Ministry of Justice

The Right Honourable
David Gauke MP
Lord Chancellor & Secretary of State for Justice

Sir William Cash MP
European Scrutiny Committee
House of Commons
London
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17 July 2018

Dear Bill

Document 10767/16: Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast)

Sir Oliver Heald QC last wrote to you about this proposal on 13 October 2016.

Given the time that has passed since then I thought your Committee would appreciate an update on the negotiations. Progress on this very technical proposal has been steady but slow. Although the Commission issuing its proposal two years ago, for some parts of the text the working group has only recently been considering the first Presidency redrafting suggestions. Despite that, the incoming Austrian Presidency hopes to make as much progress as possible with the ambition of achieving adoption by the end of the year.

In this letter I will give an update on each of the six areas of the proposal as set out in the Explanatory Memorandum.

Procedures supplementing the 1980 Hague Convention regarding abducted children
There has been much detailed discussion of how to re-formulate these key provisions of the Regulation, in part to achieve certain substantive changes, and in part to clarify the aim of other provisions. A UK suggested redraft is providing the basis of further discussions (Articles 26(1)–(4)).

A further achievement of the UK in this context has been to confirm with the Commission that its original proposal for a re-formulation of the well-known 'override' provision (which allows a custody judgment from the state of habitual residence of an abducted child to 'override' a non-return order from the state of abduction) created new obligations for courts when this was not the intention and would be objectionable on subsidiarity grounds. Work continues, however, on how to re-formulate the provision so as to avoid this effect (Article 26(4)).

There has been general support for the principle of clearer deadlines for each stage of the procedure to reduce delays, although the exact deadlines and how these will work have yet to be agreed. Most delegations recognise the benefit of concentration of jurisdiction (Article 22) to ensure that courts build up expertise in dealing with such cases, but a number of delegations have shared our concerns, on subsidiarity grounds, to including an obligation in the Regulation. We wait to see how the Presidency suggests taking this forward.

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On the question of whether there should be a limit to one appeal (Article 25), there is consensus that only an 'ordinary appeal', as it is known in civil law countries, should be available against the decision ordering or refusing the return of the child. That will not preclude challenges on human rights and constitutional grounds. This is subject to our insistence in the negotiations that the concept of ordinary appeal needs to be clarified for Ireland, Cyprus and the United Kingdom, as in Article 51 of the recast Brussels I Regulation, so that any form of appeal (on factual or legal grounds) is possible.

We raised some subsidiarity concerns about requirements for courts to have to provide particular information in court judgments. One example has been deleted (Article 26(1)) but another remains for the time being (Article 10(5)).

Placement of a child in another Member State (Article 65)

This was an issue discussed at the last JHA Council where there was general support for the Commission's objective that the Regulation needs clarification as to the circumstances in which consent of the relevant authority in a Member State is required when another Member State contemplates placing a child in a foster family or institutional care in that state. This need for clarification has arisen because the current Regulation, which requires consent for such placements, is interpreted differently by Member States, in particular as to what constitutes a placement with a foster family. There is disparate interpretation in particular where a proposed placement is with a member of a child's extended family – some Member States require or seek consent in these circumstances and others do not. Discussions are ongoing, however, about how to formulate the circumstances in which consent is required. A UK suggestion that this provision should include a requirement that information on any contemplated funding for the placement was agreed.

Discussions are also ongoing about the time limit during which such consent should be given. The current Regulation has no deadline which can give rise to delays of several months which are not helpful to children and increase the risk of a breach of the 26-week statutory limit for care proceedings decisions in England and Wales. In our consultations on the proposal there was general support for such a widening of the requirement for consent.

There is also ongoing discussion, led by a small number of Member States, about the procedures that a court or other authority should undertake when considering placement of a child that has the nationality of, or a close connection to, another Member State. The concern is that children are being placed with foster families or in institutions in the state in which they are resident, when placements in other Member States with which the child has connections, including, for example, family members, should be considered. A number of proposals have been suggested which include procedures for notification and receipt of information and/or consultation.

Automatic recognition of judgments

At the December 2017 JHA Council, Ministers accepted that in principle the procedural step known as 'exequatur' should be abolished in the revised Regulation. 'Exequatur' is the procedural step that requires that a judgment from another Member State is registered before it can be recognised as valid. This step is currently required for most children judgments within the scope of the Regulation and for all divorce, judicial separation decrees etc. This step is currently not required for two categories of judgments – known as 'privileged decisions' – orders for contact with children and orders in custody decisions that entail the return of an abducted child. During the negotiations there has been a lot of discussion about what procedures and safeguards should apply once exequatur is abolished for the remaining judgments. Currently, for the privileged decisions, the opportunity for a party to challenge enforcement of the decision is essentially in the Member State where the decision and 'certificate' for enforcement is given, whereas for all the other judgments, it is in the state of enforcement.

There was some discussion about whether the new Regulation should have one method for the automatic recognition of judgments or retain a separate system for the privileged decisions. The Government, as well as a number of other Member States, thought that one system would be better for users of the Regulation but a number of Member States have insisted that a separate system for privileged decisions should be retained. Therefore, it will remain the case that for privileged decisions, the opportunity to challenge enforcement will remain in the state of origin, and for those decisions where exequatur is now to be abolished, the opportunity to challenge enforcement will remain at the stage of enforcement. The working group is now considering how best to provide a streamlined method for automatic recognition that allows different procedures for the privileged and non-privileged decisions. While this is not the Government's preferred option it believes it is acceptable and considers the safeguards for parties, which for the non-privileged decisions are based on the already agreed Brussels I recast Regulation, to be appropriate.

Hearing the child

The Commission's proposal to create a new requirement for courts or other authorities to provide an opportunity for a child to express his or her views in proceedings under the Regulation (Article 20) has received almost unanimous support from Member States, despite a number of concerns being raised by the Government. These concerns have been on several fronts. First, this provision would create a new right in EU law that would be directly enforceable in UK courts by individuals. The right would be similar to the right set out in Article 12 of the UN Convention of the Rights of the Child, but importantly, that right is not enforceable in UK courts because it has not been incorporated into UK law and the UK is a 'dualist' system, meaning it would need to be in order for individuals to have recourse to domestic courts for any breach of these rights. Second, the direct enforceability of these rights will mean that courts, including the CJEU, will interpret them and therefore potentially have effects on national law and procedure, including potentially creating uniform requirements for when and how a child is heard. Finally, even though the Regulation is meant to apply only to cross-border cases, the effect of the provision would almost certainly be that courts would apply it in domestic cases, since any domestic case can become cross-border later (e.g. if a parent moves and needs to enforce a contact decision in another Member State) and a court decision that did not comply with the Article 20 requirement might not be enforceable

As a result of our interventions, the latest text from the Presidency provides that the requirements for the process and manner by which the child should be heard need only be done in accordance with national law and procedure. This lessens the concerns the Government had in relation to the development of a possible uniform requirement to hear the child and the impact on national law and procedure, but some concerns remain. Given the level of support for this provision from other Member States, including others with 'dualist' systems, and the fact that all other Ministers at a JHA Council agreed in principle that the Regulation should include such a provision, inclusion may be inevitable. The Government intends to continue to work with the Presidency and Member States to limit the provision as far as possible, including any effect on national law.

One suggested addition to Article 20 clarifies that Member States can provide the child with the opportunity to express his or her views in ways that go beyond any minimum requirements of the right as expressed in the provision.

The Commission's policy reason for including Article 20 was to create a clear and binding requirement for hearing the child that would then enable it to remove from the Regulation the ability that courts currently have to refuse to recognise and enforce children judgments from other Member States where the court of origin had not heard the child in line with the fundamental principles of the Member State of enforcement. As mentioned in the Explanatory Memorandum, practitioners had not at the time raised concerns about the Commission's suggestion to remove the rights of courts to refuse to accept decisions on the grounds of hearing the child. Since then we have continued to hear no concerns on this point and the Government has supported the Commission's suggestion to remove this possibility for refusal to recognise or enforce children judgments. A number of Member States do not agree, however. During the negotiations we have

pointed out that including both a provision on hearing the child and a right to refuse to enforce a decision on the grounds of hearing the child will provide parties with two opportunities to challenge a decision on those grounds – once in the Member State which makes the decision, and then later in the Member State of enforcement. Several Member States have supported the UK's position but it remains to be seen what happens on this point as negotiations progress.

Enforcement of decisions

The Government continues to support action which removes obstacles to the effective enforcement of decisions. It was concerned, however, that Article 32(2) of the Commission text was, for the first time, harmonising to some extent the enforcement procedures in this area. A majority of Member States shared these concerns and this paragraph has now been removed from the text. Article 31(1) has also been amended to delete the text "in so far as it is not covered by this Regulation" so that the text states specifically and without qualification that the procedure for the enforcement of decisions given in another Member State shall be governed by the law of the Member State of enforcement. Discussions continue on if/how courts should provide reasons for enforcement action taking longer than six weeks (Article 32(4)).

The Commission had also proposed that the court competent to decide on the recognition of decisions should be the same as that which is competent for enforcement. Most Member States were against this suggestion on subsidiarity grounds so this has been removed from the text and the decision on the courts that are competent for both processes remains a matter for Member States to decide.

With regard to the proposal that provisional or protective measures ordered by a court that does not otherwise have jurisdiction under the Regulation to make such orders should be capable of enforcement in other Member States, there is ongoing discussion as to whether this should happen only in cases where a court is considering the return of an abducted child. This will mean, for example, that in cases where allegations of abuse have been made against a left behind parent and a court decides a child can be returned only where there is supervised contact with that parent, the orders of that court need to be applied by the court in the Member State to which the child is to be returned until such time as the latter court makes its own decision on the matter. This should give courts fewer reasons not to return a child and will increase protection for children who might be re-abducted to another country.

Cooperation between central authorities

Subject to a number of technical issues that are still open for discussion there has been general support for the provisions which clarify the functions of central authorities. The issue that raised the most concern was in relation to Article 61 which would have obliged Member States to ensure that central authorities had adequate resources to enable them to carry out their functions under the Regulation. Most Member States believed that such a provision was inappropriate and such matters were best left to Member States to decide. This has been removed from the text. As negotiations continue the Government will consider carefully the resource implications of each of the provisions relating to the central authorities.

The Government will provide a further update on negotiations in due course.

I am copying this letter to Lord Boswell, Chairman of the EU Select Committee; Les Saunders (Department for Exiting the EU); and Mark May, Departmental Scrutiny Co-ordinator.

Yours ever

David

RT HON DAVID GAUKE MP