



COMMISSION OF THE EUROPEAN COMMUNITIES

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2001/0204 (CNS)

Proposal for a

**COUNCIL REGULATION**

**on jurisdiction and the recognition and enforcement of judgments in matters of parental  
responsibility**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. OBJECTIVE

The European Council meeting at Tampere in October 1999 identified the area of visiting rights as a priority for judicial cooperation<sup>1</sup>. This is a response to a real social need. As people increasingly move from one Member State to another, and families break up and are recomposed, children need a secure legal environment for maintaining relations with persons who have parental responsibility over them and who may now live in different Member States.

Consider, for instance, the following scenario: Following a decision of the courts of Member State X giving custody to Child's Mother and rights of access to Child's Father, Father relocates to Member State Y. Without a guarantee that the decision will be effectively recognized and enforced in Member State Y, Mother is reluctant to let Child cross the border to visit Father. Or, Mother finally lets Child go, but having had the exercise of his rights of access frustrated, Father retains Child and seizes the courts of Member State Y to have the custody decision modified. This is an unfortunate, albeit all too common, scenario within the Community today.

The objective of Community action in this context is to protect the child's best interests, and in particular to give concrete expression to his or her fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents, as laid down in Article 24 of the Charter of Fundamental Rights of the European Union. On the one hand, the decision that structures the relations between the child and the persons having parental responsibility over him or her is by its very nature always subject to review so as to better reflect the child's best interests as his situation evolves. On the other hand, such a decision must circulate freely and its review take place (and the relations between the child and the persons having parental responsibility allowed to evolve) in an environment of legal certainty that minimizes conflict and brings about the necessary stability in the child's life. A balance must be found between ensuring that decisions always reflect the best interests of the child and allowing decisions taken in one Member State to benefit from recognition throughout the Community.

To this end, the Commission is hereby proposing to extend the principle of mutual recognition to all decisions on parental responsibility (thus allowing all children to benefit from these rules). To support the requisite mutual trust between Member States, the proposal sets up a clear and coherent set of rules for attributing jurisdiction, and a mechanism for cooperation between courts and authorities. The ultimate objective is the abolition of *exequatur* before a decision taken in one Member State can be enforced in another Member State.

At the same time, the Commission is preparing a proposal with a view to approving the 1996 Hague Convention in the same area, so as to allow this valuable international instrument to stand alongside the Community rules and address situations that transcend the boundaries of the Community.

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<sup>1</sup> Conclusions of the Tampere European Council, Point 34.

## 2. CONTEXT

This Proposal is part of ongoing work within the European Community towards the establishment of a genuine judicial area based on the principle of mutual recognition of judicial decisions<sup>2</sup>.

Its legal basis is Articles 61(c) and 67(1) of the Treaty establishing the European Community. According to Articles 61(c) and 65 of the Treaty, the Community adopts measures in the field of judicial cooperation in civil matters having cross-border implications and insofar as necessary for the proper functioning of the internal market. These measures include improving and simplifying the recognition and enforcement of decisions in civil and commercial cases. The basic instrument in this area is Council Regulation (EC) No 44/2001, which however does not apply to certain well-defined matters, including the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession<sup>3</sup>.

In the family law area, Council Regulation (EC) No 1347/2000 sets out rules on jurisdiction, automatic recognition and simplified enforcement of certain judgments issued at the time of divorce or separation<sup>4</sup>. As regards decisions on parental responsibility in particular, its scope is limited to judgments on parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. The Regulation entered into force on 1 March 2001.

Building on Council Regulation (EC) No 1347/2000, France presented on 3 July 2000 an initiative aimed at facilitating, through the abolition of *exequatur*, the exercise of cross-border rights of access in the case of children of divorced or separated couples<sup>5</sup>. To balance the direct enforceability of judgments relating to rights of access, the French initiative is premised on a guarantee that the child will return after its stay abroad.

The Justice and Home Affairs Council meeting on 30 November 2000 adopted a program for the progressive abolition of *exequatur* in four areas of work<sup>6</sup>. In area 2 the program includes at its first stage an extension of the scope of Regulation (EC) No 1347/2000 coupled with the abolition of *exequatur* for rights of access. On the same occasion, the Council concluded that work on the French initiative could proceed only in parallel with the extension of the scope of Regulation (EC)

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<sup>2</sup> Conclusions of the Tampere European Council, Point 33.

<sup>3</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16.1.2001, p. 1, Article 1(2)(a).

<sup>4</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160 of 30.6.2000, p. 19.

<sup>5</sup> Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, OJ C 234 of 15.8.2000, p. 7.

<sup>6</sup> Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12 of 15.1.2001, p. 1. The program concerns the following four areas of work: (i) Brussels I; (ii) Brussels II and family situations arising through relationships other than marriage; (iii) rights in property arising out of a matrimonial relationship and the property consequences of the separation of an unmarried couple; and (iv) wills and succession. In the third (and final) stage of the program, the *exequatur* is abolished in all four areas.

No 1347/2000. This will guarantee equality of treatment for all children, thus taking into account social realities, such as the diversification of family structures.

To pave the way forward, the Commission presented on 27 March 2001 a working document on the mutual recognition of decisions on parental responsibility. The document sets out a number of preliminary considerations for the extension of the scope of Regulation (EC) No 1347/2000, the corresponding rules on jurisdiction and a number of related issues.

As a follow-up to the working document, a public hearing was held on 27 June 2001.

In the light of the responses from Member States and from other interested parties that took part in the hearing, the Commission is hereby proposing a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility. The Proposal completes Regulation (EC) No 1347/2000 in improving the free circulation of all decisions on parental responsibility based on a set of common rules on jurisdiction that must be laid down at Community level and on reinforced cooperation between authorities. The Proposal does not go beyond what is necessary to achieve the objective of simplifying the recognition and enforcement of decisions on parental responsibility, and thus meets the requirements of subsidiarity and proportionality set out in Article 5 of the Treaty establishing the European Community. Read together with the French initiative for abolishing *exequatur* for decisions on rights of access, they implement the first stage of area 2 of the program of mutual recognition.

### **3. ARTICLES**

#### Chapter I – Scope and definitions

##### Article 1 – Scope

The Proposal covers the same type of proceedings before the same type of authorities as Regulation (EC) No 1347/2000. The term ‘civil proceedings’ thus encompasses not only judicial but also administrative proceedings where available under national law.

The difference lies in severing the link with the matrimonial proceedings that is made in Article 1 of Regulation (EC) No 1347/2000, thus covering all decisions on parental responsibility over a child irrespective of his or her family situation.

The Proposal does not apply to Denmark, in conformity with the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community. As regards Ireland and the United Kingdom, they may exercise their opt-in within three months, in conformity with the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and the Treaty establishing the European Community.

## Article 2 – ‘Holder of parental responsibility’

A definition is provided for the term ‘holder of parental responsibility’ to include the natural and legal persons having parental responsibility over a child by judgment or by operation of law. According to Article 13, paragraph 3 of Regulation (EC) No 1347/2000, the term ‘judgment’ refers not only to judicial and administrative decisions but also to authentic instruments and settlements approved by court. The term ‘holder of parental responsibility’ is then used in Articles 4, 5, 6, 13 and 17 (where his consent is required for the court to assume jurisdiction, or where he has the right to ask for the transfer of the case or for the assistance of a central authority).

Admittedly national laws differ considerably as to the possible holders of parental responsibility (ranging from the child’s parents, to other members of the child’s family, to third persons). The Commission considers that any concerns surrounding the enforcement of decisions granting parental responsibility to persons who would not be so entitled under the law of the Member State of enforcement may be better addressed when abolishing *exequatur* for rights of access.

### *‘Parental responsibility’*

A definition of ‘parental responsibility’ is not given, but it is expected that a certain convergence will develop through the case law of the Court of Justice. In addition, a whereas clause specifies that the term includes rights of access and excludes maintenance obligations, the latter being covered by Regulation (EC) No 44/2001. To maintain the coherence between the two instruments, consideration should be given to amending Article 5(2) of Regulation (EC) No 44/2001 for the purpose of ensuring that a court has jurisdiction in matters related maintenance in all cases where these are ancillary to proceedings concerning matters of parental responsibility.

It may be necessary to also provide a ‘black list’ of measures taken in ‘civil proceedings’ but too closely connected to the exercise of public authority (for instance, relating to the placement of a child in an institution) for their inclusion in the scope of the Regulation to be justified. The Commission has opted not to restrict the Proposal in this sense and to let Member States put forth any concerns they may have under their national laws.

### *Applicable law*

The law to be applied in determining who are the holders of parental responsibility is left at the discretion of the court seized. In assessing whether a child’s removal or retention is wrongful, Article 5 refers to the law of the Member State of the child’s habitual residence immediately before such removal or retention. As a general matter, the program of mutual recognition does not prejudge the question of applicable law. Although this proposal does not include provisions on applicable law (neither did Regulation (EC) No 1347/2000), the Commission considers that the role that the harmonization of choice of law rules both on divorce and on parental responsibility could play in facilitating mutual recognition merits further reflection.

## Chapter II – Jurisdiction

With a view to enhancing legal certainty, the Proposal sets up a complete system of bases of jurisdiction aiming at avoiding conflicts of competence, that has to a large extent been inspired by the corresponding rules of the 1996 Hague Convention<sup>7</sup>. The basic ground of the child's habitual residence (Article 3) is qualified in certain cases of a change in the child's habitual residence or pursuant to an agreement between the holders of parental responsibility (Articles 4, 5 and 6) and a flexibility mechanism is also provided (Article 13). The aim is to attribute jurisdiction in all cases in a way that serves the best interests of the child.

Clearly, the basic rule on jurisdiction (Article 3) applies only where the child concerned is habitually resident within the Community. But, Articles 4-6 apply irrespective of the child's habitual residence being within or outside the Community. The same is true for the exercise of residual jurisdiction under national law pursuant to Article 8. At the same time, the Community is considering the approval of the 1996 Hague Convention. This approval would not affect the application of rules adopted at Community level to children habitually resident within the Community. However, the rules on jurisdiction set out in the Convention would take precedence over Community rules where the child concerned is not resident within the Community and is resident in a Contracting Party to the Convention which is not a Member State.

### Section I

#### Article 3 – General jurisdiction

As in the 1996 Hague Convention, jurisdiction is based in the first place on the child's habitual residence. This means that, where a child's habitual residence changes, the courts of the Member State of his or her new habitual residence shall have jurisdiction.

In line with customary practice within the Hague Conference where the concept of 'habitual residence' has been developed, the term is not defined, but is instead a question of fact to be appreciated by the judge in each case. However, it is expected that a certain convergence will develop through the case law of the Court of Justice.

Given that a child's habitual residence may change instantaneously or through an unlawful action, there are situations where the best interests of the child would be served if the courts of the Member State of the child's former habitual residence continue to exercise jurisdiction. These situations are addressed in Articles 4 and 5.

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<sup>7</sup> XXXIV. *Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children* (concluded October 19, 1996). The Convention has not yet entered into force.

#### Article 4 – Continuing jurisdiction of the Member State of last judgment

Article 4 provides that jurisdiction may remain for some time with the Member State that issued the last judgment if the child has only recently moved to his new habitual residence while one of the holders of parental responsibility continues to reside in the Member State of the last judgment. The aim is to allow for some continuity, without nonetheless touching on the definition of the term ‘habitual residence’. Moreover, the modification of its earlier judgment to reflect the change in the child’s situation is made by the court that is closest to the child at the time of the relocation. At the same time, the holder of parental responsibility who is left behind is relieved from having to bring the case in an unfamiliar setting, unless he chooses to avail himself of this possibility. And once six months have elapsed, jurisdiction shifts to the courts of the child’s habitual residence as the place that is now closest to the child.

Consider, for instance, the following case: A decision issued in Member State X gives custody of Child to Mother and access rights to Father every other weekend, all three residing in X. Mother decides to relocate with Child to Member State Y, and the decision will have to be modified as it is no longer practical for Father to see Child every other weekend. Even if, under the terms of the existing decision, it is not necessary to do this before relocating, Article 4 still allows Father to seize the courts in X for this purpose. The courts in Y must decline jurisdiction for six months after relocation, unless Father accepts their jurisdiction.

Three conditions must be met for the application of this Article: the child must have not resided in the State of his new habitual residence for a period longer than six months (paragraph a); one of the holders of parental responsibility must still reside in the Member State of the last judgment (paragraph b); and this person must have not accepted the jurisdiction of the courts of the Member State of the child’s habitual residence (paragraph c).

#### Article 5 – Child abduction

The fact that jurisdiction automatically follows a change in the child’s habitual residence also presents the risk of the use of force to establish artificial jurisdictional links with a view to obtaining custody of a child.

At the international level, the 1980 Hague Convention on child abduction aims at the restoration of the status quo by means of the prompt return of children wrongfully removed or retained<sup>8</sup>. A child’s removal or retention is deemed wrongful where in breach of rights of custody that were actually exercised. At the same time, the Convention recognizes the need for a limited number of exceptions to the obligation to return the child, including where there is a grave risk that return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation (Article 13(b)). The implications for jurisdiction are that, following a child abduction, the new habitual residence would not assume jurisdiction unless a decision has been taken not to return the child, or an application for the child’s return has not been lodged within reasonable time.

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<sup>8</sup> XXVIII. *Convention on the civil aspects of international child abduction* (concluded October 25, 1980). The Convention is in force in all Member States.

Within the Community, on the one hand, this new de facto situation created by a child abduction should produce its effects on jurisdiction where this situation has been accepted by all holders of parental responsibility (for instance, when no application for the return of the child is lodged). On the other hand, the Commission considers that there is no justification in a common judicial area for a permanent transfer of jurisdiction in any other situation, such as an Article 13(b)-type case. In fact, the 1980 Hague Convention encourages Contracting Parties to further limit the exceptions to return set out therein or to apply other instruments for the purpose of facilitating return<sup>9</sup>.

Consider the following solution within the Community: On the basis of a decision given in Member State X, Mother residing in Member State X has rights of custody and Father residing in Member State Y has rights of access. During a visit of Child to Member State Y it appears that Child is at risk. Father would then apply in Member State Y for provisional measures to protect the child, and within one month go before the courts of Member State X to have the custody decision modified. In all cases, the courts of Member State X where the child lives will have the ultimate say. This means that, should they consider the allegations of risk as unfounded, then the provisional measures in Member State Y would cease to apply and Child would be returned. In that case, the central authorities of the two Member States would cooperate in taking any necessary measures of protection to accompany Child's return.

This solution is premised on a level of trust inherent in a common judicial area that the courts of another Member State can equally protect the child. To facilitate judicial cooperation, a number of mechanisms are being put in place that would allow, for instance, taking evidence from the child in Member State Y to be used by the courts of Member State X<sup>10</sup>. The fact that the decision on the substance of the matter would always be taken by the courts having jurisdiction as to it, is expected to produce a deterrent effect, in that child abductors would no longer be tempted to use such methods to bring about a change in the court having jurisdiction. The same considerations have informed the provisions on return in the French initiative on rights of access.

Paragraph 1 lays down the general rule, also found in Article 4 of Regulation (EC) No 1347/2000, that courts should exercise their jurisdiction in conformity with the 1980 Hague Convention. Paragraph 2 allows the courts of the child's new habitual residence to assume jurisdiction only if all holders of parental responsibility have accepted the situation. Paragraph 3 is the necessary corollary to paragraph 2 and requires the courts to order the child's return where they cannot assume jurisdiction pursuant to paragraph 2 and without prejudice to any provisional measures they may take pursuant to Article 9. Paragraph 4 defines 'wrongful removal or retention' as in the 1980 Hague Convention.

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<sup>9</sup> See Articles 34 and 36 of the 1980 Hague Convention.

<sup>10</sup> See Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174 of 27.6.2001, p. 1.



### Article 6 – Prorogation of jurisdiction

This Article allows for an agreement between all holders of parental responsibility to bring the case before the courts of a Member State where the child has a substantial connection. This solution aims at promoting agreement, even if only on the court that should hear the case. The court seized would still have the discretion to assess whether its assuming jurisdiction is in the best interests of the child.

The jurisdiction of the divorce court as provided in Article 3, paragraph 2 of Regulation (EC) No 1347/2000 may be considered as a special case of prorogation of jurisdiction under the terms of Article 6. By way of example, other possible fora may include the Member State of the habitual residence of one of the holders of parental responsibility, or the Member State of a former habitual residence of the child.

### Article 7 – Jurisdiction based on the child’s presence

This Article provides that where a child’s habitual residence cannot be established, then the Member State of the child’s presence shall by default assume jurisdiction. This situation may arise in respect of refugee children, but also where the courts of one Member State consider that the child has lost his habitual residence while the courts of another Member State consider that the conditions for acquiring a new habitual residence are not yet fulfilled.

To prevent any abuses in its application, this Article has been given a subsidiary role in relation to Articles 3-6 (that is, it would apply only if no court of a Member State can assume jurisdiction pursuant to these Articles).

### Article 8 – Residual jurisdiction

The residual application of national law is foreseen where no court of a Member State has jurisdiction pursuant to Articles 3-7. These cases would in most instances concern children who have a substantial connection with but are not habitually resident in a Member State. Of course, approval of the 1996 Hague Convention would preclude the exercise of jurisdiction over children who have their habitual residence in another Contracting Party to the Convention unless this is in conformity to the rules of the Convention, for instance through application of its Articles 8 and 9.

As in Regulation (EC) No 1347/2000, a decision based on residual jurisdiction would benefit from the same regime for its recognition and enforcement in all other Member States.

### Article 9 – Jurisdiction to take provisional measures to protect the child

In urgent cases, the courts of the Member State where the child is present should be able to take the necessary measures to protect the child.

However, care should be exercised that these measures are not maintained indefinitely, thus effectively preventing the courts having jurisdiction as to the substance of the matter from being able to exercise it in practice. It is therefore proposed that first, these measures will cease to apply unless proceedings are instituted before the courts having jurisdiction as to the substance of the matter within one month, and second, that these measures may then be overruled by a decision (at first instance) of the court having jurisdiction as to the substance of the matter.

It is important that courts cooperate directly or through the central authorities (for instance, in taking evidence) with respect to such measures.

#### Article 10 – Jurisdiction to organize the exercise of parental responsibility

A distinction must be drawn between decisions on attributing rights of parental responsibility and decisions on organizing their exercise. In the latter case the courts of the Member State where these rights are exercised should have some leeway to make the necessary practical arrangements, to the extent that these are not foreseen in the original decision.

Again care should be exercised not to modify the substance of the decision. To prevent any such abuse, paragraph 3 provides that the courts having jurisdiction as to the substance of the matter may then overrule these practical arrangements.

It is important that courts cooperate directly or through the central authorities in relation to this Article.

## Section II

#### Articles 11 and 12 – Examination as to jurisdiction and admissibility

As in Articles 9 and 10 of Regulation (EC) No 1347/2000, the court issuing a decision is responsible for examining that it has jurisdiction and that the rights of defense have been respected.

#### Article 13 – Transfer to a court better placed to hear the case

The rules on jurisdiction in Section I have been structured with a view to putting into place a complete and rational system that serves the best interests of the child. Still, there may be situations (albeit exceptional) where the courts of another Member State would be better placed to hear the case. A provision that would allow the transfer of a case has thus been included both to recognize and to further promote the mutual trust that has been developing between Member States in the area of judicial cooperation. A similar mechanism for the transfer of cases is foreseen in the 1996 Hague Convention.

The system proposed here is less open-ended and based on criteria better tailored to the Community context. It is emphasized that this Article should apply only in exceptional circumstances. The requisite connection to the Member State to which the case may be transferred is based on the child having a former habitual residence in that Member State, or one of the holders of parental responsibility having his or her habitual residence in that Member State. Moreover, the transfer must be requested by a holder of parental responsibility, and cannot therefore be made on the court's own initiative. An additional safeguard is the evaluation of the court proposing the transfer as well as the court accepting the transfer that this is in the best interests of the child.

Further consideration should be given to the possibilities for making a direct court-to-court transfer and exchange of views. To the extent that this is not possible, the central authorities would have an important role to play.

#### Article 14 – *Lis pendens*

A *lis pendens* rule is provided, where cases involving matters of parental responsibility over the same child are pending before courts in different Member States. However, it is expected that this rule will not be used often, as the jurisdictional regime of the Regulation is not structured on the basis of alternative grounds of jurisdiction.

### Chapter III – Recognition and enforcement

#### Article 15

This Article refers to the regime set out in Regulation (EC) No 1347/2000.

The Member States will communicate to the Commission the relevant information for purposes of Annexes I to III of Regulation (EC) No 1347/2000 (courts and redress procedures), to be published in the Official Journal. Also, the certificate in Annex V of Regulation (EC) No 1347/2000 should be modified using the comitology procedure provided therein, so as to include all holders of parental responsibility (in section 3), as well as a short description of their rights and obligations.

### Chapter IV – Cooperation between central authorities

#### Articles 16-18

A system of cooperation between central authorities is an essential element of the Proposal's architecture.

Central authorities may have a general information/coordination function, as well as take action in specific cases.

In the first place, as members of the European Judicial Network<sup>11</sup>, the central authorities will work on an information system and discuss issues of common interest and their methods of coordination. It is also possible to use the structures of the network to convene meetings of the central authorities.

Most importantly, central authorities are expected to assume an active (and pro-active) role for the purpose of ensuring the effective exercise of parental responsibility in specific cases, within the limits placed on their action by national law. Their activities include the support of the enforcement of decisions (including the return of the child), as well as the promotion of mediation, whose importance was emphasized by the Justice and Home Affairs Council meeting of 30 November 2000. One cannot be too prescriptive here, but only encourage the development of a culture of close cooperation, which may usefully build on existing cooperation mechanisms, for instance between the authorities designated under the 1980 Hague Convention.

## Chapter V – General, transitional and final provisions

### Article 19 – Relationship with Council Regulation (EC) No 1347/2000

The objective being the extension of the scope of Regulation (EC) No 1347/2000, this Article aims nonetheless at enhancing legal certainty by providing that the provisions of this Regulation should take precedence over the corresponding provisions of Regulation (EC) No 1347/2000. Consideration should be given to bringing together the provisions of this Regulation, the corresponding provisions of Regulation (EC) No 1347/2000, as well as the French initiative on rights of access for the purpose of enabling judges and practitioners to work on the basis of a single instrument.

### Article 20 – Member States with two or more legal systems

This Article essentially reproduces Article 41 of Regulation (EC) No 1347/2000.

### Article 21 – Transitional provisions

The same approach as that in Article 42 of Regulation (EC) No 1347/2000 will also allow for the application of this Regulation in certain cases where proceedings were instituted before its entry into force.

### Article 22 – Lists of central authorities, courts and redress procedures

On the basis of the information communicated by Member States, the Commission will keep the contact information of central authorities up to date and make this information publicly available.

Member States will also communicate to the Commission the list of courts and redress procedures in Annexes I to III of Regulation (EC) No 1347/2000 within three months of its entry into force, to allow for their publication in the Official Journal well before the Regulation becomes applicable.

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<sup>11</sup> Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ L 174, 27.6.2001, p. 25.

### Article 23 – Committee

This Article refers to the committee instituted by Article 45 of Regulation (EC) No 1347/2000.

### Article 24 – Entry into force

It is foreseen that the Regulation will apply one year after its publication in the Official Journal. However, Article 22 will apply twenty days following its publication in the Official Journal, since Member States will have the obligation to communicate the information indicated therein within three months.

Proposal for a

**COUNCIL REGULATION**

**on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission<sup>12</sup>,

Having regard to the opinion of the European Parliament<sup>13</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>14</sup>,

Whereas:

- (1) The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.
- (2) The Tampere European Council has endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area.
- (3) Council Regulation (EC) No 1347/2000 sets out rules on jurisdiction, automatic recognition and simplified enforcement of judgments in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings.
- (4) On 30 November 2000 the Council and the Commission adopted a program for the implementation of the principle of mutual recognition of decisions in civil and commercial matters. This program includes at its first stage the extension of the scope of Regulation (EC) No 1347/2000 coupled with a specific project for the abolition of *exequatur* for rights of access.

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<sup>12</sup> OJ C ...

<sup>13</sup> OJ C ...

<sup>14</sup> OJ C ...

- (5) This Regulation respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the fundamental rights of the child as recognized in Article 24 of the Charter of Fundamental Rights of the European Union.
- (6) In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including rights of access and excluding maintenance obligations; the latter are covered by Regulation (EC) No 44/2001.
- (7) The grounds of jurisdiction accepted in this Regulation are shaped in the light of the best interests of the child. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's habitual residence or pursuant to an agreement between the holders of parental responsibility.
- (8) In particular in cases of a child's wrongful removal or retention, the courts of the Member State where the child has been removed or is retained should be able to take the necessary measures to protect the child, but then refer the case to the courts having jurisdiction for a decision on the substance.
- (9) The rules on jurisdiction should not preclude measures in the Member State where the child is present for the purpose of protecting the child in urgent cases, or organizing the exercise of parental responsibility. However, the courts of the Member State having jurisdiction as to the substance of the matter should have the final say, including the possibility to overrule such measures.
- (10) Decisions are recognized and enforced in accordance with the regime set out in Regulation (EC) No 1347/2000.
- (11) Cooperation between central authorities is vital in this context both as a general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes.
- (12) In accordance with Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>15</sup>, measures for the implementation of this Regulation should be adopted by use of the advisory procedure provided for in Article 3 of that Decision.
- (13) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty establishing the European Community, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation does not go beyond what is necessary to achieve those objectives.

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<sup>15</sup> OJ L 184, 17.7.1999, p. 23.

- (14) [The United Kingdom and Ireland, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, are not participating in the adoption of this Regulation, and are therefore not bound by it nor subject to its application.] / [The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.]
- (15) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

HAS ADOPTED THIS REGULATION:

CHAPTER I

**SCOPE AND DEFINITIONS**

*Article 1*

*Scope*

1. This Regulation shall apply to all civil proceedings relating to parental responsibility.
2. Other proceedings officially recognized in a Member State shall be regarded as equivalent to judicial proceedings. The term ‘court’ shall cover all the authorities with jurisdiction in these matters in the Member States.
3. In this Regulation, the term ‘Member State’ shall mean all Member States with the exception of Denmark[, Ireland and the United Kingdom].

*Article 2*

*Holder of parental responsibility*

For purposes of this Regulation, the term ‘holder of parental responsibility’ shall mean any natural or legal person having parental responsibility over a child by judgment or by operation of law.



## CHAPTER II

### JURISDICTION

#### SECTION I

##### *Article 3* *General jurisdiction*

Without prejudice to Articles 4, 5 and 6, the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized.

##### *Article 4* *Continuing jurisdiction of the Member State of the last judgment*

The courts of the Member State where the last judgment on parental responsibility over a child was issued in conformity with Articles 3-8 of this Regulation shall continue to have jurisdiction where:

- (a) the child has resided in the State of his or her habitual residence for a period of less than six months at the time the court is seized; and
- (b) one of the holders of parental responsibility is habitually resident in the Member State of the last judgment; unless
- (c) the child is habitually resident in another Member State, and the holder of parental responsibility referred to in subparagraph (b) has accepted the jurisdiction of the courts of the Member State of the child's habitual residence.

##### *Article 5* *Child abduction*

1. The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.
2. Notwithstanding paragraph 1, in case of a wrongful removal or retention of a child, the courts of the Member State in which the child was habitually resident immediately before the removal or retention shall continue to have jurisdiction until the child has acquired a habitual residence in another State, and

- (a) each holder of parental responsibility has acquiesced in the removal or retention; or
  - (b) the child has resided in that other State for a period of at least one year after the holder of parental responsibility has or should have had knowledge of the whereabouts of the child, no request for return has been lodged within that period, and the child is settled in his or her new environment.
3. Notwithstanding the exceptions to the obligation to return the child provided in the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, in case of wrongful removal or retention of a child, and on the basis of an application by a holder of parental responsibility or by a central authority, the courts of the Member State to which the child has been removed or is retained shall order the immediate return of the child to the Member State that continues to have jurisdiction pursuant to paragraph 2, without prejudice to any provisional measures under Article 9 they may consider necessary.
4. A child's removal or retention shall be considered wrongful where:
- (a) it is in breach of rights of parental responsibility by judgment or by operation of law under the law of the Member State where the child was habitually resident immediately before the removal or retention; and
  - (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

*Article 6*  
*Prorogation of jurisdiction*

1. The courts of a Member State shall have jurisdiction where:
- (a) Article 3, paragraph 2 of Council Regulation (EC) No 1347/2000 applies; or
  - (b) jurisdiction has been accepted by all holders of parental responsibility, the child has a substantial connection with that Member State, and jurisdiction is in the best interests of the child.
2. For purposes of paragraph 1, subparagraph b, the holders of parental responsibility shall be deemed to have accepted the court's jurisdiction if they appear before that court, unless appearance was entered for the sole purpose of contesting the court's jurisdiction.

*Article 7*  
*Jurisdiction based on the child's presence*

Where a child's habitual residence cannot be established and no court of a Member State has jurisdiction pursuant to Articles 3-6, the courts of the Member State where the child is present shall have jurisdiction in matters of parental responsibility over the child.

*Article 8*  
*Residual jurisdiction*

Where no court of a Member State has jurisdiction pursuant to Articles 3-7, jurisdiction shall be determined, in each Member State, by the laws of that State.

*Article 9*  
*Jurisdiction to take provisional measures to protect the child*

1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional measures to protect a child present in that Member State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.
2. The courts of the Member State where the child is present shall prescribe a time period during which the courts of a Member State having jurisdiction as to the substance of the matter must be seized; otherwise, the measures shall cease to apply. This time period shall not exceed one month.
3. For the purposes of the preceding paragraph, a court shall be deemed to be seized:
  - (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or
  - (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.
4. These measures shall cease to apply when the courts of a Member State having jurisdiction as to the substance of the matter issue a judgment pursuant to paragraph 2.

*Article 10*  
*Jurisdiction to organize the exercise of parental responsibility*

1. The provisions of this Regulation shall not prevent the courts of the Member State where parental responsibility is exercised or enforcement of a judgment is sought from having jurisdiction solely for the purpose of making practical arrangements for organizing the exercise of parental responsibility, if the necessary arrangements have not been made in the judgment of the Member State having jurisdiction as to the substance of the matter.
2. Under no circumstances may a judgment on the substance of the matter be issued.
3. These practical arrangements shall cease to apply pursuant to a later judgment by the courts of the Member State having jurisdiction as to the substance of the matter.

4. For purposes of this Article, the central authority of the Member State where parental responsibility is exercised or enforcement of a judgment is sought, designated pursuant to Article 16, shall cooperate closely with the central authority of the Member State having jurisdiction as to the substance of the matter.

## SECTION II

### *Article 11 Examination as to jurisdiction*

Where a court of a Member State is seized of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

### *Article 12 Examination as to admissibility*

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defense, or that all necessary steps have been taken to this end.
2. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.
3. Where the provisions of Council Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

### *Article 13 Transfer to a court better placed to hear the case*

1. On the basis of an application by a holder of parental responsibility, the courts of a Member State having jurisdiction as to the substance of the matter may, in exceptional circumstances where this is in the best interests of the child, transfer the case to the courts of another Member State of the former habitual residence of the child or of the habitual residence of a holder of parental responsibility.
2. To this end, they shall stay the proceedings and prescribe a time period during which the courts of that Member State must be seized.

3. The courts of that Member State may, where this is in the best interests of the child, accept jurisdiction during the time period set in paragraph 2. In this case, the court first seized shall decline jurisdiction.
4. The courts shall cooperate closely for the purpose of facilitating the transfer and for exchanging views on the case, either directly or through the central authorities.

*Article 14*  
*Lis pendens*

1. Where proceedings involving matters of parental responsibility over the same child are brought before courts of different Member States, the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
2. Where the jurisdiction of the court first seized is established, the court second seized shall decline jurisdiction in favor of that court. In that case, the party who brought the relevant action before the court second seized may bring that action before the court first seized.
3. A court shall be deemed to be seized:
  - (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or
  - (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

CHAPTER III

**RECOGNITION AND ENFORCEMENT**

*Article 15*

1. A judgment given in a Member State shall be recognized and enforced in the other Member States in accordance with the relevant provisions in Chapter III of Regulation (EC) No 1347/2000.
2. Annexes I-III of Regulation (EC) No 1347/2000 shall be completed pursuant to Article 22 of this Regulation.
3. Any amendment to Annex V for purposes of this Regulation shall be adopted in accordance with the procedure set out in Article 23(2).

## CHAPTER IV

### COOPERATION BETWEEN CENTRAL AUTHORITIES

#### *Article 16* *Designation*

1. Each Member State shall designate a central authority to assist with the application of the Regulation.
2. In addition to the central authority designated pursuant to paragraph 1, a Member State where two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units may designate one authority for each territorial unit and specify their territorial competence. In these cases, communications may be sent either directly to the territorially competent authority, or to the central authority, which shall be responsible for forwarding them to the territorially competent authority and informing the sender thereof.

#### *Article 17* *Functions*

1. The central authorities shall establish an information system on national laws and procedures and take measures for improving the application of this Regulation and strengthening their cooperation, using the European Judicial Network in civil and commercial matters for this purpose.
2. The central authorities shall cooperate on specific cases for the purpose of ensuring the effective exercise of rights of parental responsibility over a child. To this end, and in accordance with their laws, they shall:
  - (a) exchange information on the situation of the child;
  - (b) take action to support the enforcement of decisions on their territory, including decisions ordering the return of the child pursuant to Article 5, paragraph 3;
  - (c) take the measures of protection they consider necessary, where these measures cannot be taken in the Member State having jurisdiction, or initiate proceedings to this end;
  - (d) recommend to the authority of the Member State having jurisdiction or where the child is present to take the measures of protection they consider necessary or to initiate proceedings to this end;
  - (e) promote agreement between holders of parental responsibility through mediation or other means, and organize cross-border cooperation to this end.

3. A holder of parental responsibility may submit a request for assistance to the central authority of the Member State of his habitual residence, or to the central authority of the Member State where the child is habitually resident or present. If the request for assistance makes reference to a judgment given pursuant to this Regulation, the holder of parental responsibility shall attach the certificate in Annex V of Regulation (EC) No 1347/2000 to the request.

*Article 18*  
*Meetings*

The Commission shall convene meetings of central authorities, using the European Judicial Network in civil and commercial matters.

CHAPTER V

**GENERAL, TRANSITIONAL AND FINAL PROVISIONS**

*Article 19*  
*Relationship with Council Regulation (EC) No 1347/2000*

This Regulation shall take precedence over Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

*Article 20*  
*Member States with two or more legal systems*

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

- (a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
- (b) any reference to nationality, or in the case of the United Kingdom "domicile", shall refer to the territorial unit designated by the law of that State;
- (c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;
- (d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

*Article 21*  
*Transitional provisions*

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements that have been approved by a court in the course of proceedings after its entry into force.
2. Judgments given after the date of entry into force of this Regulation in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Chapter III if jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

*Article 22*  
*Lists of central authorities, courts and redress procedures*

1. Member States shall communicate to the Commission within three months following the entry into force of this Regulation:
  - (a) the names and addresses of the central authorities pursuant to Article 16, and the technical means and languages accepted for communications between authorities;
  - (b) the lists of courts and redress procedures set out in Annexes I to III of Regulation (EC) No 1347/2000.
2. Member States shall communicate to the Commission any changes to this information.
3. The Commission shall make the information under paragraph 1(a) publicly available. The Commission shall publish the information under paragraph 1(b) in the *Official Journal of the European Communities*.

*Article 23*  
*Committee*

1. The Commission shall be assisted by the committee instituted by Article 45 of Regulation (EC) No 1347/2000.
2. Where reference is made to this paragraph, the advisory procedure laid down in Article 3 of Decision 1999/468/EC shall apply, in compliance with Article 7(3) thereof.



*Article 24*  
*Entry into force*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

The Regulation shall apply one year after its publication in the *Official Journal of the European Communities*, with the exception of Article 22, which shall apply on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

*For the Council*  
*The President*