



BRIEFING PAPER

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Brexit: the Brussels IIa regulation – cross-border child contact cases, and child abduction

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1. Summary

On 27 October 2016, the UK Government announced it would opt into the European Commission's proposal which repeals and replaces Brussels IIa, a decision which, as the Government noted, was "notwithstanding the result of the referendum on EU membership".¹

Brussels IIa is a regulation of the European Commission that considers matrimonial matters (which are touched on in this note) and parental responsibility issues (such as rights of custody and access) across borders, and supplements the Hague Convention on international child abduction.

The status of EU law – such as the Brussels IIa regulation – in the UK after Brexit is unclear; see the Library briefing paper, [Brexit: how does the Article 50 process work?](#)

2. What is Brussels IIa and its effect on domestic law?

Brussels IIa, also known as Brussels IIR or Brussels II *bis*, is shorthand for [European Council Regulation \(EC\) No 2201/2003](#), which is entitled "Matrimonial and parental judgments: jurisdiction, recognition and enforcement".

In terms of what the regulation does:

It sets out:

- rules determining which court [i.e. which Member State] is responsible for dealing with matrimonial matters and parental responsibility in disputes involving more than one country
- rules making it easier to recognise and enforce judgments issued in one EU country in another
- a procedure to settle cases in which a parent abducts a child from one EU country and takes them to another.

It does not deal with substantive family law matters. These are the responsibility of individual EU countries.

[...]

¹ [HCWS225 27 October 2016](#)

2 Brexit: the Brussels IIa regulation – cross-border child contact cases, and child abduction

Under the Regulation, any EU country must automatically recognise judgments given in another EU country on matrimonial and parental responsibility matters [unless certain exceptions apply].²

In particular, Brussels IIa supplements certain provisions of the Hague Convention on International Child Abduction of 25 October 1980. The European Commission has published a [Practice Guide for the application of the Brussels IIa Regulation](#) which sets out how Brussels IIR complements the Hague Convention in more detail. For further information, see the Library briefing paper [International Child Abduction](#), in particular section 1.2.

3. The United Kingdom’s decision to opt into Brussels IIa

Although the United Kingdom could have opted out of Brussels IIa (under Article 3 of Protocol 21 of the Treaty on European Union, as amended by the Lisbon Treaty),³ it decided to opt into it.⁴ Brussels IIa has applied to the United Kingdom and the other EU Member States (except Denmark, which opted out) since 1 March 2005.

4. The European Commission’s decision to “recast” Brussels IIa

In a report published in June 2016 proposing a “recast” of Brussels IIa, the European Commission observed that:

Ten years after the entry into application of the Regulation, the Commission has assessed the operation of the Regulation in practice and considered necessary amendments to the instrument in its application report adopted in April 2014.

[...]

While the Regulation is overall considered to work well, the consultation of stakeholders and a number of studies have revealed several deficiencies in the current operation of the Regulation which should be remedied. Among the two areas covered by the Regulation, the matrimonial and parental responsibility matters, the latter were identified to have caused acute problems which need to be addressed urgently.

[...]

Essentially, six main shortcomings concerning parental responsibility matters could be identified: Child return procedure ... Placement of the child in another Member State ... The requirement of exequatur ... Hearing of the child... Actual enforcement of decisions ... Cooperation between the Central Authorities.⁵

² EUR-Lex, [Matrimonial and parental judgments: jurisdiction, recognition and enforcement \(Brussels IIa\) – Summary](#), webpage

³ EUR-Lex, [Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences](#), Official Journal C 326 , 26/10/2012 P. 0001 - 0390

⁴ European Commission, [Council Regulation \(EC\) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation \(EC\) No 1347/2000](#), Official Journal L338, 23/12/2003 P. 0001 – 0029, para 30

⁵ European Commission, [Proposal for a COUNCIL REGULATION on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction \(recast\)](#), COM(2016) 411 final, 30 June 2016

However, in regard to matrimonial matters there was “only limited evidence of existing problems”, perhaps because Brussels Ila has been supplemented by “three more EU instruments facilitating the handling of matrimonial matters in case of divorce of an international couple”.⁶

Taking as an example the time limits set under Brussels Ila that supplement the Hague Convention on international child abduction, at present “the court must apply the most expeditious procedures available under national law and issue a decision within six weeks of being seised with the application for return of the child. This time limit may only be exceeded if exceptional circumstances make it impossible to achieve”.⁷

The European Commission found that, in practice:

It appeared however that the immediate return of the child could not be ensured in all cases. Inefficiency of the return proceedings can be attributed to several aspects. The six-week time limit to issue a return order proved inadequate in practice since there are doubts among judges and practitioners whether the six weeks apply per instance, include appeals or even the enforcement of a return decision. In addition, the current Regulation sets no time limit for the processing of an application by the receiving Central Authority. Furthermore, problems in meeting the deadline have been attributed in particular to the lack in national law of a limitation of the number of appeals that can be brought against a return order. Delays in handling cases were also caused by a lack of specialisation of the courts dealing with return applications in several Member States.⁸

Under the recast regulations, there would be time limits set for each stage: “a separate six-week time limit would apply to the proceedings before the first instance court and the appellate court, respectively. In addition, the proposal would oblige Central Authorities to also work under a six-week time limit to receive and process the application; locate the respondent and the child; promote mediation while making sure that this does not delay the proceedings, and refer the applicant to a qualified lawyer or file the case with the court (depending on the national legal system)”. This is in contrast to the current Brussels Ila, where “no time limit exists for Central Authorities”. Under the recast, a “new 6+6+6 deadline therefore envisages a maximum period of 18 weeks for all possible stages instead of average proceedings taking up to 165 days nowadays”.

In addition, “the measures proposed include an obligation for Member States to concentrate jurisdiction for child abduction cases in a limited number of courts while respecting the structure of the legal system concerned. This would ensure that judges experienced with this very specific type of procedure would rule on the return applications”. It would also limit the number of possibilities to appeal a decision on return to one.⁹

⁶ As above, p3

⁷ European Commission, [Practice Guide for the application of the Brussels Ila Regulation](#), p56, section 4.3.5

⁸ European Commission, [Proposal for a COUNCIL REGULATION on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction \(recast\)](#), COM(2016) 411 final, 30 June 2016, p3

⁹ As above, p13

5. The UK's October 2016 announcement on its posture on Brussels IIa's replacement

In a written ministerial statement on 27 October 2016, the Minister for Courts and Justice, Sir Oliver Heald, told the House that “the Government have today decided to opt in to the European Commission’s proposal which repeals and replaces regulation 2201/2003, also known as the Brussels IIa regulation, on cross-border family matters”.

As noted above, under Protocol 21 of the EU Treaty the UK has an opt-out from matters relating to freedom, security and justice. On this occasion, the UK has decided to opt in under Article 3 of the Protocol.

The Minister stated that “notwithstanding the result of the referendum on EU membership the Government consider it is in the UK’s interests to opt in to this proposal”, explaining that:

First the UK already applies the current regulation to the benefit of UK citizens, including children, in cross-border families, and it wants to avoid the risk that, if the new regulation comes into force before the UK’s exit, and the UK has not opted in to the regulation, the existing regulation will no longer apply to the UK because it might be deemed inoperable. This might mean for a period of time no EU instrument regulates these matters for UK families even though the UK is still a member state. Secondly, even after a UK exit the regulation will affect UK citizens, principally in other member states, and it is in the UK’s interests to influence the negotiations. As a family justice measure, this proposal must be agreed by unanimity in the Council.

Sir Oliver added that “during the negotiations the Government will aim to make sure that what is agreed respects national competence, limits any impacts on domestic law and procedures and minimises any additional burdens on the courts and the authorities that will use the new regulation”.¹⁰

6. What might happen after Brexit?

In an article in *Family Law*, Nicholas Bennett, a partner at Farrer & Co, wrote that:

So far as litigation on children is concerned, little may change: the provisions of the Brussels IIA Regulation are relatively similar to those of the 1996 [Hague] Convention [on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children], to which the Union is a signatory on behalf of the Member States and which the UK is likely to apply in its domestic law after Brexit. The UK’s residual jurisdiction to hear children cases based on a child’s presence, or in very limited cases his or her British nationality, may be clarified by Parliament.¹¹

In regard to Brussels IIa and the 1980 Hague Convention on international child abduction, as noted above Brussels IIa supplements certain provisions of the Hague Convention. While the Hague Convention would continue to apply in the UK after Brexit, the additional measures that Brussels IIa provide would no longer apply.

In an article published in *Practical Law*, it was considered whether Brussels IIa might still apply in the UK after Brexit depending on whether it chose to join an existing international organisation:

¹⁰ [HCWS225 27 October 2016](#)

¹¹ [“The European family in crisis: the consequences of Brexit on English family law”](#), *Family Law*, 17 October 2016

It is too soon to predict what the impact will be on this regime [EU family law instruments, such as Brussels IIa], but if the UK joins the EEA [European Economic Area], it would in all likelihood decide to join the Lugano Convention, and therefore be under a regime similar to Brussels IIa. The EEA countries have no say on the specific provisions of Brussels IIa.

If the UK followed the WTO [World Trade Organisation] route, it would remain a party to the Hague Conventions, but it might be difficult to achieve the same level of co-operation on jurisdiction and enforcement which exists at EU level. Bilateral agreements with non-Hague countries are therefore seen as less effective in cases affecting children.¹²

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¹² ["Practical Law's Brexit summary: a watching brief"](#), *Practical Law*, 27 July 2016