

COUNCIL REGULATION (EU) 2019/1111 of June 25, 2019, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, as well as international child abduction.

It will come into force on August 1, 2022, following its adoption on June 25 by the Council of the European Union, and will replace the Brussels II bis Regulation of November 27, 2003.

This recast was expected and all the more necessary as Brussels II bis had, since its entry into force in 2008, provoked a significant litigation before the Court of Justice of the European Union. It was necessary to make the existing rules more flexible, to improve access to legal proceedings and to reinforce the efficiency of the procedures.

The new regulation now contains 98 recitals, 105 articles and 123 pages of annexes including model certificates and forms that can be used directly by the competent authorities of the Member States.

I- The contributions of the Brussels II ter Regulation in matrimonial matters

There is no substantial change in matrimonial matters.

Indeed, the following have been maintained and therefore remain unchanged

- The alternative grounds of jurisdiction (article 3), although they generate numerous cases of lis pendens;
- Residual jurisdiction, which is now contained in a single article 6 and which allows national rules of jurisdiction to be applied in a subsidiary manner;
- The rule that the spouses cannot choose the competent judge for their divorce. However, this opportunity is offered in other areas of family law such as maintenance, matrimonial property, partnership and now parental responsibility;

Obviously taking into account the Brexit, the reference to the United Kingdom and the notion of "domicile" in the Anglo-Saxon sense has been removed.

The Brussels II ter Regulation nevertheless includes some novelties, namely :

➤ **The "private divorce" without a judge**

The new regulation contains a definition of the agreement in Article 2 § 2 and 3 which could include the divorce agreement governed by Article 229-1 of the Civil Code. According to this article, the agreement is an act which is not an authentic instrument and which is registered by a public authority notified to this effect by the Member States to the Commission in accordance with the procedure of Article 103.

The new Regulation would therefore allow notaries to intervene and to be the competent authorities to register agreements.

➤ **The circulation of authentic instruments**

Brussels Ia Regulation provided for a single Article 46 concerning the circulation of authentic instruments, unlike the new Brussels Ib Regulation, which comprises a section consisting of 5 articles, namely Articles 64 to 68.

In this sense, authentic instruments and agreements relating to legal separation and divorce that have binding legal effect in the Member State of origin are recognized in the other Member States "without any special procedure being required" unless one of the grounds for refusal of recognition provided for in Article 68(1) applies. From then on, registered agreements and authentic instruments will circulate according to a certificate system (Article 103).

In practice, and as provided for in recital 70 of the Brussels II ter Regulation, authentic instruments and agreements are to be treated as decisions.

The circulation of divorce by mutual consent is thus favoured and is taken into account by the European text. However, the effects of the divorce that do not fall under the Brussels II ter Regulation will not be able to circulate within the European Union.

According to Article 64 of the Brussels II ter Regulation, authentic instruments drawn up and agreements registered must be formally established or concluded in a Member State that would have been competent under the Regulation. If this is not the case, they can circulate between Member States under national provisions.

II- Contributions of the Brussels II ter Regulation in the field of parental responsibility

➤ **The best interests of the child**

One of the main objectives of the Brussels II ter Regulation is to reinforce the protection of the fundamental rights of children.

Thus, the interests of the child are promoted 17 times in the recitals and 13 times in the articles, which is in line with article 3 of the 1989 International Convention on the Rights of the Child (CRC): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. It is regrettable, however, that the text does not specify what the best interests of the child might be.

The best interests of the child underlie the general ground of jurisdiction of the child's habitual residence (recital 20) as well as the rules on recognition and enforcement of decisions (recital 55).

The other novelty is that the Brussels II ter Regulation provides a definition of a child as "any person under the age of 18 years", thus avoiding differences in definition between Member States. This definition is reminiscent of that contained in other international law instruments relating to the protection of children, such as the CRC and the 1996 Hague Convention on the Protection of Children.

This emphasis on the best interests of the child affects the hierarchy of interests to be taken into account (parents' interests, child's interests). Thus, "the rules of jurisdiction in matters of parental responsibility are designed in accordance with the best interests of the child and should be applied with respect for those interests" (Recital 19).

➤ **The child's right to express his or her views**

While Brussels II bis mentioned the need to hear the child, but in a discreet manner and mainly in the mechanism of recognition of decisions, Brussels II ter goes further and sets out a general obligation to hear the child in all proceedings relating to parental responsibility. Indeed, there must be a "real and effective opportunity for the child to express his or her views". This same opportunity is provided for in article 26 in the context of child abduction proceedings.

Thus, Article 21 enshrines the right of the child to express his or her views, but does not specify the manner in which the child should be heard, thus leaving it to the national courts to determine the most appropriate method for the child.

Article 56 of the Regulation also provides that the enforcement of a decision may be suspended if it exposes "the child to serious physical or psychological harm as a result of temporary impediments that arose after the decision was given or any other significant change of circumstances". According to recital 69, this may take the form of a clear and strong objection by the child expressed after the decision was made.

➤ **Concerning jurisdiction**

Brussels II ter takes over the rules of Brussels II bis:

- Article 7 of the Brussels II ter Regulation provides for the jurisdiction of the child's habitual residence;
- If it is impossible to determine the place of habitual residence, Article 11 provides for a substitute jurisdiction;
- Article 15 provides for provisional and protective measures in urgent cases;
- Article 14 provides for residual jurisdiction, with recourse to national rules.

The novelties of the Brussels II ter Regulation regarding jurisdiction in matters of parental responsibility are the following:

- Article 16, which provides for "incidental questions": according to this article "if at the end of proceedings in a case falling outside the scope of this Regulation which is brought before a court of a Member State, an incidental question concerning parental responsibility arises, a court of that Member State may determine that question for the purposes of those proceedings, even if that Member State does not have jurisdiction under this Regulation". In other words, it refers to extending the jurisdiction of a court that is seized of an application the outcome of which depends on the resolution of parental responsibility.
- Parents can choose in advance the court having jurisdiction in matters of parental responsibility under Article 10. The Brussels II bis Regulation also allowed for agreement on the choice of court, but only at the time of the dispute and not in advance. The Brussels II ter Regulation now offers both possibilities:

- o Upstream;
- o During the litigation;
- o And this choice of court is now disconnected from the existence of proceedings concerning the divorce! (Recital 23 nevertheless still mentions this circumstance).

However, certain conditions must be met:

- o A close connection of the child with the chosen State;
- o The holders of parental authority have freely agreed on the jurisdiction at the latest when the court is seized or have expressly accepted the jurisdiction during the proceedings;
- o The exercise of jurisdiction is in the best interests of the child;
- o The agreement on the choice must be in writing.

The chosen court will therefore not be able to transfer its jurisdiction to another court under the rules that constitute a form of "forum non conveniens".

- Maintaining the system of transferring jurisdiction to the best-placed judge (articles 12 and 13) with the abandonment of the term "transfer" and the insertion of the word "transfer". The procedure is then divided into two articles since :

- o One relates to the transfer according to whether the transfer emanates from the court in principle competent;
- o The other relates to the transfer requested by the court that claims jurisdiction.

➤ **Recognition of decisions**

- Another innovation is the abolition of the exequatur for all decisions on parental responsibility. However, the Brussels II ter Regulation maintains the two-track system, since the recognition of so-called ordinary judgments is contained in Articles 30 et seq. and so-called privileged judgments in Articles 48 et seq. The privileged decisions concern decisions granting access rights and decisions given under Article 29 insofar as they involve a child.

The Brussels II ter Regulation maintains the difference between these two decisions but abolishes exequatur for all decisions relating to parental responsibility (Article 34§1).

In addition :

- o Concerning privileged decisions: once certified, the enforcement of the privileged decision may not be challenged in the requested State, unless the challenge concerns the rectification of a material error in the certificate itself (Article 48) or for reasons of irreconcilability with another decision (Article 50).
- o Concerning ordinary decisions: they are enforceable immediately, but they may be the subject of an application for refusal of enforcement on the basis of the various grounds of non-recognition traditionally recognized in this area.

Article 39 of Brussels II ter, on the grounds for refusal of recognition of decisions on parental responsibility, virtually reproduces Article 23 of Brussels II bis on this subject.

Paragraph 2 of this article provides that recognition of a decision on parental responsibility may be refused **if the decision was made without the child who is capable of forming his or her own views having been given the opportunity to express them**, except:

- o If the proceeding concerned only the property of the child and provided that the hearing of the child was not required by the purpose of the proceeding;
- o Or if there were serious grounds for doing so, particularly in view of the urgency of the case.

- The reinforcement of the cooperation of authorities: Chapter V provides for several provisions concerning cooperation in matters of parental responsibility, whether it be cooperation between central authorities or even in specific matters, such as the placement of children.

III- The contributions of the Brussels II ter Regulation in matters of international child abduction

The most remarkable contribution of the Brussels II ter Regulation is of course Chapter 3, which is entirely devoted to the wrongful removal of children, the Regulation also confirming the will to reinforce the operation of the 1980 Hague Convention.

The new features of the Brussels II ter Regulation are as follows:

- The emphasis is on the speed of the return proceedings, regardless of the stage of the proceedings. According to Article 24, a time limit of six weeks after the filing of the application is prescribed for each instance, unless there are "exceptional circumstances".
- Where there is a danger to the child in the event of return, the Brussels II ter Regulation now states that the applicant for return must establish that sufficient measures of protection have been taken. Indeed, Article 27(3) provides that the requested State may not refuse return if :
 - o The party requesting the return of the child assures the court, by providing sufficient evidence, that adequate arrangements have been made for the protection of the child after his or her return;
 - o The court is otherwise satisfied.

For this purpose, the court may contact the competent authorities of the Member State where the child was habitually resident.

- The Brussels II ter Regulation also introduces alternative dispute resolution in its Article 25. In this respect, the court must, as soon as possible or at any stage of the proceedings, invite the parties to consider whether they can enter into mediation or any other alternative dispute resolution procedure, unless :
 - o It is contrary to the best interests of the child ;
 - o It is not appropriate in the circumstances; or
 - o It would unduly delay the proceedings.

- The derogation mechanism allowing the court of the Member State of origin to consent to the return of the child despite a contrary decision given in the requested State is maintained. However, recourse to this derogation mechanism is only allowed when the decision of non-return has been given under Article 13(1)(b) and Article 13(2) of the 1980 Hague Convention.

The court of the child's habitual residence can only give this decision in the context of proceedings on the merits of parental responsibility, which enables it to make a stable assessment of the child's future. This reduces the risk of multiple transfers. This procedure on the merits will have taken into account all the data, such as the removal, the refusal to return, the interests of the child and the conditions of reception with the parents in the two States concerned.

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Through Brussels II ter, the European legislator has tried to find a balance between the autonomy of the parties, the need to grant flexibility to judicial and extra-judicial authorities and the protection of the fundamental rights of the child.

The new regulation therefore seems more pedagogical but also more precise and puts the best interests of the child at the heart of this recast. Moreover, it finally allows to take note of certain weaknesses or gaps which existed in the Brussels II bis Regulation.

However, if this new regulation consecrates a new autonomy of the parties in the procedures relating to children, instituting a kind of "child friendly" *ca dre* and an improvement of the rules governing the movement of children, it leaves the "forum shopping" cause of so many litigations. Future case law applications will undoubtedly shed light on this instrument.