

# CCBE response to the public consultation of the Commission on the functioning of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing regulation (EC) No 1347/2000 ("Brussels IIa Regulation")

20/06/2014

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

In this paper the CCBE is responding to the [public consultation](#) launched by the Commission on the functioning of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing regulation (EC) No 1347/2000 (hereinafter "Brussels IIa Regulation" or "the Regulation").

After having consulted the members of the CCBE Family & Succession Law Committee which consists of practitioners from across the EU working in this area, the CCBE would like to provide the following feedback to the questions raised in the consultation paper. The text of this position follows the structure of the Commission questionnaire, although not all questions have been covered.

## 1. THE FUNCTIONING OF THE REGULATION IN GENERAL

### **Question 5 - Do you think that the Regulation is a helpful tool for spouses involved in cross-border divorce/legal separation/marriage annulment?**

In general, the CCBE is of the opinion that the Brussels IIa Regulation is a helpful tool for spouses involved in cross-border divorce/legal separation/marriage annulment and for cases concerning parental authority.

On the positive side, the Brussels IIa Regulation provides more legal certainty for the affected spouses by setting out clear rules on the determination of the competent court in cross-border divorce cases. It also provides common jurisdictional grounds across Member States and assists in imparting a measure of certainty, and, in pragmatic terms, reduces the amount of collateral satellite litigation as to which of two rival sets of proceedings should take priority. The provisions of recognition in combination with the system of certificates are easy to handle in practice. It is also useful because it establishes the principle of mutual recognition of judgments in all Member States, thus consolidating mutual trust between the Member States.

On the other hand, there are negatives in so far as the Regulation is not giving any solution and even encourages a "rush to court" and discourages mediation and other alternative dispute resolution.

There is also a need to address the differences between jurisdiction in relation to divorce/ division of property on the one hand and maintenance on the other, which combined with the principle of *lis pendens*, has the potential to split cases in relation to resolution of a couple's financial affairs on divorce. This is particularly serious for jurisdictions such as those in the UK where an order for a capital payment or transfer of property may have a dual function as a division of property and maintenance<sup>1</sup>. It is also particularly urgent in the light of the Maintenance Regulation appearing to give jurisdiction for freestanding maintenance cases (e.g. variation of a foreign order) where the domestic court may lack jurisdiction/procedure under its own law.

The CCBE would argue for the transfer provisions applicable to matters of parental responsibility under Article 15 to be extended to divorce and matrimonial finance (both maintenance and capital claims where applicable) within the EU, and for an express provision equivalent to that in Articles 33 and 34 of Brussels I Recast (Council Regulation (EC) No 1215/2012) for stay of proceedings if there is an action involving the same subject matter in a non-Member State.

The CCBE is also of the opinion that the Regulation should provide a residual jurisdiction where none of the spouses is habitually resident in the territory of a Member State and do not have a common nationality of a Member State, or, in the case of the United Kingdom and Ireland do not have their "domicile" within the territory of one of the latter Member States, in accordance with Article 7 of the [proposal for a Council Regulation amending Regulation no 2201 /2003](#). In this case, "the courts of a Member State are competent by virtue of the fact that:

- a) *the spouses had their common previous habitual residence in the territory of that Member State for at least three years; or*
- b) *one of the spouses has the nationality of that Member State, or, in the case of United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States."*

It should also be clarified that Article 66 does not mean that the Regulation has application in purely domestic cases.

### **Question 6 - Do you think that the Regulation is a helpful tool in cross-border cases concerning custody over a child?**

The CCBE considers the Regulation a helpful tool in cross-border cases concerning custody over a child. Also in this respect, the principle of mutual recognition of judgments between Member States plays a positive role, as well as the fact that in relation to the protection of the minor – contrary to the previous version of the Regulation 1347/2000 – it does not allow discrimination between marital and non-marital family relationships in conformity with the principles of the European Convention on Human Rights.

In addition, the Regulation supports the principle of decision-making in the jurisdiction of the child's habitual residence. It is helpful in that it provides common jurisdictional grounds across Member States and assists in imparting a measure of certainty. Since there is no definition of habitual residence, besides the rulings of the ECJ, and children are increasingly moving from one Member State to another, the responsibility of determining the child's habitual residence will lie with the addressed court which should be aware of the ECJ rulings.

The flexibility in Article 15 is, however, in principle, a positive feature but is very considerably underused and misunderstood in practice<sup>2</sup>.

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<sup>1</sup> See Van den Boogaard v Laumen [1997] ECR I-1147.

<sup>2</sup> See for English/Hungarian example T v T (Brussels IIa: Art 15) 2010 EWHC 3928.

**Question 7 - Do you think that the Regulation is a helpful tool in cross-border cases concerning access rights to children?**

According to the CCBE, the Regulation is a helpful tool in cross-border cases concerning access rights to children, especially since it has recognised the right of the child to be heard.

It is also positive that the Regulation supports free-movement of persons by making access decisions enforceable. This is particularly important in relocation cases. If a court is minded to permit relocation there can then be greater confidence that access/contact orders will operate effectively.

**Question 8 - Do you think that the Regulation is a helpful and effective tool in cases of cross-border parental child abduction?**

Generally speaking the CCBE considers that the Regulation is a helpful and effective tool in cases of cross-border parental child abduction.

The regulation reinforces the operation of the Hague Convention on the Civil Aspects of International Child Abduction. The difficulty with this reinforcement is the inconsistent application in different Member States, which risks bringing the Regulation into disrespect. In particular the 6 week period for determining an application is desirable, but difficult to apply in itself and difficult to apply consistently across all Member States. Specifying circumstances for extension of the period may encourage greater compliance, e.g. a period for mediation, a period for appeal, an additional period if further information is sought from the applicant or the country of the child's habitual residence.

Another solution could be to improve the international cooperation between Member States and training of judges/courts. The Central Authorities of the Member States should play a more important role in advising the courts in their jurisdiction.

In general, the CCBE sees that applicants can benefit from a centralised court system within Member States as that usually results in such cases being dealt with more expeditiously.

The CCBE would also recommend trying to find instruments to speed up the proceedings which usually take a very long time, partially due to the necessary translations.

**2. JURISDICTION**

**a) Matrimonial matters (divorce, legal separation, marriage annulment)**

**Question 9 - Do you think that the ways of identifying the responsible court in matrimonial matters should be revised so as to better reduce the risk of a "rush to court"?**

The CCBE considers that the ways of identifying the responsible court in matrimonial matters should be revised so as to better reduce the risk of a "rush to court". The Regulation does not provide for the possibility of spouses to agree on the responsible court that should hear their divorce or legal separation (choice of court agreement). Allowing spouses to agree on the responsible court could be particularly useful in cases of divorce by mutual consent, especially as spouses have the possibility under the Rome III Regulation to agree on the law applicable to their matrimonial dispute.

A further option would be to retain the alternative jurisdictions, but then make provision for transfers and stays in appropriate cases as indicated in the answer to Question 5.

In the absence of a choice of court agreement by the parties, in order to prevent a "rush to court" and to promote alternative ways of dispute resolution those Member States that are party to the Rome III Regulation<sup>3</sup> consider that it would be helpful to establish hierarchical rather than alternative criteria to determine the competent jurisdiction, in accordance with- Article 8 of Regulation No 1259/ 2010. Such a solution may not be as attractive to Member States which are not party to Rome III.

**Question 10 - Should there be a possibility for spouses to choose the responsible court by a common agreement?**

As already mentioned, the CCBE strongly supports the possibility for spouses to choose the responsible court by common agreement but the Regulation should limit the choice only to courts of an EU Member State with which one or both spouses have a substantial connection.

The possibility of a choice of court agreement could be in conformity with, for example, Article 5 of Regulation No 1259/2010 (implementing enhanced cooperation in the area of the law applicable to divorce and legal separation), or Article 3a of the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (2006/0135 ) where the main criteria were the existence of a "substantial connection with that Member State by virtue of the fact that:

- a. any of the grounds of jurisdiction listed in Article 3 applies, or
- b. it is the place of the spouses' last common habitual residence for a minimum period of three years, or
- c. one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States."

The CCBE supports all the alternatives mentioned in the questionnaire but especially the one providing that "at the time the agreement is concluded, the EU country whose courts have been chosen by the spouses is the country where the spouses have had their habitual residence for at least a certain period of time, provided that this residence period did not end more than a certain period of time before the court is seised".

As to the period, the CCBE considers a minimum period of six months of habitual residence to be sufficient.

The CCBE recommends that in the case of the United Kingdom and Ireland "domicile" should be used in place of "nationality" as a connecting factor.

**Question 11 - Should the formal requirements of such agreement draw inspiration from other EU instruments?**

According to the CCBE, the formal requirements of such agreement should be based on Article 4(2) of the Maintenance Regulation. It is important that proceedings relating to all financial issues on divorce proceed in the same court and Article 4 of the Maintenance Regulation provides a suitable model.

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<sup>3</sup> The Member States party to the Regulation are: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

**b) Parental responsibility matters (custody and access rights)**

**Question 13 - Do you think that the cooperation mechanism aimed at ensuring a smooth functioning of the transfer should be improved?**

The CCBE considers that this practical matter would be best dealt with through judicial co-operation and between the Central Authorities of the Member States. The transfers should be subject to stricter forms and timeframes since the fear of extremely long delays is an obstacle to the efficiency of this mechanism.

**c) Jurisdiction – questions common to matrimonial matters and matters of parental responsibility**

**Question 14 - Do you think that the existing rules have helped effectively in preventing parallel proceedings?**

According to the CCBE, the *lis pendens* rule has helped prevent parallel proceedings but at the expense of engendering a potentially harmful “rush to court” (see answer to question 5 above).

Also, it is too often necessary to go to the court in order to prove that an applicant has already referred his case to a competent jurisdiction. This obviously takes time and costs a lot of money. The first referral should be subject to minimal criteria which would be enough to stay the proceedings or to decline jurisdiction except if the plaintiff in the second court raises a real opposition. For this purpose, the establishment of a database of the current procedures available to the different courts and lawyers could be a good solution.

In addition, it is necessary to clarify the procedure for monitoring the referral directly by the second seised court upon presentation by the lawyer acting for the applicant in the court first seised. The need to take a local lawyer imposes a heavy financial and time burden on the applicant who raised proceedings first. A possible solution is to go through the Central Authorities of the Member States.

**Question 15 - Do you think that the Regulation should address parallel proceedings brought before the court of an EU country and those brought before the court of a non-EU country?**

The CCBE considers that it would be helpful to regulate the question of articulation between bilateral conventions between the EU Member States and third countries and the Brussels IIa Regulation. It is desirable that the EU starts negotiations with third countries in order to regulate the question of *lis pendens* or to adopt general treaties between the EU and third countries.

Another solution could be to include express provision equivalent to that in Articles 33/34 of the Brussels I Recast (Council Regulation (EC) No 1215/2012), for stay of proceedings if there is an action involving the same subject matter in a non-Member State.

On the other hand, it is possible that this might not work well in practice since the other non-EU Member States will not - at least not all - except the same regulations to prevent parallel proceedings, if a case is pending in an EU Member State. This cannot be only a “one-way-regulation”.

**Question 16 - Do you think that the existing rules function well?**

The CCBE finds the notion of mutual trust between Member States to be crucial in this respect and building trust is essential to swiftly communicate and transmit the decisions of the courts. Only the speed of information transmission will facilitate the effective resolution of emergency cases.

On the other hand, the circumstances for the granting of provisional and protective measures are uncertain. However, it is up to the case law in each EU Member State when there are circumstances given to grant provisional or protective measures. This cannot be improved by an EU regulation.

**Question 18 - Do you think that the Regulation should ensure access to justice in cases where the responsible courts outside the EU cannot exercise their jurisdiction?**

The CCBE agrees that a *forum necessitatis* should be incorporated into the Regulation similar to the Succession Regulation.

**3. RETURN OF THE CHILD IN CASES OF CROSS-BORDER PARENTAL CHILD ABDUCTION WITHIN THE EU**

**Question 19 - Do you think that the Regulation has ensured the immediate return of the child within the EU?**

The regulation has very significantly contributed to accelerating the return of the child by imposing strict deadlines but its effects are limited and related to goodwill and the organisation of the Member States and the Central Authorities.

It might be good to compile the findings of the ECJ judgments in order to harmonise best practice and principles, for example a "Code of Best Practice" for EU Member States.

**4. ABOLITION OF EXEQUATUR**

**Question 20 - Do you consider that all judgments, authentic instruments and agreements concerning parental responsibility should circulate freely between EU countries without exequatur?**

The CCBE is of the opinion that all judgments, authentic instruments and agreements (including acts drawn up by lawyers) concerning parental responsibility should circulate freely between EU Member States without exequatur but without resorting to, or copying, the current two-speed approach under the Maintenance Regulation, whereby judgments from the United Kingdom and Denmark are subject to the requirement of declarations of enforceability and those of all other Member States are immediately enforceable without exequatur. The process should not depend on whether or not a Member State is able and willing to apply foreign law as currently under the Hague Protocol.

**Question 21 - If abolition of exequatur should be expanded, do you consider that maintaining safeguards is required?**

The CCBE considers that some safeguards should be maintained, especially safeguards relating to service, right of the parties to be heard, right of the child to be heard, irreconcilable judgments and compliance with placement procedures.

## 5. HEARING OF THE CHILD

### **Question 22 - Do you think that the common minimum standards for the hearing of a child could help in avoiding the refusal of recognition, enforceability and/or enforcement of a judgment from another EU country?**

The CCBE agrees that such common minimum standards could help and suggests that it is clarified that children aged 12 and over are generally considered of an age and maturity to express views. In respect of children under that age, a decision should be taken in each case regarding whether the child has sufficient understanding of the issues to express a view (for that purpose the child could be assisted by a psychiatrist and/or social worker). It should also be specified that a child may express a view in writing, through a third party, directly to the judge or to a court-appointed officer or any other way considered appropriate by the court making the decision. A lawyer could also be appointed to the child in order to verify that his rights and his situation are taken into account.

## 6. ENFORCEMENT

### **Question 23 - Do you think that it is important to improve the actual enforcement of decisions concerning parental responsibility given in another EU country?**

The CCBE agrees that the enforcement of decisions concerning parental responsibility given in another EU Member State should be improved. There should be a time specified within which orders should usually be enforced as well as means of notification. This is an area for judicial co-operation and co-operation between Central Authorities as enforcement mechanisms will vary from state to state. The introduction of an instrument like "*international civil warrants*" to enforce the decisions could be a possibility in this respect.

The CCBE believes that enhancement of the existing online information tools regarding substantive law in EU Member States (e.g. the e-Justice Portal) would be beneficial.

### **Question 24 - Do you think that it is important to improve the actual enforcement of return orders?**

According to the CCBE, the enforcement of return orders should be improved. For example by introducing possible sanctions or, as mentioned in the response to question 23, by harmonising the time within which orders should be enforced as well as notification means.

## 7. COOPERATION BETWEEN CENTRAL AUTHORITIES

### **Question 25 - In general, do you think that the cooperation between the Central Authorities functions well?**

The CCBE thinks that cooperation between the Central Authorities does not function well. The technical possibilities are not used to their best advantage and significant difficulties exist in communication and translation.

**Question 26 - Could the cooperation between the Central Authorities be improved through the mandatory use of forms translated into all EU languages to facilitate the exchange of information between Central Authorities?**

The CCBE sees the attraction of this proposal for a minimum transfer of information at least.

**Question 27 - Do you think that it would be useful for the Regulation to provide for additional provisions so as to enhance the use of mediation?**

The *lis pendens* rule that militates against mediation pre-proceedings could be modified in particular. However, it is difficult to see how this would work in practice unless the present first-past-the-post principle is changed, or, as advocated above, the present Article 15 transfer provisions are significantly expanded and encouraged. Another possibility would be to simply encourage non-mandatory mediation in a possible “Code of Best Practice” (see response to question 19).

**Question 29 - Do you think that the cooperation between Central Authorities and the local child welfare system in cross-border situations works well as it should in order to ensure the smooth operation of the Regulation?**

The CCBE thinks that co-operation between Central Authorities works well, but the decision in *Health Service Executive*<sup>4</sup> exposed difficulties when a declaration of enforcement is required before the implementation of measures in another Member State for the care of vulnerable children. Domestic rules provided (and still provide) for suspension of the declaration pending a period for appeal, contrary to the decision of the CJEU. There is a conflict of considerations that could helpfully be resolved in the Regulation, by abolition of exequatur and express provision for immediate enforcement, with no suspensive effect unless expressly ordered by the court.

## **8. PLACEMENT OF A CHILD IN ANOTHER EU COUNTRY**

**Question 31 - Do you think that the rules in the Regulation governing the placement of a child in another EU country function in a satisfactory manner?**

The CCBE shares the opinion that these rules function in a satisfactory manner, but considers that some further domestic adjustments are required.

## **9. CERTIFICATES**

**Question 32 - Do you think that the certificates annexed to the Regulation function in a satisfactory manner?**

In general, the different certificates work. However there is one exception: Article 43 (2) provides no appeal against the issuing of a certificate pursuant to Article 42 (1). This means that in the case that the Member State of origin delivers a return order in accordance with Article 11 (8) and a certificate is issued, there is no appeal against this issued certificate. Whether a rectification of this certificate according to Article 43 (1) is available depends on the law of the Member State of origin.

It must be taken into account that Article 43 (2) only applies when a court of the Member State of the abducting parent denies the return of the child according to Article 13 Hague Abduction

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<sup>4</sup> See *HSE v SC and AC*, case C-92/12 PPU.



Convention. An appeal is necessary in the case that the return-order issued by the court of the Member State of origin is enforceable but doubts on the correctness of the certificates are in place.

The CCBE has also been informed that in some cases the delivery of certificates takes too long.

## CONCLUSIONS

In view of these responses, the CCBE wishes to make the following recommendations towards the European Commission:

1. To foresee a possibility for the parties to have a choice of court agreement which would help to more easily identify the responsible court and reduce the risk of a "rush to court". Such choice should be limited only to courts of an EU Member State with which one or both spouses have a substantial connection, in particular the Member State of the habitual residence of the spouses.
2. For Member States who are party to the Rome III Regulation, to establish a hierarchical order of priority ways to identify the responsible court that should hear the case, in the absence of a choice of court agreement.
3. To make the Regulation more consistent with the Maintenance Regulation. It is important that proceedings relating to all financial issues on divorce proceed in the same court.
4. To provide a residual jurisdiction where neither of the spouses is habitually resident in the territory of a Member State and do not have a common nationality of a Member State, or, in the case of the United Kingdom and Ireland do not have their "domicile" within the territory of one of the latter Member States.
5. To include in the Brussels IIa Regulation, in case of parallel proceedings brought before the court of an EU Member State and those brought before the court of a non-EU Member State, a similar provision to Articles 33 and 34 of Council Regulation N° 1215/2012 for stay of proceedings if there is an action involving the same subject matter in a non-Member State.
6. To incorporate a *forum necessitas* provision equivalent to that in the Succession Regulation.
7. To abolish exequatur to all judgments, authentic instruments and agreements such as acts drawn up by lawyers concerning parental authority subject to certain safeguards.
8. To improve the enforcement of return orders in cases of cross-border parental child abduction.
9. To improve the relationship between the Hague Conventions and the Brussels IIa Regulation.
10. To raise awareness about the functioning of the Regulation by organising, facilitating or encouraging training and information sessions and the increased use of online information tools both in relation to procedure and substantive law throughout the Member States.