

Opinion of the European Economic and Social Committee on the ‘Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)’

(COM(2016) 411 *final* — 2016/0190 (CNS))

(2017/C 125/06)

Rapporteur: **Christian BÄUMLER**

Consultation	Council of the European Union, 20.7.2016
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Employment, Social Affairs and Citizenship
Adopted in section	10.1.2017
Adopted at plenary	26.1.2017
Plenary session No	522
Outcome of vote (for/against/abstentions)	116/0/1

1. Conclusions and recommendations

1.1 In the EESC’s view, the Juncker Commission’s political guidelines are right to emphasise that judicial cooperation between EU Member States must be gradually improved and must keep pace with the fact that there is an increasing number of mobile citizens in the EU, who are getting married and having children.

1.2 The EESC welcomes the fact that the Commission proposal aims to take greater account of the best interests of children with regard to decisions about returns. The EESC supports children’s rights and stresses that it is of the utmost importance to uphold these rights in all policy areas relating to children. The best interests of children must be paramount.

1.3 The EESC welcomes the fact that the Commission is proposing several significant changes with the aim of making the procedure of returning an abducted child more efficient. In the EESC’s view, this could include the adoption of common minimum standards, including a uniform enforcement procedure.

1.4 The EESC is of the view that cooperation between central authorities in cases specifically relating to parental responsibility — set out in Article 55 — is essential and supports the reformulation of these provisions.

1.5 The EESC welcomes the fact that Member States are obliged to concentrate jurisdiction in a limited number of courts, in line with the structure of each country’s legal system.

1.6 The EESC welcomes the fact that the proposal specifies the time limits for issuing an enforceable return order and shortens return proceedings to 18 weeks in total.

1.7 The EESC believes that it is reasonable to allow only one appeal in return proceedings.

1.8 The EESC welcomes the fact that the court of origin could declare a decision provisionally enforceable even if this possibility does not exist in its national law.

1.9 The EESC believes that minimum standards for the hearing of a child could help to enhance acceptance of the decision.

1.10 The EESC also supports the abolition of exequatur. In the EESC's view, however, safeguards should be maintained.

1.11 The EESC welcomes the fact that it should be possible for the court of the Member State of refuge to order urgent protective measures required if the child might be at a grave risk of harm.

1.12 The EESC welcomes the fact that the draft stipulates that the placement of the child in a foster family or institutional care in another Member State shall in every case be conditional on the host country's consent.

1.13 The EESC considers that the scope of application of the Brussels IIa Regulation needs to be clarified. Even if marriage is defined according to 'national' criteria, Member States are required to comply with Article 21 of the EU Charter of Fundamental Rights. The EESC proposes that compliance with Article 21 be mentioned in one of the recitals of the Regulation.

1.14 The EESC considers that there is a need for regulation in cases where one parent does not come from the European Union and encourages bilateral agreements to be signed, in particular with countries that are not parties to the Hague Convention on Child Abduction.

2. General comments

2.1 On 30 June 2016, the European Commission put forward proposals for a reform of the Brussels IIa Regulation, which is the cornerstone of judicial cooperation in family matters in the European Union. It establishes uniform jurisdiction rules for divorce, separation and the annulment of marriage as well as for disputes about parental responsibility in cross-border situations. It facilitates the free circulation of judgments, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in other Member States. It has applied since 1 March 2005 to all Member States except Denmark.

2.2 The part of the regulation that deals with legal matters pertaining to parent-child relationships settles international jurisdiction questions relating to parent-child matters within the European Union, and also regulates the recognition and enforcement of judgments on parent-child relationships that have been handed down in other Member States. The regulation also sets out arrangements for the return of children wrongfully removed to, or being wrongfully retained in, another Member State. In this regard, the regulation reinforces the return mechanism under the Hague Convention on Child Abduction.

2.3 Several aspects of the regulation — which has already been the subject of 24 judgments of the European Court of Justice — are now to be reformed. This Commission proposal intends to make the regulation even more effective: it focuses on the part of the regulation that deals with legal matters pertaining to parent-child relationships and does not go into the rules relating to divorce procedures.

2.4 In the EESC's view, the Juncker Commission's political guidelines are right to emphasise that judicial cooperation between EU Member States must be gradually improved and must keep pace with the fact that there is an increasing number of mobile citizens in the EU, who are getting married and having children.

2.5 In previous opinions⁽¹⁾, the EESC has stressed that the Treaties and the Charter of Fundamental Rights of the European Union guarantee the right to access justice and respect for fundamental rights, namely: the right to property, equality before the law, the principle of non-discrimination, the right to private and family life, the right to marry and to found a family and the right to a fair trial.

2.6 The Commission has assessed the operation of the regulation in practice and considered necessary amendments to the instrument in its application report (COM(2014) 225)⁽²⁾ adopted in April 2014. This assessment took place as part of the Regulatory Fitness Programme (REFIT).

2.7 The objective of the recast is to further develop the European area of Justice and Fundamental Rights based on Mutual Trust by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition, and to better protect the best interests of children by simplifying procedures and enhancing their efficiency.

⁽¹⁾ OJ C 376, 22.12.2011, p. 87.

⁽²⁾ COM(2014) 225 final.

2.8 The EESC welcomes the fact that the Commission proposal aims to take greater account of the best interests of children with regard to decisions about returns. Increasing migration means that more cooperation channels and structures are needed so that children can be protected beyond national borders.

2.9 The EESC welcomes the fact that the Commission is proposing several significant changes with the aim of making the procedure of returning an abducted child more efficient. In cases of parental child abduction, timing is key to the successful operation of the child return procedure established in the regulation.

2.10 The EESC is of the view that cooperation between central authorities in cases specifically relating to parental responsibility — set out in Article 55 — is essential to effectively support parents and children involved in cross-border proceedings relating to child matters.

2.11 In the EESC's opinion, the unclear drafting of the article setting out the assistance to be provided by central authorities in cases specifically relating to parental responsibility is a crucial problem. For the national authorities of some Member States, this does not provide a sufficient legal basis on which to act.

2.12 The EESC welcomes the fact that the proposal clarifies who can ask for what assistance or information from whom and under which conditions. It is also made clear that courts and child welfare authorities can request the assistance of central authorities. The recast provides a legal basis for child welfare authorities to obtain the necessary information from other Member States via central authorities.

2.13 The EESC welcomes the fact that Member States are obliged to concentrate jurisdiction in a limited number of courts, in line with the structure of each country's legal system. Delays in handling cases are caused by a lack of specialisation of the courts dealing with return applications in several Member States. As a result judges are less familiar with the procedures and provisions involved and have less opportunity to regularly liaise with other EU jurisdictions in a way that allows mutual trust to be fostered.

2.14 The EESC welcomes the fact that the proposal specifies the time limits for issuing an enforceable return order and shortens return proceedings to 18 weeks in total.

2.15 The proposal would oblige central authorities to work to a 6-week time limit to receive and process the application, locate the respondent and the child, and promote mediation while making sure that this does not delay the proceedings. Currently, no time limit exists for central authorities.

2.16 A separate 6-week time limit is stipulated to apply to the proceedings before the first instance court and the appellate court. In the EESC's view, this renders the time limit for courts more realistic with a view to protecting the right of the defendant to a fair trial. The EESC points out that each legal system's compliance with these time limits must be guaranteed.

2.17 The EESC believes that it is reasonable to allow only one appeal in return proceedings. Most Member States' constitutions allow only one appeal against public-law decisions.

2.18 The EESC welcomes the fact that the court of origin could declare a decision provisionally enforceable even if this possibility does not exist in its national law. This is useful in systems where the decision is not yet enforceable while it is still subject to appeal. As a result, a parent would be able to have access to the child based on a decision declared provisionally enforceable while the appeal proceedings concerning that decision are being carried out on request of the other parent.

2.19 The EESC supports explicitly inviting judges to consider whether a return order should be provisionally enforceable. Delays after a return decision have a negative impact on parent-child relationships and the best interests of children. The EESC welcomes the fact that the proposal contains a number of clarifications to better implement the current rules. It obliges the Member State where the child was habitually resident immediately before the wrongful removal or retention to conduct a thorough examination of the best interests of the child before a final custody decision, possibly implying return of the child, is given. In this context, when conducting this examination of the best interests of the child, any child who is capable of forming his or her own views has the right to be heard, even if not physically present, using alternative means such as videoconferencing as appropriate.

2.20 The EESC believes that minimum standards for the hearing of a child could help to avoid refusal of recognition, enforcement or 'exequatur' of a decision handed down in another EU country and thus could enhance EU citizens' acceptance (of the decision). Examples include the minimum age at which a child can be the subject of a hearing, but not procedural questions that go beyond this, such as who is to question the child. This ought to continue to be a matter for the Member States. The EESC recommends that judges involved in hearings of children should receive additional socio-educational training.

2.21 The EESC also supports the abolition of exequatur for all decisions taken in a Member State (and for authentic instruments and agreements) on parental responsibility. With regard to enforcement, which as such is a matter for the Member States, the case law of the European Court of Justice holds that the application of national rules for enforcement should not prejudice the useful effect of the regulation.

2.22 In addition, the requirement of exequatur generated average delays of several months per case and costs reaching up to EUR 4 000 for citizens⁽³⁾.

2.23 In the EESC's view, however, certain safeguards should be maintained. These certainly include the proper service of documents, the right of the parties and of the child to be heard, especially with regard to contradictory decisions, as well as compliance with certain procedural provisions regarding the placement of a child in another EU country, based on the existing Article 56 of the Brussels IIa Regulation.

2.24 The EESC welcomes the fact that it should be possible for the court of the Member State of refuge to order urgent protective measures required if the child might be at a grave risk of harm or might otherwise be placed in an intolerable situation. For example, the court before which return proceedings are pending can grant access rights to one of the parents which will also be enforceable in the Member State of habitual residence of the child until the court of that country takes a final decision with respect to the access to a child.

2.25 The EESC welcomes the fact that the Commission proposal stipulates that the placement of the child in a foster family or institutional care in another Member State shall in every case be conditional on the host country's consent. The requirement for consent ensures that the child will receive targeted care in the host country. The EESC also recommends that accommodating the child within his or her family should be a priority, if this is not possible or not in line with the best interest of the child, alternative foster family or community-based care should be provided.

2.26 The EESC notes that it sometimes takes several months after the application report until it has been established whether, in a given case, consent is required. If consent is required, the consultation procedure must be followed, which is also lengthy as no deadline is set for the response of the authorities receiving the application. As a result, many authorities making applications order placement of the child and send it to the host country while the consultation procedure is still ongoing or even before it is launched, because they consider placement to be urgent and are aware of the length of the procedure. This places the child in a situation of legal uncertainty.

2.27 The EESC considers that the proposal should provide for the introduction of a period of 8 weeks within which the Member State in question must take a decision on the application. Speeding up the procedure will serve the best interests of the child.

2.28 The EESC accepts that, under the Hague Convention, the court of the State in which the child is located has jurisdiction. The EESC points out, however, that in most child abduction cases the competent court will be that of the abductor. The EESC draws attention to the fact that the Brussels IIa Regulation already provides for free counselling arrangements for parents who come from a country other than the child's current country of residence.

2.29 The EESC voices its overall support for the adoption of common minimum standards including a uniform enforcement procedure, in order to make return proceedings faster.

⁽³⁾ COM(2016) 411/2, p. 8.

3. Specific comments

3.1 The EESC considers that there is a need for regulation in cases where one parent does not come from the European Union. Migration and the global exchange of goods and services are leading to an increase in these cases. The EESC considers that it is particularly crucial to sign bilateral agreements with countries that are not parties to the Hague Convention on Child Abduction.

3.2 The EESC considers that the scope of application of the Brussels IIa Regulation needs to be clarified. It is not clear from the Commission's proposal whether new forms of marriage and divorce are covered by the Regulation. What is meant by marriage is not defined, but assumed. Even if marriage is defined according to 'national' criteria, Member States are required to comply with Article 21 of the EU Charter of Fundamental Rights, which prohibits discrimination on grounds of sexual orientation. The EESC proposes that compliance with Article 21 be mentioned in one of the recitals of the Regulation.

Brussels, 26 January 2017.

The President
of the European Economic and Social Committee
Georges DASSIS
