other Union policies**

Beside the general objective of developing judicial cooperation in civil matters having cross-border implications under Article 81 TFEU, the present proposal is linked to the objective enshrined in Article 3 of the Treaty on the European Union to protect the rights of the child. The 1980 Hague Convention system is designed to protect the child from the harmful effects of a parental abduction and ensure that the child is able to maintain contact with both parents, for instance by securing the effective exercise of access rights.

The proposal is also consistent with the promotion of the use of mediation in the settlement of cross-border family disputes. The Directive on certain aspects of mediation in civil and commercial matters[4] applies, among other matters, to family law within the common European judicial area. The 1980 Hague Convention also encourages the amicable resolution of family disputes. One of the Guides to Good Practice under the 1980 Hague Convention published by the Hague Conference on Private International Law is devoted to the use of mediation for the resolution of international family disputes concerning children which fall within the scope of the Convention. At the initiative of the European Commission, this Guide has been translated in all EU languages other than English and French and also in Arabic to support the dialogue with States which have not yet ratified the Convention and help finding

[2] COM (2011) 904, 908, 909, 911, 912, 915, 916, 917 adopted on 21/12/2011

[3] COUNCIL DECISION (EU) 2015/1023 of 15.6.2015; COUNCIL DECISION (EU) 2015/1024 of 15 June 2015; COUNCIL DECISION (EU) 2015/2354 of 10 December 2015; COUNCIL DECISION (EU) 2015/2355 of 10 December 2015; COUNCIL DECISION (EU) 2015/2356 of 10 December 2015; COUNCIL DECISION (EU) 2015/2357 of 10 December 2015; COUNCIL DECISION (EU) 2015/2358 of 10 December 2015. The decision concerning Gabon is temporarily put on hold pending the appointment by Gabon of the Central Authority to be designated under Article 6 of the Convention.

[4] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136 of 24 May 2008 ,p. 3).

concrete ways to tackle the problems posed by international child abduction with non-ratification countries[5].

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

Given the fact that the decision regards an international agreement, the applicable legal basis is Article 218 of the Treaty on the Functioning of the European Union together with Article 81(3). The Council shall act unanimously after consulting the European Parliament.

The United Kingdom and Ireland are bound by Regulation (EC) No 2201/2003 and are therefore taking part in the adoption and application of this Decision.

In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

• Subsidiarity

The initiative falls under the exclusive competence of the EU according to Article 3 (2) of the TFEU as confirmed by Opinion 1/13 of the Court of Justice of the European Union. Therefore, the subsidiarity principle does not apply.

• Proportionality

The present proposal is drafted along the lines of the already adopted Council Decisions on the same subject matter and does not go beyond what is necessary to achieve the objective of a coherent EU action in the matter of international child abduction by ensuring that all EU Member States accept the accession of Kazakhstan to the 1980 Hague Convention within a given time frame.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Stakeholder consultations

In order for the EU to take an informed decision on whether to accept or not the accession of a given third country to the 1980 Convention, it is necessary to carry out appropriate preparatory work.

During an expert meeting of 20 January 2015, the Commission and the EU Member States agreed on a set of benchmarks to assess the situation of the third country which acceded to the Convention. The consultation carried out with the Member States and the discussions held at an expert meeting of 15 January 2016 showed that -at this stage- there are no objections from the Member States to the acceptance of the accession of Kazakhstan to the 1980 Convention.

• Collection and use of expertise

The relevant information concerning the level of implementation of the Convention in Kazakhstan has been collected through several sources. In the first place, information was

[5] https://www.hcch.net/en/publications-and-studies/details4/?pid=5568&dtid=3

gathered by the EU Delegation in Kazakhstan, having regard, in particular, to the enacting of implementing legislation, the functioning of the Central Authority, the enforcement procedure in child abduction cases, and the possibility for foreigners to accede to legal aid. The results of the inquiry was satisfactory and, even if there are some concerns concerning the difficulties of locating a child in such a vast territory, these are not such as to prevent the acceptance of the accession of the Kazakhstan.

Also Member States gathered information on the situation in Kazakhstan and the outcome was discussed at the expert meeting of 15 January 2016.

Further information came from the Permanent Bureau of The Hague Conference on Private International Law. Kazakhstan has been working closely with Unicef on the implementation of the 1980 Convention. Guidelines on the implementation of the Convention have been developed. Under the auspices of Unicef, an exchange of knowledge between the Kazakh authorities/judges and judges from other Contracting States to the 1980 Convention was planned in order to discuss the role that judges play in implementing and applying the 1980 Convention and relevant provisions of national law. Furthermore, Kazakhstan has designated a judge to the International Hague Network of Judges. In October 2015, the Secretary General of The Hague Conference on Private International Law met with the Central Authority and was informed that the country profile is in preparation and that implementing legislation was in place. In November 2015, a three-day regional seminar was organised in Kazakhstan with the participation of Tajikistan, Turkmenistan, Russia and Belarus promoting the core Hague Conventions, including the 1980 Convention. In the views of the Permanent Bureau of The Hague Conference on Private International Law, Kazakhstan is a motivated State working hard with a view to implement properly the 1980 Convention.

- **Impact assessment**

The present proposal does not have any significant economic, social or environmental impact which would require an impact assessment within the scope of the European Commission's Better Regulation Guidelines. Similar to the 7 Council Decisions already adopted in 2015 concerning the acceptance of the accession of certain third States to the 1980 Hague Convention, no impact assessment for this proposal is needed given the nature of this legislative act. Indeed, there are not any other options than a Council Decision to accept the accession of a third State to the 1980 Convention.

However, a specific assessment of the situation of Kazakhstan, in order to verify whether it is capable to implement the 1980 Convention in a satisfactory way was carried out together by the Commission and the Member States along the lines described above.

4. BUDGETARY IMPLICATIONS

The proposed decision has no budgetary implications.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

As the proposal concerns only the authorization to the Member States to accept the accession of Kazakhstan to the 1980 Convention, the monitoring of its implementation is limited to the respect by the Member States of the wording of the declaration and the timeframe to deposit it and communicate its deposit to the Commission as established in the Council Decision.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(3) in conjunction with Article 218 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament[6],

Whereas:

(1) The European Union has set as one of its aims the promotion of the protection of the rights of the child, as stated in Article 3 of the Treaty on European Union. Measures for the protection of children against wrongful removal or retention are an essential part of that policy.

(2) The Union has adopted Council Regulation (EC) No 2201/2003[7] ('Brussels IIa Regulation'), which aims to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure the protection of rights of access and rights of custody.

(3) Regulation (EC) No 2201/2003 complements and reinforces the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the 1980 Hague Convention') which establishes, at international level, a system of obligations and cooperation among contracting States and between central authorities and aims to ensure the prompt return of wrongfully removed or retained children.

(4) All Member States of the Union are party to the 1980 Hague Convention.

(5) The Union encourages third States to accede to the 1980 Hague Convention and supports the correct implementation of the 1980 Hague Convention by participating, along with the Member States, inter alia, in the special commissions organised on a regular basis by the Hague Conference on private international law.

(6) A common legal framework applicable between Member States of the Union and third States may be considered to offer the best solution to sensitive cases of international child abduction.

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6 OJ C , , p. .

7 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, 23.12.2003, p. 1).

(7) The 1980 Hague Convention stipulates that it applies between the acceding State and such contracting States as have declared their acceptance of the accession.

(8) The 1980 Hague Convention does not allow regional economic integration organisations such as the Union to become party to it. Therefore, the Union cannot accede to that Convention, nor can it deposit a declaration of acceptance of an acceding State.

(9) Pursuant to Opinion 1/13 of the Court of Justice of the European Union declarations of acceptance under the 1980 Hague Convention falls within the exclusive external competence of the Union.

(10) Kazakhstan deposited its instrument of accession to the 1980 Hague Convention on 3 June 2013. That Convention entered into force for Kazakhstan on 1 September 2013.

(11) Only the Kingdom of the Netherlands has already accepted the accession of Kazakhstan to the 1980 Hague Convention. An assessment of the situation in Kazakhstan has led to the conclusion that those Member States that have not yet accepted the accession of Kazakhstan are in a position to accept, in the interest of the Union, the accession of Kazakhstan under the terms of the 1980 Hague Convention.

(12) The Member States that have not yet accepted the accession of the Kazakhstan should therefore be authorised to accept it in the interest of the Union and to deposit their declarations of acceptance of accession of Kazakhstan in accordance with the terms set out in this Decision. The Kingdom of the Netherlands has already accepted the accession of Kazakhstan to the 1980 Hague Convention and should therefore not deposit a new declaration of acceptance as the existing declaration remains valid under public international law.

(13) The United Kingdom and Ireland are bound by Regulation (EC) No 2201/2003 and are therefore taking part in the adoption and application of this Decision.

(14) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

HAS ADOPTED THIS DECISION:

Article 1

1. The Member States that have not yet done so are hereby authorised to accept the accession of Kazakhstan to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the 1980 Hague Convention') in the interest of the Union.

2. Member States referred to in paragraph 1 shall, no later than …,* deposit a declaration of acceptance of the accession of Kazakhstan to the 1980 Hague Convention in the interest of the Union worded as follows:

"[*Full name of MEMBER STATE] declares that it accepts the accession of Kazakhstan to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, in accordance with Council Decision (EU) 2016/...***"

3. Each Member State shall inform the Council and the Commission of its deposit and communicate to the Commission the text of the declaration within two months after its deposit.

Article 2

The Member State which deposited its declaration of acceptance of the accession of Kazakhstan to the 1980 Hague Convention prior to the date of adoption of this Decision, shall make no new declarations.

Article 3

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Decision is addressed to all Member States with the exception of the Kingdom of the Netherlands and the Kingdom of Denmark.

Done at Brussels,

For the Council
The President