

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.11.2001
COM(2001) 680 final

Proposal for a

COUNCIL DECISION

authorizing the Member States to sign in the interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention)

(presented by the Commission)

EXPLANATORY MEMORANDUM

Objective

1. The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention) was concluded on 19 October 1996 within the Hague Conference on Private International Law. Although now falling partly under Community competence, the Convention does not allow for accession by the Community.

2. It is widely recognized that the Convention would make a valuable contribution to the protection of children in situations that transcend the boundaries of the Community and thus usefully complement existing and future Community rules in the same area. Therefore, the Commission is hereby proposing that the Council exceptionally authorize those Member States bound by Community rules in the same area to sign the Convention in the interest of the Community.

3. With a view to safeguarding the development of a common judicial area within the Community, this authorization is subject to making a declaration when signing the Convention, and to opening negotiations for Community accession as soon as possible.

Development of a common judicial area within the Community

4. The European Community has set the objective of creating a genuine judicial area based on the principle of mutual recognition of judicial decisions. The European Council meeting at Tampere in October 1999 called for decisions to be automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. To this end, the Council and the Commission adopted in December 2000 a program of measures for the progressive abolition of *exequatur* in four areas of work.[1]

5. As regards decisions on parental responsibility, which fall within area II of the program of mutual recognition, Council Regulation 1347/2000 (the Brussels II Regulation) already provides for the mutual recognition of certain judgments issued at the time of divorce or separation.[2] Furthermore, the first stage of the program of mutual recognition in the family law area consists of an extension to the areas not covered by the Brussels II Regulation, as well as a specific project on rights of access. As regards the former, the Commission presented on 6 September 2001 a Proposal for a Regulation that extends the principle of mutual recognition to all

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1 *Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters*, OJ 2001 C12/1.

2 *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 2000 L160/19. The Regulation 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.

decisions on parental responsibility.[3] As regards the latter, the Council is pursuing its examination of the French initiative on rights of access presented in July 2000.[4]

6. The long-term objective is to abolish *exequatur* for all decisions on parental responsibility on the basis of a clear and coherent set of rules on jurisdiction.

The 1996 Hague Convention

7. The 1996 Hague Convention lays down rules on jurisdiction, applicable law, recognition and enforcement of measures on parental responsibility and protection of children. The Convention is based in the first place on the jurisdiction of the Contracting State of the habitual residence of the child. The competent authority will in principle apply its internal law, and may transfer the case to a court better placed to hear it. Judgments benefit from automatic recognition, and Contracting States must provide a simple and rapid *exequatur* procedure. A mechanism is also set out for cooperation between authorities.

8. The Convention was concluded on 19 October 1996 within the framework of the Hague Conference of Private International Law and has not yet entered into force. The Community is not a member of The Hague Conference for the time being. The Commission did not participate in these negotiations, although it attended them as an observer. The Convention does not allow for accession other than by States. To date the Netherlands are the only Member State to have signed (but not ratified) the Convention.

9. In fact, in accordance with the AETR case law of the Court of Justice on external competence, Member States are no longer free to approve on their own the Convention, as its provisions on jurisdiction and enforcement affect the common rules of Regulation 1347/2000. Therefore, competence is shared between the Community and the Member States.

10. The relationship between the rules contained in the Convention and existing and future Community rules is set out in Article 52 of the Convention, which states:

"(1) This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

(3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.

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3 *Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility*, COM (2001) 505 final.

4 *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 2000 C234/7.

(4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned."

11. One should however note that these paragraphs were not drafted in view of a possible interplay with Community rules. In fact, although consultations took place at the time for the purpose of ensuring consistency between the 1996 Hague Convention and the Brussels II Convention concluded in 1998 (after which the Brussels II Regulation was subsequently tailored), this was before the transfer of the area of judicial cooperation to the first pillar and the development of Community policy in the area of parental responsibility. As a result, and while paragraph 2 was drafted with a view to avoid conflict with the then Brussels II Convention, the application of paragraphs 2, 3 and 4 to the Community context is a matter which needs to be addressed[5].

Clarification of the limits the Convention places on Community action

12. For the purpose of applying Article 52 of the Convention to the Community context, paragraphs 2 and 3 can be read together with paragraph 4 by assimilating Community acts to international agreements. There are, however, two issues that need to be clarified in this context.

13. First, paragraph 2 would allow the Community to act in respect of children habitually resident in one of the Member States. *A contrario*, it might thus appear that the Community would not be allowed to act in respect of children who are habitually resident outside the Community.

14. However, this cannot be the correct interpretation of paragraph 2 read together with paragraph 4. This is because any limitation placed on Community action can only relate to children who are not resident in one of the Member States, but who are resident in another Contracting State. A different interpretation would go beyond the scope of the Convention. It would also lead to the absurd result that the Community and its Member States could no longer enter into an international agreement with a State that is not Party to the 1996 Convention in respect of children resident in that State. To the extent that a Member State could no longer enter into such an agreement on its own (such agreements now falling at least partly under Community competence), this interpretation would preclude any international solution for the protection of these children (apart from accession of their State of habitual residence to the Convention).

15. Second, as already indicated, the application of Article 52 to the Community context rests on assimilating Community acts to international agreements. However, it should be clarified that any limitation on Community action cannot possibly concern the legislative activity of the Community. In other words, as each Member State remains free to legislate with respect to non-resident children, so should the Community legislator in an area of Community competence benefit from the same freedom to adopt secondary legislation with respect to non-resident children.

16. In the light of these considerations, the Commission considers that the only rational interpretation of Article 52, as applied to the Community context, is as follows: in

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[5] Paragraph 1 is not relevant for present purposes, as it refers to agreements existing (or legislation adopted) before the conclusion of the Convention (that is, before 1996).

respect of children who are not resident in a Member State and who are resident in another Contracting State, the rules of the Convention take precedence over Community rules (if any).

17. To dispel any doubts as to this interpretation and thus enhance legal certainty, it is proposed that Member States make a declaration when signing the Convention aimed at clarifying the limits placed on Community action when applying Article 52 to the Community context.

Safeguarding the application of Community rules on recognition and enforcement

18. As discussed, Article 52 should properly be read to give precedence to the rules of the Convention over Community rules in respect of children who are not resident in a Member State but who are resident in another Contracting State.[6]

19. Admittedly, with respect to rules on jurisdiction, this approach is justified as part of the balance that had to be struck when attributing jurisdiction among Contracting States. It is in fact an essential function of the Convention to attribute jurisdiction among Contracting States. There can therefore be no question as to the rules of the Convention on jurisdiction taking precedence over Community rules in respect of children who are not resident in a Member State but who are resident in another Contracting State.

20. As regards the rules on recognition and enforcement, a number of different considerations are at play.

21. The application of the rules of the Convention, rather than Community rules, for the recognition and enforcement of a decision taken in one Member State in another Member State, even if only in a limited number of cases, would frustrate the full implementation of the program of mutual recognition.[7] The very essence of the program of mutual recognition is that all decisions taken in one Member State can freely circulate within the Community under a common set of rules, which are to be progressively simplified until *exequatur* is abolished. It is worth noting that, under existing Community instruments, these common rules on recognition and enforcement apply irrespective of whether the rules on jurisdiction are established at Community level or by reference to national law.[8] It is therefore imperative to find a

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6 Similarly, the Community legislator recognizes in Article 37 of Council Regulation (EC) 1347/2000 that the Regulation takes precedence over the Convention "provided that the child concerned is habitually resident in a Member State".

7 For example, a Member State Party to the Convention could take a decision on parental responsibility over a child that is habitually resident in another Contracting Party that is not a Member State, on the basis of Article 10 of the Convention (jurisdiction of the divorce court) or Articles 8 and 9 (transfer of a case to a court better placed to hear it). Given the habitual residence of the child in another Contracting State, this decision taken in one Member State would then be recognised and enforced in another Member State not under the Community rules but under the rules of the Convention. This would mean that the decision would be subject to review as to its jurisdictional basis under the rules of the Convention, whereas the application of the regime of Regulation (EC) No 1347/2000 would have precluded such review. And the discrepancies between the two regimes would be further exacerbated in the future when *exequatur* will have been abolished between Member States, while some decisions would still remain subject to the regime set out in the Convention.

8 For instance, the rules on recognition and enforcement of Council Regulation (EC) 1347/2000 also apply where jurisdiction is established under national law pursuant to Article 8. Similarly, the rules on recognition and enforcement of Council Regulation (EC) 44/2001 apply where the defendant is not

solution that would allow the circulation within the Community under Community rules on recognition and enforcement of all decisions taken under the Convention in a Member State. This is particularly important in view of the abolition of *exequatur*.

22. Such a solution may not be difficult to tailor, as it is fully in line with the objective of the Convention to facilitate recognition and enforcement of judgments, while the grounds for non-recognition set out there in are not mandatory.[9] Hence the application of Community rules that further limit the grounds of non-recognition and simplify enforcement between Member States would make a contribution to the objectives of the Convention.

23. In the light of the above considerations, the Community should open negotiations within the Hague Conference as soon as possible for a two-fold purpose. First, to safeguard the application of Community rules in all cases involving the recognition and enforcement of decisions rendered in one Member State in another Member State. Second, to allow for Community accession, not only because this is the institutionally sound solution but also for purposes of demonstrating to the rest of the world the value that the Community attaches to this Convention.

Proposal of the Commission

24. The Commission has taken note of the favorable opinion expressed by the Member States that negotiated the Convention as to its value in the protection of children, and their urging for Community action that would allow its entry into force without any delay.

25. Clearly, the final objective is for the Community to accede to the Convention. To this end, the Community will open negotiations as soon as possible for accession and for safeguarding the development of a common judicial area, which requires that all decisions taken in one Member State can circulate within the Community under a common set of rules.

26. In the meantime, given that the Convention today allows accession only by States, the Commission is hereby proposing that the Council authorize the Member States bound by Community rules in this area to sign the Convention in the interest of the Community.

27. This derogation to the normal way of exercising Community competence under Article 300 of the Treaty establishing the European Community can be exceptionally justified on the basis of the value of the Convention for the protection of children and the need to ensure that it enters into force as soon as possible. This decision should nonetheless remain exceptional, and not constitute in any way a precedent for the future.

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domiciled in a Member State and jurisdiction is established under national law pursuant to Article 4. Similarly, a primary consideration in on-ongoing negotiations on international Conventions is to safeguard as between Member States the application of Community rules on recognition and enforcement by means of a disconnection clause.

[9] Article 23 of the Convention provides for automatic recognition and sets out a number of grounds on which recognition may be refused. Article 26 requires Contracting States to apply a simple and rapid procedure to the declaration of enforceability or registration, which may only be refused on the same grounds.

28. At the same time, Member States should make a declaration at the time of signature for the purpose of clarifying the limits placed by the Convention on Community action, as discussed in paragraphs 12-17 above.

29. The present decision will thus allow Member States to make all necessary preparations for ratification without any further delay. In addition, arrangements for joint signature may be envisaged for the purpose of signaling to the rest of the world the value that the Community attaches to the Convention. This decision will be followed by another decision for the ratification of the Convention.

30. In accordance with the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not bound by Regulation 1347/2000 nor subject to its application. As a result, Denmark is free to decide whether to approve the 1996 Hague Convention. However, the duty of cooperation enshrined in Article 10 of the Treaty establishing the European Community translates into a duty to consult on this matter with the other Member States in the Council.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61 point c), 67 paragraph 1 and Article 300 thereof,

Having regard to the proposal from the Commission[10],

Whereas:

(1) The European Community is working towards the establishment of a common judicial area based on the principle of mutual recognition of judicial decisions.

(2) The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children concluded on 19 October 1996 on the occasion of the Hague Conference on private international law makes a valuable contribution to the protection of children at the international level, and is therefore desirable that its provisions be applied as soon as possible.

(3) Competence to approve the Convention lies partly with the Community and partly with the Member States.

(4) The Convention does not allow for accession by the Community.

(5) For the purpose of safeguarding the development of a common judicial area within the Community, the limits placed by the Convention on Community action must be clarified.

(6) This decision will be followed by another decision to deal with the issue of ratification.

(7) The Community shall seek, as soon as possible, to negotiate a protocol for accession and for safeguarding the application of Community rules on recognition and enforcement within the Community.

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[10] OJ C , , p. .

HAS ADOPTED THIS DECISION:

Article 1

The Council hereby authorizes the Member States to sign the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, concluded on 19 October 1996 subject to making the declaration in the Annex to the present Decision and subject to its conclusion at a later date.

Article 2

This Decision is addressed to the Member States, except Denmark.

Done at Brussels,

For the Council
The President

ANNEX

Declaration

When signing the Convention, the Member States shall make the following declaration:

"The Member States of the European Community have been authorized in the interest of the Community to express their consent to be bound by the provisions of the Convention that fall under the competence of the Community. As a result, in conformity with Article 52 of the Convention, the Convention shall take precedence over Community rules in respect of children who are not habitually resident in a Member State and who are habitually resident in another Contracting State.

As soon as possible, the necessary steps will be taken to open negotiations for a protocol to the Convention that would allow for the accession of the Community and would safeguard the application of Community rules for the recognition and enforcement of a decision taken in one Member State in another Member State.

For purposes of this declaration, the term 'Member States' refers to the Member States of the European Community bound by common rules in the areas covered by the Convention."