International and European Social Policy

Opinion of the German Association on the Proposal of the European Commission for a recast of Council Regulation (EC) No. 2201/2003 of 27th November 2003 on jurisdiction, the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (Brussels IIa)

This opinion (DV 25/16) was passed by the Executive Committee of the German Association in a circulation procedure on 26th August 2016.

Deutscher Verein
für öffentliche
und private Fürsorge e.V.

Content

With its draft proposal for revision of Council Regulation (EC) No. 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (Brussels IIa Regulation), the European Commission submitted a completely new version of this Regulation. Its objective is to protect the best interests of the child by expediting and simplifying cross-border custody and access procedures as well as simplifying the enforcement of relevant judgments, to shorten return procedures after child abduction, and clearer regulations for cross-border placement of minors. In order to achieve these goals, also the rules on cross-border cooperation have been developed further.

Basic remarks

The German Association welcomes the plan to further simplify and shorten cross-border procedures concerning parental responsibility. To a large extent, this seems to have been successful.

The German Association welcomes the Commission's goal to shape the rules on custody and access as well as child abduction procedures in such a way that the procedures will quickly and easily result in a clarification. This goal is in the best interests of the children. However, there are some reservations, particularly about the abolishment of *perpetuatio fori* (see 2.3 below). In some cases, the amendments may ultimately have little implications; in other cases, necessary clarification is missing. In the opinion of the German Association, there are an increasing number of constellations in which the element of "habitual residence" (HR) is hardly applicable anymore. More and more often, two different places have to be identified as being the child's "habitual residence". In particular, small children are commuting with their mother or father between two different places; many children have two different care systems. It would be desirable to add a number of terms to the list of definitions in Article 2 RP, e.g. the term of "interested person".

The German Association explicitly welcomes the detailed presentation of the rules on the cooperation of authorities and courts. However, it would be useful to point out even more clearly the scope of application of those rules (see 2.14 below).

The German Association also welcomes the reformation of the rules on placement of a child in another country. However, it has to be stated that the procedure applied until now, which has been very unclear and hard to put into practice, will now be converted into a very strictly regulated procedure, which in practice might turn out to be too strict and therefore not achieve its purpose. After all, the goal of the regulation is to ensure the protection of minors who are in a particularly difficult situation. In view of the many-faceted character of civil court procedures and youth welfare measures, different paths are possible and practicable in this field, which should not be unnecessarily be impaired by too narrow rules.

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What is missing in the Proposal are plausible and detailed statements on the reasons for the amendments. Therefore, it is hard to read and the objectives and reasons for the amendments are sometimes difficult to understand. In some cases, the desired objective of an amendment can only be taken from accompanying texts, such as the fact sheet on the Proposal which has also been published by the Commission.[1]

By the way, the correctness of the translation is sometimes questionable. There are several passages where the English and the German version have different meanings, such as in Article 21 (1) of the Proposal, where it results in two completely different statements. It has not been possible to check this in detail. In view of this, this Opinion has to be presented with the proviso of possible misunderstandings due to the language.

In this Opinion, the German Association comments only on selected parts of the Proposal. Insofar as it is useful for reasons of context, relevant recitals are dealt with together with the relevant regulations.

2. Selected regulation areas of the Commission's Proposal

2.1 Article 2 No. 9 RP

The German Association welcomes the insertion of no. 9, which makes clear that the holder of parental responsibility, within the meaning of the Regulation, can be not only a person but also "any institution or other body". In the past, ISS German Branch in the German Association received information about a considerable number of difficulties, in particular, concerning the recognition of official guardians' right to act.

2.2 Article 7 (1) sentence 2 RP – Recital 15

The German Association recommends that *perpetuatio fori* should be maintained even in case that the child has lawfully changed his or her habitual residence. It is true that this would bring about uniformity with the regulations of the Hague Convention on the Protection of Children (henceforth referred to as 1996 Convention). However, the *perpetuatio fori* rule has proved successful, for several reasons:

In its counselling work, ISS German Branch is frequently confronted with cases where a mother or father with sole custody leaves Germany together with the child and moves with the child to another country while proceedings for joint custody are pending in Germany. The way things are at the moment, *perpetuatio fori* applies for proceedings already pending, with the result that the proceedings can be continued and finalized and the court decision will take effect also at the child's present place of residence, and the situation will become clear. This would no longer be possible under the new regulation. So the new regulation may have undesirable effects: on the one hand, mothers would be

1 https://ec.europa.eu/germany/news/eu-kommission-will-kinder-bei-trennung-der-eltern-besser-sch%C3%BCtzen_de

more inclined to evade the proceedings by moving abroad; and more fathers would see the necessity to go to court at an early stage, which might often result in escalation of relationship conflicts between the parents.

Another useful scope of application of the *perpetuatio fori* are those cases where child protection proceedings are pending and the parents decide to move to another country in order to avoid protection measures by the youth welfare office or court. Under the new regulation, it would no longer be possible to finalize the proceedings with a court decision to be recognized in the other country.

Likewise, there is no provision for a transfer of these proceedings to a court in the other country; the applicability of former Article 15 – now 14 RP – will most probably not be possible in this regard because there is no international jurisdiction. Instead, the proceedings would have to be terminated; the new competent authorities would have to be informed, who would first of all have to get an idea of the situation and possibly initiate new proceedings. Such a delay would not be in the best interests of the child.

Also the argument of maintaining proximity to the child, which is mentioned in recital 15, could turn out to be against the best interests of the child unless the proceedings which are already pending, instead of being suspended because of loss of jurisdiction, would be transferred through an orderly procedure to the court which now has jurisdiction.

By the way, this regulation contradicts the Commission's objective of simplifying and expediting the procedure. In fact, as a result of the necessary clarifications and new initiation of proceedings, there will be a loss of time as well as additional costs.

2.3 Article 10 (3) RP

The headline and wording of paragraph 3 b) suggest that a choice of court would be possible irrespective of divorce proceedings and, in particular, irrespective of the habitual residence, and at any time. This means that the logics of the Regulation would be definitely shifted, as the Regulation was just intended to prevent that the parents, at any time, from their negotiating position, would be able to choose the place of jurisdiction for issues concerning parental responsibility. To avoid misunderstandings, the former version of the Regulation (Article 12 paragraph 3) should be maintained.

2.4 Article 12 RP – Recital no. 17

We also greatly welcome the clearer formulation that the authorities of the State where the child is present can, in urgent cases, order provisional measures for the protection of the child (formerly Article 20). Now, within the meaning of Recital no. 17, those measures shall be effective also in the State which has jurisdiction over the substance of the matter, and they shall apply until the State of habitual residence has taken the measures it considers appropriate.

This provision is helpful for all cases concerning return of a child to the State which has jurisdiction over the substance of the matter. It might certainly gain special practical importance for proceedings under the Hague Convention on the Civil Aspects of International Child Abduction (1980 Convention) with regard to arrangements for the time after the child's return to the State which has jurisdiction.

2.5 Article 20 RP – Recitals no. 23 and 24

The new provision on the hearing of the child's views in proceedings concerning parental responsibility is absolutely to be welcomed. Up to now, there had just been a few remarks contained in the rules on child abduction, recognition and enforcement. However, the restraint in formulating more definitely how and by whom the child should be heard is understandable in view of the EU competence rules. Because of the extremely different rules of each Member State about the hearing of the child, there will be, now as before, a certain ambiguity about the minimum requirements and their verifiability. In the recitals mentioned above, there are some valuable clues on basic rules and the possible cross-border handling (by means of Council Regulation (EC) on the Taking of Evidence). Moreover, the German Association proposes to continue advertising internationally for the "hearing by a judge", its benefits and feasibility.

2.6 The chapter on child abduction

The German Association greatly welcomes the new version of the rules on implementation of proceedings under the Hague Child Abduction Convention in a separate chapter and several articles on the different segments of the procedure, which had formerly been combined in Article 11. This was very complex and unclear.

2.6.1 Article 21 RP

Please note that the German translation of this article causes a problem: In the English version, it is stated that the following articles apply if an application is filed for the return of a child; the German version gives the impression as if those articles should apply only in case of a decision in favour of the child's return.

2.6.2 Article 22 RP – Recital no. 26

The German Association welcomes the concentration of jurisdiction laid down in this article. In the experience of ISS German Branch/German Association, concentration as well as the specialization resulting from it has a positive effect on the procedures. By pooling such applications, it is also easier to facilitate professional exchange between the judges. The option of locating jurisdiction at the place of the court of appeal, as suggested in recital no. 26, would be a good solution, at least for the larger States.

2.6.3 Article 23 RP – Recitals no. 27 and 28

2.6.3.1 Article 23 (1) / Article 63 (1g) RP

The German Association absolutely welcomes the effort to further expedite the procedure under the Hague Child Abduction Convention by defining the time limit for each instance to make its decision. According to Recital no. 27 as well as Article 63 (1g) RP, the Central Authorities are, quite rightly, not exempted from this rule. However, a Central Authority can have only limited control over meeting the deadline in actual practice because usually interaction is necessary between the two Central Authorities and the applicant – and possibly even further authorities if e.g. documents have to be obtained. For Germany, where the number of incoming applications is relatively low (174 in 2015) it should be considered if legal aid should always be granted without having to meet any further preconditions, in order to expedite the procedure under the Hague Child Abduction Convention.

2.6.3.2 Article 23 (2)

Basically the German Association welcomes the efforts to find amicable solutions even when a procedure under the Hague Convention has already started. It is true that not every case can be solved in this way. But it should be examined whether it would be possible. However, the German Association suggests that instead of the term "Mediation" in this article as well as in recital no. 28, it would be more appropriate to use the term "alternative conflict resolution possibilities". On the one hand, the English term is much more open, comprising any kind of arbitration; on the other hand, it would comprize a wider range of available means.

Moreover, the German Association suggests that the possibility of a mediation costs subsidy should be considered in the revision of the German rules later on. In other States, such provisions have already been initiated. This, too, will enhance mediation in return procedures under the Hague Convention. In Germany, up to now there have only been research projects, e.g. the BIGFAM project for Berlin (Berlin Initiative for "supported family mediation"), which includes mediation costs subsidy.

2.6.4 Article 25 RP – Recital no. 29

The German Association welcomes the formulation in this article of the rules for the court's having to deal with return obstacles. Nevertheless, the provision in paragraph 3 that a return order can be declared provisionally enforceable already by the court of first instance may be problematic. Instead, the German Association proposes to grant this possibility only to the appellate court.

2.6.5 Article 26 (1) RP – Recital no. 30

The German Association welcomes the provision that in a decision to refuse the child's return, the court must explicitly specify the rule on which the refusal is

based. This helps to clarify if it will be possible to initiate the further procedural step due to the custody regulation overruling this decision. In the past, it was not always clearly recognizable whether the refusal of the child's return was based on an obstacle according to Article 13 Hague Child Abduction Convention, thus opening up the further procedural step according to Article 11 (6) to (8), or whether it was based on other reasons.

2.6.6 Article 26 (4) RP

The German Association welcomes this rule, which is definitely clearer as compared to the former provision of Article 11 (8). It is particularly appreciated that the new rule provides that the court, when making its decision, explicitly has to deal with the reasons which had been stated against the child's return. At the same time, however, the German Association deems it right that a decision which after such examination leads to a custody settlement and a decision for the child's return, shall be enforceable in every Member State.

2.7 Article 27 RP – Recital no. 31

The German Association welcomes the deletion of the adjective "special" in paragraphs 1 and 2. This seems to be necessary for clarification because it had caused considerable confusion in the past, as it was sometimes assumed that no "special" but the "general" recognition procedure rules of the Member State should apply so that after all, a recognition procedure was required.

2.8 Article 28 RP

Equally, the new formulation of Article 28 (1), by avoiding the term "recognition", will help to reduce misunderstandings concerning the necessity of a recognition procedure.

2.9 Article 35 RP

The German Association recommends that this rule should be specified even more accurately. In particular, in paragraph 1, a deadline should be specified between service of the certificate according to Article 53 and the enforcement as such. The deadline should be long enough at least to make it possible to lodge an appeal. With the present version of this article, an interval of just a few minutes would at least be imaginable.

2.10 Article 38 RP

The German Association suggests that the term of "interested party" used in Article 38 should be defined more precisely, either in a recital or in Article 2.

2.11 Article 42 RP

The recitals do not provide any explanation of the reasons for this regulation. But one could imagine e.g. the case that a parent would evade the enforcement of a decision according to Article 26 (4) by fleeing to another Member State, in which he or she would not take up residence. For the case of paragraph 3, the German Association suggests that it should be clarified, for cases that the parent has no postal address or authorized representative, how the enforcement respectively service of the documents required for it would nevertheless be possible.

2.12 Article 48 RP

The German Association basically welcomes the enforceability of provisional measures. However, it would be good to describe more in detail the minimum requirements which have to be met for considering the requirement of having the respondent heard as being fulfilled. The present wording of "measures ordered by an authority without the respondent being summoned to appear" seems to be very vague.

2.13 Chapter V RP – Recital no. 44

The German Association appreciates the elaboration of the rules on cooperation between Central Authorities. This had been too scanty in the present version of the Regulation and had often caused uncertainties or refusal to cooperate with authorities because the legal reason for the request had not been evident. However, the communication described in this chapter borders on the functions of child and youth services. E.g. in the context of custody and access proceedings, the Central Authority will turn to the child welfare authorities to ask them for cooperation – which in Germany is required on the basis of "participation of the youth welfare office" according to Section 50 SGB VIII (Child and Youth Services Act). Therefore, for the implementation of the Regulation, it would be advisable to carefully evaluate the German regulations, especially the competence rules laid down in the IntFamRGV (Act to Implement Certain Legal Instruments in the Field of International Family Law) and in SGB VIII. It still has to be noted that the rules on cooperation, on the one hand, can relate only to cooperation in cases ruled by the Regulation, and that this does not exclude the possibility that the competent authorities may also have recourse to other ways of communication according to national rules.

In the interest of best possible clarification of questions that may arise, the German Association therefore greatly appreciates the statement in recital 44 which says that not only the Central Authorities but also any other requesting authority can decide freely to use any other channel available. It explicitly mentions also specialized non-governmental organizations which in many Member States offer professional knowledge and possibilities of cooperation.

2.14 Article 64 (5) RP

The German Association suggests that this regulation should be checked as to its feasibility. Unlike the provisions preceding this article, it provides the option that in cases of proceedings on the right of access, the person who is seeking access will request the competent authority in his or her State of residence to gather information on his or her suitability and on the conditions under which access should be exercised. In the experience of ISS German Branch/the German Association, however, this would be extremely impracticable. In many cases, the requested authority will not accept to be competent; moreover, it is usually not informed about the legal framework of the State in which the proceedings are pending. It would be much more useful, also for this case, to channel the request, with clear questions, using suitable ways, from the court to the competent authority, via the Central Authorities or other cooperation possibilities.

2.15 Article 65 RP

This regulation has a very close connection with the field of child and youth services. Therefore, the present regulation always caused the difficulty to determine in which cases it should be applied at all, since the Regulation explicitly refers to judicial cooperation in civil matters. Therefore, we would suggest to insert a recital dealing with the delimitation of case constellations governed by civil law and those governed by public law. The recital should also include constellations of cross-border placement of minors in connection with a transfer of guardianship. The experience of ISS German Branch/German Association is that in such cases, there often is no consultation procedure at all; instead, recourse is made to the recognition of the decision on parental responsibility.

The German Association welcomes the deletion of the regulation that the consultation procedure was required only where it would be required for comparable domestic situations. In the experience of ISS German Branch/German Association, this rule could hardly be practically applied so far. Now it is replaced by an absolute consultation requirement, just like it is provided by Article 33 of the Hague Convention on the Protection of Children. Already now, the German Association expects different views in the Member States with regard to cases of kinship care placement; therefore, for the purpose of clarity, the German Association suggests that a definition of this term should be inserted in Article 2.

Paragraph (1) sentence no. 2 would suggest that the consultation must always take place via the Central Authorities. In the opinion of the German Association, on the basis of its experience in this regard, this is neither necessary nor convenient. Instead, now as before, it should be possible to use other paths, either directly or with the help of appropriate agencies. The German Association therefore suggests that paragraph 1 sentence 2 should be amended at least in such a way that the Member States can choose the form of transmission which they deem convenient for them. Thus it would be possible, in the interest of the minors concerned, to determine the path which is necessary in the individual case and which is most time-saving. Because we always have to bear in mind

that those decisions are about children who are in a difficult situation already, for whom durable solutions have to be found without unnecessary delay.

In this sense, the German Association appreciates the provision of paragraph (4) which says that the decision on the request shall be transmitted no later than two months following the receipt of the request by the requested Central Authority. In the experience of the German Association, if the procedure takes place according to the present procedural rules laid down in Sections 45-47 IntFamRVG (International Family Law Procedure Act), this deadline can usually be met. Nevertheless, the German Association misses a specific rule about the consequences if the deadline has not been met. Therefore, the German Association suggests to add to paragraph (4) a second sentence: "If, within three months following receipt of the request by the Central Authority, there has been no response in terms of a decision or by referring to proceedings still pending, the consent required in paragraph (3) shall be considered as having been given."

Furthermore, the German Association suggests to have a look at paragraph (1) with regard to the accompanying documents: paragraph (1) requires only to enclose a report on the child as well as the reasons for the proposed placement. According to recital no. 50, this is an exhaustive regulation; there is no possibility to request additional information. Although this may be in the interest of expediting the procedure, it may not always be helpful. According to the guidelines recently published by the Federal Work Group of State Youth Welfare Offices (BAGLJÄ) on "Procedures in cases of cross-border placement of children and youths in Germany",[2] much more information is needed for being able to evaluate the options in the best interests of the child, quite rightly mentioned in recital no. 51.

Furthermore, the German Association would like to point out that the recast of the Council Regulation does not contain any provisions for the case of non-compliance with the consultation requirement. In the present version of the Council Regulation in its Article 23 (g), this had been listed as one of the grounds for non-recognition. In view of the fact that this rule – in the experience of ISS German Branch/German Association – did not have any practicable consequences for child and youth services, the German Association suggests that the issue of possible consequences should be clarified among the Member States.

2 http://www.bagljae.de/downloads/125_verfahrensstandards_2016.pdf

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The German Association is funded by the Federal Ministry for Family Affairs, Senior Citizens, Women, and Youth.

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Published by:

Deutscher Verein für öffentliche und private Fürsorge e.V.
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