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10968/18
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10970/18
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STANDARD FORM OF EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION AND DOCUMENTS

Proposal for a COUNCIL DECISION authorising Austria, Cyprus, Croatia, Luxembourg, Portugal, Romania and the United Kingdom to accept, in the interest of the European Union, the accession of the Dominican Republic to the 1980 Hague Convention on the Civil Aspects of International Child Abduction

Proposal for a COUNCIL DECISION authorising Austria to accept, in the interest of the European Union, the accession of Ecuador and Ukraine to the 1980 Hague Convention on the Civil Aspects of International Child Abduction

Proposal for a COUNCIL DECISION authorising Austria and Romania to accept, in the interest of the European Union, the accession of Honduras to the 1980 Hague Convention on the Civil Aspects of International Child Abduction

Proposal for a COUNCIL DECISION authorising Austria, Luxembourg and Romania to accept, in the interest of the European Union, the accession of Belarus and Uzbekistan to the 1980 Hague Convention on the Civil Aspects of International Child Abduction

Submitted by the Foreign and Commonwealth Office on 20 July 2018.

SUBJECT MATTER

1. The aims of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the Convention”) are (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. When a State accedes to the Convention, it is necessary for a Contracting State to declare its acceptance of that State’s accession in order for the Convention to have effect between them.

2. All EU Member States are parties to the Convention. The EU itself is not and there is no provision for it to become so (in contrast to some of the more recent Hague Conventions). Nevertheless, acceptance of the accession of a third State to the Convention falls within the exclusive competence of the European Union. The Court of Justice of the European Union (“CJEU”) came to this conclusion in its Opinion 1/13 (October 2014), citing the importance of the uniform and consistent application of Regulation 2201/2003 (the Brussels IIa Regulation). Therefore, the Commission considers that it is necessary for Member States to agree collectively to accept the accession of the listed States by way of proposed Council Decisions, “in the interest of the European Union”.
3. Documents 10967/18, 10968/18, 10969/18 and 10970/18 are proposals from the European Commission for Member States to declare by way of Council Decisions their acceptance of the accessions of Belarus, the Dominican Republic, Ecuador, Honduras, Ukraine and Uzbekistan to the Convention. Documents 10968/18, 10969/18 and 10970/18 do not apply to the United Kingdom, as we have already accepted the accession of Belarus (2003), Ecuador (1992), Honduras (1994), Ukraine (2011) and Uzbekistan (2003) to the Convention. Document 10967/18 authorises the UK to accept, in the interest of the European Union, the accession of the Dominican Republic.
4. All of the proposals follow the same pattern. They explain how each acceding State has deposited an instrument of accession and that Member States are required to deposit their declaration of acceptance of each accession, using a standard form of words, simultaneously on a date yet to be agreed.

SCRUTINY HISTORY

5. None, on any of these proposals. An Explanatory Memorandum on the subject of accessions of a different list of States was submitted for Parliamentary Scrutiny on 31 July 2017. The House of Commons European Scrutiny Committee cleared the documents as “not legally or politically important” on 13 November 2017. The House of Lords Select Committee on the European Union cleared the documents on 16 November 2017 and sent for information to Justice.

MINISTERIAL RESPONSIBILITY

6. The Secretary of State for Foreign and Commonwealth Affairs is responsible for the decision on whether the UK should enter into treaty relations with States acceding to the Convention. The Secretary of State for Justice is responsible for those international child abduction matters which fall within the scope of the Convention, as incorporated into UK law by the Child Abduction and Custody Act 1985 (the “1985 Act”).

INTEREST OF THE DEVOLVED ADMINISTRATIONS

7. While matters relating to the acceptance of the accession of States to the Convention are reserved to the UK Government, responsibility for the operation of the Convention in Scotland and Northern Ireland is devolved.

LEGAL AND PROCEDURAL ISSUES

8. Pursuant to CJEU Opinion 1/13, the proposed legal bases for these proposals are Articles 218 and 81(3) of the Treaty on the Functioning of the European Union (“TFEU”). Article 218 covers, inter alia, the negotiation of international agreements between the EU and third countries and Article 81(3) addresses family law measures with cross-border implications.
9. The proposals suggest that the UK will be adopting and applying the Council Decisions as a result of being bound by the Brussels IIa Regulation. The UK Government believes the opt-in applies and will seek to amend the wording of Recital 13 of proposals 10967/18 and 10969/18, and Recital 15 of proposals 10968/18 and 10970/18, to reflect this.
10. Voting Procedures: Unanimity.
11. Impact on UK Law: If the proposals are agreed, it will be necessary to add the acceding States to the list of “Convention States” under the 1985 Act. An Order in Council procedure will be used, pursuant to section 2 of the 1985 Act. Legal implementation is therefore generally not burdensome. By accepting the accession of a State, the UK’s legal obligations under the Convention (as incorporated into domestic law by the 1985 Act) will be extended to each such State. For this reason, the UK has historically attached great importance to the scrutiny of the acceding State’s ability and willingness to operate the Convention effectively.
12. Application to Gibraltar: If adopted, the Decisions will apply to Gibraltar.
13. Fundamental rights analysis: These proposals in themselves have no direct impact on fundamental rights issues. However, where States accede to the Convention, there is a direct impact on the rights to family life. The availability of the Convention, if properly operated, leads to greater legal certainty that (i) rights of residence relating to a child will be respected when that child is taken to a Contracting State and, (ii) where such rights are not respected, that the child will be returned to the State of his or her habitual residence (where, if necessary, the issue of residence and contact can be litigated). This is just as important to the child in question as it is to the parents or guardians of that child – and in many circumstances, more so.
14. Articles 7 and 9 of the UN Convention on the Rights of the Child recognise, respectively, the right of the child to know and be cared for by his or her parents; and the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.
15. Article 24(3) of the EU Charter on Fundamental Rights – rights of the child – provides that each child has a right to maintain a personal relationship with both parents.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

16. None.

SUBSIDIARITY

17. Pursuant to Opinion 1/13 of the CJEU, this falls under the exclusive competence of the EU (Article 3(2) of the TFEU). Therefore, the subsidiarity principle does not apply.

POLICY IMPLICATIONS (including Exit implications where appropriate)

18. On 23 June 2016, the EU referendum was held and the people of the United Kingdom voted to leave the European Union. The Government respected the result and triggered Article 50 of the Treaty on European Union on 29 March 2017 to begin the process of exit. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will also continue to negotiate, implement and apply EU legislation.

19. The Government supports, in principle, the extension of the Convention to as many States as possible, provided that they can fully comply with their ensuing obligations. The Convention has proved itself an effective tool in the resolution of international child abduction cases between State Parties.

20. Prior to accepting a State's accession, the Government must be satisfied that the State concerned will be able to operate the Convention effectively. The Government notes that the Commission's proposals rely on the information concerning the level of implementation of the Convention by the acceding States gathered by the EU Delegations, Member States and Permanent Bureau of The Hague Conference on Private International Law using previously agreed criteria. The UK has already accepted five of the accession States named in these proposals.

21. The Government proposes to agree to these proposals, including accepting the accession of the Dominican Republic to the Convention.

22. Given that it is the Government's position that the Title V opt-in protocol applies to these proposals presented to the Council in English on 9 July, the eight-week period before which the Government will not make a decision on whether to opt-in expires on 3 September.

CONSULTATION

23. The Government has positively assessed the suitability of the acceptance of the accession of the Dominican Republic in consultation with the British Embassy in Santo Domingo, which sought expert views.

24. The three Central Authorities in the UK which implement the Convention are the International Child Abduction and Contact Centre for England and Wales, the Scottish Government, and the Northern Ireland Courts and Tribunals Service. The Convention also extends to the British Overseas Territories of Anguilla, Bermuda, Cayman Islands, Falkland Islands and Montserrat, and Crown Dependencies the Isle of Man and Jersey. None of these has expressed any concern to the Foreign and Commonwealth Office regarding the operation of the Convention in Belarus, the Dominican Republic, Ecuador, Honduras, Ukraine and Uzbekistan.

IMPACT ASSESSMENT

25. These proposals have no regulatory impact.

FINANCIAL IMPLICATIONS

26. No significant financial implications arise from these proposals. The existing central authorities will handle all relevant cases.

TIMETABLE

27. It is possible that the proposals will be adopted under the Austrian Presidency, in December 2018.

A handwritten signature in black ink that reads "Alan Duncan". The signature is written in a cursive style with a large initial 'A' and a long, sweeping tail on the 'n'.

Rt Hon Sir Alan Duncan KCMG MP
Minister for Europe
Foreign and Commonwealth Office