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# Novelties introduced with the recast of the Brussels IIa Regulation

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# Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction

## The legislative process

- The proposal (COM/2016/0411 final) was presented by the Commission on 30 June 2016.
- The Recast was subject to the special legislative procedure which requires unanimity in the Council after consultation of the European Parliament (Article 81(3) TFEU)).
- All Member states, except Denmark, take part in the adoption and application of this legislation.
- The new Regulation will apply as of 1<sup>st</sup> August 2022.



## Matrimonial Matters

### Inclusion of "divorce without a judge" in the scope of the Regulation

- **Private divorces do not fall in the scope of the Brussels IIa Regulation** (cf. CJEU, Case C-372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI:EU:C:2017:988)
- **Article 2(3) of the Recast:** 'agreement' means, for the purposes of Chapter IV, a document which is not an authentic instrument, has been concluded by the parties in the matters falling within the scope of this Regulation and has been registered by a public authority as communicated to the Commission by a Member State in accordance with Article 103 for that purpose;
- **Article 64 of the Recast** provides an important clarification in this area: it indicates that the provisions relating to recognition and enforcement apply to authentic instruments which have been drawn up and to agreements which have been registered "in a Member State whose courts have jurisdiction under Chapter II".
- According to **recital 70**, such agreements should be "assimilated to decisions as regards the rules of recognition". The principle of full recognition of these agreements is therefore now established. In other words, no recognition or exequatur procedure is required in the executing Member State for divorce without a judge to be able to take effect there.



## Definition of “child”

- Uniform definition of child provided at Article 2(6): 'child' means any person below the age of 18 years
- This definition is in line with Article 2 of the 1996 Hague Convention on Child Protection

## No amendments to the rules on jurisdiction

- Regardless of the Commission’s proposal, which indicated it wanted to increase the autonomy of the spouses by endowing them with a real power to choose the judge by mutual agreement, in particular in the event of divorce by mutual consent. Indeed, by way of comparison, it is often argued that the spouses already benefit from an opportunity to agree on the law applicable to their matrimonial dispute in the Rome III Regulation.



## Parental responsibility

### The child's right to express his/her opinion – A major novelty

- One of the novelties of the regulation consists in a consecration of the right of the child to express his/her opinion in **Article 21**.
- This provision takes inspiration from Article 24 of the CFREU, according to which the children "can express their opinion freely. This is taken into consideration for the subjects which concern them, according to their age and maturity".
- However, this is by no means an obligation to hear the child, but simply **an obligation to give the child capable of discernment a real and effective opportunity to express his or her opinion**. Therefore, the judge is not bound by any wishes expressed by the child during the hearing.
- The regulation leaves the Member States free to organize this hearing, which takes place "in accordance with national laws and procedures". However, states are prohibited from refusing to recognize a decision simply because a hearing of the child in another country has been carried out differently from what is prescribed by the standards applied to that jurisdiction.



## Parental responsibility

### The child's right to express his/her opinion – A major novelty (cont'd)

- The importance of the child's voice is also confirmed in the recognition of decisions. **Article 21 of the Recast constitutes an exception to the automatic recognition of a decision relating to parental responsibility.** Such recognition may be refused if the decision has been given without the child who is capable of discernment having had the opportunity to express his opinion in accordance with Article 21.
- Only two hypotheses can justify the absence of a hearing: 1) if the proceedings related only to the child's property and provided that it was not required to give this possibility given the object of the proceedings; 2) if there were serious reasons to act in this way, taking into account in particular the urgency of the case.



## Chapter III: A new Chapter on international child abduction

### The short duration of the return proceedings - **Another major novelty**

- **Articles from 22 to 29** of the Recast replace Article 11 of the Brussels IIA Regulation.
- The Recast **does not call into question the system of the combined application of the Community mechanism and the 1980 Hague Convention on Child Abduction**. According to the Recast, the provisions of the Convention apply and are supplemented by its Chapters III and VI. The rules relating to jurisdiction in matters of unlawful removal have not changed compared to those of Article 10 of the Brussels II bis Regulation.
- Regarding the judicial aspect of the procedure, **Article 24** of the Recast emphasizes the **speed of the procedure**. Time plays, indeed, an extremely important role in this dispute on the return of the child. Hence, the Recast enjoins MS to use **“the most expeditious procedures available under national law”** to decide these cases. In many countries, courts may need to use urgent summary proceedings. This requirement is not new, however the Recast further specifies the maximum time limits: namely, it requires action within an extremely short period of 6 weeks for each level of jurisdiction. Thus, the whole procedure should not last more than 18 weeks. However, this deadline seems extremely difficult to meet, given the length of procedures usually observed in this area.



## Chapter III: A new Chapter on international child abduction

### The return of the child and Article 13(1)(b) 1980 HCCH Convention - **Another major novelty**

- Article 11(4) of the Brussels IIA Regulation only prohibited the court from refusing the return of the child on grounds of serious danger on the basis of Article 13(1)(b) of the 1980 Hague Convention if it was established that “adequate arrangements have been made to secure the protection of the child after his or her return”.
- Article 27(3) of the Recast is more concrete: Where a court considers refusing to return a child solely on the basis of point (b) of Article 13(1) of the 1980 Hague Convention, it shall not refuse to return the child if the party seeking the return of the child satisfies the court by providing sufficient evidence, or the court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return.
- In this context, contact between courts and / or central authorities, is extremely important.





## Chapter III: A new Chapter on international child abduction

### Procedure for the return of a child

- According to **Article 11(8) of the Brussels IIA Regulation** “Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child”
- Last word mechanism, aimed to guarantee the effectiveness of the mechanism put in place by the Regulation for the return of the child by countering unjustified refusals of return.
- However, this mechanism triggered extensive litigation.
- **Article 27(6) of the Recast** simply states: A decision ordering the return of the child may be declared provisionally enforceable, notwithstanding any appeal, where the return of the child before the decision on the appeal is required by the best interests of the child
- Thus, if the return may well be ordered by the authorities of the State of origin despite a decision refusing the return, it is because of a procedure initiated on the merits of the case and which will have precisely taken into account all the data: displacement, refusal of return, best interests of the child, and conditions of reception with the parents in the two States concerned (arts. 29, 3; 29, 5 and 29, 6). This time the best interests of the child do not play the role of a limit, they serve to make the return process more efficient



## The abolition of *exequatur* extended to all the decisions that fall in the scope of the Recast - **Another major novelty**

- Still with a view to **simplifying procedures and facilitating the circulation of decisions**, the Recast goes further in terms of the elimination of *exequatur*.
- While the Brussels II bis Regulation provided for the abolition of *exequatur* only for decisions relating to access and return rights, **at Article 38 the Recast extends the abolition to all decisions falling within its scope.**
- Only a certificate issued by the Member State of origin attesting to the enforceability of the decision in that same State will suffice for the applicant to obtain enforcement in the Member State of enforcement.



## In conclusion...

The new rules amend several aspects of the existing Brussels IIA Regulation and foresee in particular:

- **clearer rules on the opportunity for the child to express his/her views** with the introduction of an obligation to give the child a genuine and effective opportunity to express his/her views;
- the **complete abolition of *exequatur*** for all decisions in matters of parental responsibility. This will save time and money for citizens whenever a decision needs to circulate from one Member State to another. This abolition of *exequatur* is accompanied by a number of procedural safeguards;
- **enhanced and clearer rules on intra-EU child abduction cases** with the introduction, for example, of clear deadlines to ensure that these cases are treated in the most expeditious manner;
- **clearer rules on the circulation of authentic instruments and extra-judicial agreements.** The text foresees that agreements on divorce, legal separation or matters of parental responsibility, will be allowed to circulate when they are accompanied by the relevant certificate.
- the **harmonisation of certain rules for the enforcement procedure.** While the enforcement procedure remains governed by the law of Member States of enforcement, the Recast includes some harmonised grounds for suspending or refusing enforcement, thereby giving more legal certainty to parents and children.



## Poll - Question

- Lena, a Hungarian national, and Richard, an Irish national, live on a permanent basis in Paris, where they got married in 2015.
- In November 2020 they decide to divorce.
- To that aim, in accordance with Article 229-1 of the French Civil Code, they stipulate and undersign an agreement to divorce.
- Is their agreement eligible for recognition in Hungary in accordance with EU private international law?

A. Yes

B. No



**Thank you for your attention!**

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