

CHAPTER 3: International Jurisdiction in Cases of Parental Responsibility

Richard Blauwhoff and Lisette Frohn

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1. Introductory Remarks

The application of the provisions of the Regulation may sometimes appear to be complicated because of the sheer multiplicity of legal sources. In this context, the 1996 Hague Convention, next to the 1980 Hague Convention, may be considered, in certain circumstances, alongside other treaties concluded between two or more Member States. As will be addressed in greater detail in Chapter 11, the Regulation prevails over these treaties in respect of all issues falling within the substantive scope of the Regulation (see Articles 59- 62). Accordingly, whenever all the conditions for application (substantive scope, scope *ratione personae* and *ratione temporis*) are met for all legal instruments, the Regulation will have prevalence over any other source. At the same time, it should be borne in mind that international treaties will remain applicable in respect of matters that are not covered by the Regulation.¹

‘Parental responsibility’ is a multi-faceted legal concept which may not always be congruent with analogous legal concepts at the national level of the Member States or third states. Given its multi-faceted nature, it is to be expected that its interpretation will continue to generate a large number of cases which may come before the CJEU. Many of the cases which have already been heard have been decided under the expeditious procedure – PPU. However, the many questions sent to the Court have made it painstakingly clear how litigious parents can become intransigent when it comes to the perceived interest of their children.²

The rules regarding jurisdiction in matters of parental responsibility are laid down in Chapter II (Jurisdiction) Section 2 (Parental responsibility), Articles 8-15 of the Regulation. These provisions set out the rules which attribute jurisdiction to the courts of the Member State in question. However, the Regulation does not go as far as to specify which is the competent court within the Member State. This question is to be determined according to national procedural law.

The general rule is provided in Article 8(1). It takes ‘habitual residence’ as the key criterion in regulating jurisdiction under the Regulation. There are a number of exceptions to this general rule. Thus, Article 9 provides for the continued jurisdiction of the courts of the state where the child had his/her former habitual residence, but only in matters of modifying access rights and only for three months following the move. Article 10 determines jurisdiction in matters pertaining to parental responsibility. Article 11 deals with requests for the return of the child in cases of child abduction. These two provisions must be read in connection with the 1980 Hague Child Abduction Convention.³ Jurisdiction which is *not* based on the habitual residence of the child is provided for in Article 12 of the Regulation and is referred to as a ‘prorogation of jurisdiction.’ This rule offers the possibility for jurisdiction to be attributed to courts other than the courts of the state where the child has his/her habitual residence.

¹ See Article 59 for the relation with treaties concluded or to be concluded between two or more EU member States, Article 60 for the relationship with certain multilateral conventions including the 1980 Hague Child Abduction Convention and Article 61 with respect to the 1996 Hague Convention.

² Kruger and Samyn, *op. cit.*, p. 146.

³ Llerranz Ballesteros, M. ‘International Child Abduction in the European Union: the Solutions incorporated by the Council Regulation’ (2004) 34 2 *Revue générale de droit*, pp. 343 *et seq.*

The ground for jurisdiction provided in Article 13 is based on the child's mere presence within a Member State, while Article 14 incorporates a rule regarding residual jurisdiction in case no court of a Member State can be seised pursuant to Articles 8 to 13. Finally, Article 15 of the Regulation allows, again by way of an exception, for the possibility for the competent court to transfer the case to a court of another Member State if this court is 'better placed' to hear the case. These jurisdictional rules will be discussed in this Chapter.

2. Scope of Application

2.1 Substantive scope – *ratione materiae*

The substantive scope of application is defined in Article 1(1)(b) so that the Regulation applies to 'the attribution, exercise, delegation, restriction or termination of parental responsibility'. The Regulation covers parental responsibility towards *all* children, i.e. regardless of whether or not they are children of both spouses.⁴ In paragraph 2 some examples are provided as to what is included under the defined scope of matters. This is a non-exhaustive list providing only a few examples of issues pertaining to parental responsibility and which fall within the substantive scope of application. An exclusive list of matters to which the Regulation does not apply is provided in Article 1(3).⁵ Excluded are questions regarding the establishment or contesting of a parent-child relationship, decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption, the surname and first names of the child, emancipation, maintenance obligations, trusts or succession, and measures taken as a result of criminal offences committed by children.⁶ Regardless of the exclusion of such issues from its substantive scope, the term 'parental responsibility' is defined broadly in Article 2(7). It covers all rights and duties of a holder of parental responsibility relating to the person or the property of the child. This broad definition encompasses, *inter alia*, rights of custody and rights of access, matters such as guardianship and the placement of a child in a foster family or in institutional care, as well as measures for the protection of the child's property.⁷ For more detailed information, see *supra* in Chapter 1, under 3.5 'Definition of 'parental responsibility' – Article 2(7)'.

In that connection, it should be borne in mind that some of the matters excluded from the substantive scope such as maintenance⁸ and succession⁹ have already been regulated in other instruments at the EU level. It remains circumspect, of course, whether any other excluded

⁴ See Article 1(1)(b) in connection with Article 2(7) of the Brussels IIbis Regulation. See also Borrás, A., 'Lights and Shadows of Communication of Private International Law: Jurisdiction and Enforcement in family Matters with regard to Relations with Third States' in: Malatesta, A., Bariatti, S. and Pocar, F. (eds), *The External Dimension of EC Private International Law in Family and Succession Matters* (CEDAM 2008), p. 113.

⁵ Practice Guide 2015, p. 21.

⁶ *Ibid.*

⁷ *Ibid.*, p. 20. See, for example, with regard to the protection of minors in matters of succession: Bonomi & Wautelet, *Le droit européen des successions: commentaire du Règlement n 650/2012 du 4 juillet 2012* (Bruylant 2013), p. 81.

⁸ Maintenance Regulation, pp. 1-79.

⁹ Succession Regulation, pp. 107-134.

matter will in future be subject to unification under private international law rules within the EU.¹⁰

2.2 Personal scope – *ratione personae*

As for the scope of application *ratione personae*, it follows from Article 8 of the Regulation that it applies to issues of parental responsibility when a child has his/her habitual residence in the EU Member State. Accordingly, the scope of application *ratione personae* regarding the rules on jurisdiction is limited to cases where a child is habitually resident in an EU Member State.

The habitual residence of a child is irrelevant regarding the rules on the recognition and enforcement of judgments on matters of parental responsibility. Rather, the fact that a judgment is rendered by a court of an EU Member State is decisive for the application of the Regulation, just as it is in the case of matters relating to divorce, legal separation or marriage annulment. This clearly follows from Article 2(4) defining a ‘judgment’ as a decision ‘pronounced by a court of a Member State’. The same follows from Article 21, which mentions a ‘judgment given in a Member State.’ Thus, the Regulation applies to the recognition or enforcement of a judgment relating to parental responsibility if that judgment has been rendered by a court of an EU Member State regardless of the habitual residence of a child at the moment when the request for enforcement has been filed. In other words, the Regulation applies to the recognition and enforcement of judgments even if a habitual residence has lawfully been changed and when, at the moment of the request for enforcement, a child habitually resides in a third country.

2.3 Temporal scope – *ratione temporis*

Regarding the scope of application *ratione temporis*, the relevant Articles are Articles 64 and 72. This is discussed *infra* in Chapter 11, under 2 ‘*Transitional provisions and entry into force*’. In the following an overview will be given of the definitions which are particularly relevant for matters of parental responsibility. Especially the problems pointed out in the National Reports following from the lack of a definition of a ‘child’ are presented.

3. Legal definition of a ‘child’

The legal concept of a ‘child’ is not defined anywhere in the (current) Regulation. In general, from an autonomous point of view within the EU, for the purposes of the Regulation a ‘child’ is a person who is younger than 18 years of age.¹¹ This age limit is in line with the 1996 Hague Convention.¹² The age limit referred to is also in line with the age of majority in all Member states, which is also 18 years.¹³

¹⁰ Kramer, X., *et al.*, ‘A European Framework for private international law: current gaps and future perspectives’ (2012) <<http://www.europarl.europa.eu/studies>> accessed 31 October 2017>.

¹¹ Carpaneto, *op. cit.*, pp. 254 *et seq.*

¹² According to Article 2 of the 1996 Hague Convention, the convention applies to children from the moment of their birth until they reach the age of 18 years.

¹³ Althammer, C., *et al.*, *Brüssel IIa, Rom III: Kommentar zu den Verordnungen (EG) 2201/2003 und (EU) 1259/2010* (Verlag C.H. Beck 2014), Article 8, Rn. 3.

3.1 Difficulties in defining a ‘child’ – National Reports

Most National Reports indicate that there are no particular problems which stem from the absence of a definition of the term child (e.g. Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Sweden and the UK).¹⁴ These reports indicate that a child is to be understood as any person who is younger than 18 years of age. Some of the Member States, like Slovenia, refer to Article 1 of the 1989 UN Convention on the Rights of the Child.¹⁵ The Greek National Report observes that in Greek law a ‘child’ is considered to be an individual under the age of 18. For abduction cases in Greece the age of 16 is allegedly accepted as the relevant age in applying the Regulation.¹⁶

Some National Reports, on the other hand, attest to some lingering problems which may stem from definitional uncertainties. The French National Report, for instance, indicates that the lack of a definition of the concept of a child creates legal uncertainty. The Report submits that it is uncertain whether the concept of a ‘child’ differs from the concept of a ‘minor’. Further, it refers to some uncertainty regarding the question of which law applies in establishing whether a young person is a ‘child’ or a ‘minor’. According to this Report, the best solution would be to align the Regulation with the 1996 Hague Convention so that it would *not* apply to persons who are over 18 years old, except in cases where the Brussels IIbis Regulation refers to the 1980 Hague Child Abduction Convention which only applies to children under 16 years of age.¹⁷ Moreover, the Italian National Report states that, in the context of child abduction, the age of sixteen is decisive, which is also in line with the 1980 Hague Convention. The Italian National Report further indicates that the term ‘child’ does not merely refer to children who are common to both parents, but also includes the children of one parent, for example a child from a previous relationship.

Further, it is to be noted that the term ‘child’ may also apply in respect of a child who has other biological parents than his or her legal parents.¹⁸ The German National Report draws attention to the fact that, unlike the 1996 Hague Convention in Art. 2, the Regulation does not clarify that it only applies from the moment of the child’s birth.¹⁹ The Spanish National Report explains that the lack of a definition of the concept of a ‘child’ may give rise to the use of national conflict of law rules to determine whether a child is a minor or not. This may result in

¹⁴ National Report Austria, question 20; National Report Belgium, question 20; National Report Bulgaria, question 20; National Report Croatia, question 20; National Report Cyprus, question 20; National Report the Czech Republic, question 20; National Report Estonia, question 20; National Report Greece, question 20; National Report Hungary, question 20; National Report Ireland, question 20; National Report Latvia, question 20; National Report Lithuania, question 20; National Report Luxembourg, question 20; National Report Malta, question 20; National Report the Netherlands, question 20; National Report Poland, question 20; National Report Portugal, question 20; National Report Slovenia, question 20; National Report Sweden, question 20 and National Report the United Kingdom, question 20.

¹⁵ National Report Slovenia, question 20.

¹⁶ National Report Greece, question 20. The Reporter refers to the Court of Appeals of Thessaloniki 722/2003, *Armenopoulos* 2004, 1157.

¹⁷ National Report France, question 20.

¹⁸ National Report Italy, question 20.

¹⁹ National Report Germany, question 20.

the situation that a person is considered to be a minor in one Member State and an adult in another Member State.²⁰

Finally, the Romanian National Report submits that it is undisputed that the Regulation is only applicable to children who are under parental responsibility/minors. It suggests that since the age of minority is dealt with as an issue of personal status, it should be interpreted according to the substantive law assigned by the private international law of the forum (choice of law rules and *renvoi*). However, according to this National Report, some Romanian authors suggest that the courts in the Member States are allowed to refer directly to their own internal substantive provisions regarding the age of maturity.²¹

3.2 Difficulties in defining a ‘child’ – CJEU case law

This issue has so far not been specifically addressed as such in the case law of the CJEU.

4. General rule on jurisdiction based on the habitual residence of the child

4.1 Jurisdiction under Article 8 – general rule based on habitual residence

The general rule regarding jurisdiction in matters of parental responsibility²² is contained in Article 8(1). This rule determines that the courts of the Member State of the child’s habitual residence shall have jurisdiction.²³ The Preamble under 12 explains that the grounds for jurisdiction in matters of parental responsibility are shaped ‘in the best interests of the child,’ for which the most important starting point is proximity.²⁴ The underlying principle of proximity therefore extensively explains the pivotal role of habitual residence in matters of jurisdiction.

The general jurisdictional rule attributes primary responsibility to the authorities of the Member State where the child has his/her habitual residence. Proximity helps to explain why the child’s habitual residence is considered to be the most appropriate forum in matters of parental responsibility.²⁵ Moreover, habitual residence has established itself as a widely accepted criterion for jurisdiction in matters relating to children, as well as other matters in the field of family law.²⁶ Given the lack of a definition in the Regulation, which is also omitted in

²⁰ National Report Spain, question 20.

²¹ National Report Romania, question 20.

²² See Magnus/Mankowski/Borrás, *op. cit.*, Article 8, note 4-5; Shannon, G., ‘The Impact and Application of Brussels IIbis in Ireland’ in Boele-Woelki and Beilfuss, *op. cit.*, p. 150: ‘Article 8(1) of Brussels IIbis [...] is modelled on Article 5 of the 1996 Hague Convention.’

²³ Shannon, *op. cit.*, pp. 150-151.

²⁴ In the opinion of Advocate General Wahl in CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436 concerning the concept of ‘habitual residence’, the AG emphasized that jurisdiction in matters of parental responsibility is determined according to the criterion of proximity (referring to Recital (12) of the Brussels IIbis Regulation).

²⁵ See CJEU Case C-403/09 PPU *Jasna Deticek v Maurizio Sgueglia* [2009] ECR I-12193; see also the CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163; see also Stone, P., *EU Private International Law* (2nd edn., Elgar European Law 2010), p. 454: ‘[...] As was recognised by Sheehan J in *O’K v A* [2008], Article 8 eliminates any judicial discretion by the courts of the Member State in which the child is habitually residence to decline jurisdiction in favour of a supposedly more appropriate court of a non-member country’.

²⁶ Article 8(1) is similar to Article 5 of the 1996 Hague Convention. See also, for example, habitual residence as a key connecting factor regarding jurisdiction in Article 3(a) and (b) of the Maintenance Regulation and Articles 4 and 21(1) of the Succession Regulation.

the 2016 Commission's Proposal, habitual residence is likely to remain a flexible (or 'fluid') criterion. Its wide acceptance and its flexibility may help to account for habitual residence being the main jurisdictional ground for attributing jurisdiction in matters of parental responsibility.

Although this flexibility offers advantages given the variety of factors that may have to be considered, courts will also have to be rigorous in their evaluation as to whether there has been a true change of residence and whether this change is lawful.²⁷ In that connection, Honorati has suggested that the principle of the proximity of the forum to the child may override another important principle, i.e. the stability and predictability of the forum.²⁸

The concept of habitual residence has neither been defined in the Regulation,²⁹ nor in the 1996 Hague Convention. It is also not defined in any other Hague Convention for that matter. Quite innovative are Recitals 23³⁰ and 24 in the Preamble to the Succession Regulation providing some criteria as to how to determine 'habitual residence.'³¹ In a general sense, it is accepted that the interpretation of habitual residence is not to be determined by reference to any concept of habitual residence under any particular national law, but for the purposes of the Brussels IIbis Regulation and for the purposes of the law of the European Union it should be given an 'autonomous' meaning.³² In other words, the interpretation of habitual residence as a key connecting factor should at once be both autonomous and uniform throughout the European Union. In that respect, the relevant case law of the CJEU is to be taken into account. As a flexible concept, it incorporates a variety of factual circumstances that may have to be considered by a court to determine the existence of a habitual residence.³³

Article 2(11) determines that the concept of the 'wrongful removal or retention' of a child relates to the removal or retention of a child that has taken place in breach of rights of custody acquired by a judgment or by operation of law or by an agreement having legal effect under the law of 'the Member State where the child was habitually resident immediately before the removal or retention'. Further, Article 11(1) provides that the provisions of that article are

²⁷ Compare Honorati, C., 'The Commission's Proposal For A Recast Of Brussels IIa Regulation' (2017) 2 International Family Law, available at SSRN: <https://ssrn.com/abstract=2964268> or <http://dx.doi.org/10.2139/ssrn.2964268>.

²⁸ *Ibid.*

²⁹ Shannon, *op. cit.*, p.151: 'It has long been that there is no need for such a definition and that the words should bear their ordinary and natural meaning and are not a term of art.'; See further *C.M. and O.M. v Delegacion de Malaga and Others* [1999] 2 I.R. 363.

³⁰ Compare Recital 23 of the Succession Regulation: 'In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.'

³¹ Recital 12 of the Brussels IIbis Regulation.

³² Practice Guide 2015, p. 25. See also Andrae, M., *Internationales Familienrecht* (Nomos 2014), p. 399-401.

³³ Stone, *op. cit.*, p. 454: '[...] The European Court explained that [...] the concept of habitual residence must be given an autonomous and uniform interpretation, determined in the light of Recital 12, by which the grounds of jurisdiction established by the Regulation are shaped in the light of the best interests of the child and the criterion of proximity. Thus the Court's case-law relating to the concept of habitual residence in other areas of EC law cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of the Regulation.'; See also CJEU Case C-523/07 A. [2009] ECR I-2805.

to apply in cases concerning the return of a child that has been wrongfully removed to or retained in ‘a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention’. These provisions make it clear that the concept of ‘habitual residence’ constitutes a key element in applications for a return and as such they can only succeed if a child was, immediately before the alleged removal or retention, habitually resident in the Member State to which his/her return is sought.³⁴

Given that neither the Regulation nor any Hague Convention defines habitual residence, the Court has repeatedly held that the concept is to be autonomously interpreted³⁵ and, moreover, that its meaning must be uniform. Accordingly, the interpretation given to that concept in the context of Articles 8 and 10 can be transposed to Article 11(1).³⁶ The ‘habitual residence’ of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment.³⁷ Thus, in addition to the physical presence of a child in a Member State, other factors must also make it clear that that the presence is not in any way temporary or intermittent and that the child’s residence corresponds to the place which reflects such integration in a social and family environment.³⁸ Such factors include the duration, regularity, conditions and reasons for the child’s stay in the territory of a Member State and the child’s nationality.³⁹ In addition, the relevant factors vary according to the age of the child concerned.⁴⁰

As Article 8 (1) contains the general rule regarding jurisdiction in matters of parental responsibility, it is evident that there are also rules which deviate from this general norm. Thus, Article 8(2) indicates that the rule under paragraph 1 to determine jurisdiction over matters of parental responsibility is subject to the provisions of Articles 9, 10 and 12. These Articles derogate from habitual residence as the connecting factor for jurisdiction. In this chapter Articles 9 and 12 are analysed. Article 10 will be discussed *infra* in Chapter 4, under 2 ‘*Jurisdiction under Article 10*’.

The question will now be explored whether the courts in the Member States have encountered any particular difficulties in applying the rule on general jurisdiction in Article 8 of the Brussels IIbis Regulation and thereafter in its application by the CJEU. Such difficulties in relation to the general rule contained in Article 8 will be discussed in two parts with regard

³⁴ CJEU Case C-523/07 A. [2009] ECR I-2805, paras 36-39.

³⁵ This concept has to be interpreted in the light of the context of the provisions referring to that concept and the objectives of the Brussels IIbis Regulation, in particular that which is apparent from Recital 12 thereof, according to which the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular according to the criterion of proximity (see CJEU Case C-523/07 A. [2009] ECR I-2805, paras 34-35; CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, paras 44 to 46).

³⁶ CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, para 41 ; see to that effect CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268, para 54. For full details of the latter case see *infra* in Chapter 1, under 3.11.2 ‘*Difficulties in application – CJEU case law*’.

³⁷ That place must be established by the national courts, taking account of all the circumstances of fact specific to each individual case (CJEU Case C-523/07 A. [2009] ECR I-2805, paras 42 and 44; CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, para 47).

³⁸ CJEU Case C-523/07 A. [2009] ECR I-2805, para 38.

³⁹ See to that effect CJEU Case C-523/07 A. [2009] ECR I-2805, para 39.

⁴⁰ CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, para 53.

to the interpretation of ‘habitual residence’ and then with regard to adherence to the ‘*perpetuatio fori*’ principle.

4.2 Difficulties in the application of Article 8 as regards habitual residence – National Reports

Both the Austrian and Greek National Reports submit that there are no problems in applying the rule on general jurisdiction in Article 8 in spite of the lack of a definition of habitual residence.⁴¹ The Reports from Ireland⁴² and Sweden⁴³ also do not report any particular problems either in applying (and, presumably, thereby in ‘delineating’) the concept of the habitual residence of the child under Article 8. A number of National Reports (Bulgaria⁴⁴, Cyprus⁴⁵, the Czech Republic⁴⁶, Estonia⁴⁷, Germany⁴⁸, Italy⁴⁹, Lithuania⁵⁰, Malta⁵¹, Romania⁵², Spain,⁵³ and Slovenia,⁵⁴) indicate that in general the concept of habitual residence in Article 8 is defined in these Member States in accordance with relevant EU case law. Some of the courts in these Member States allegedly had to get to grips with applying the concept of habitual residence in conformity with its autonomous i.e. ‘European’ interpretation. For example, Bulgarian judicial practice has now broadly embraced the view that the child’s habitual residence depends on the habitual residence of the people who are looking after that child.⁵⁵

According to the National Report of Luxembourg, national case law refers to the concept of habitual residence found in the ‘Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition

⁴¹ National Report Austria, question 1 and question 23 and National Report Greece, question 1 and question 23.

⁴² National Report Ireland, question 1 and question 23.

⁴³ National Report Sweden, question 1 and question 23. The Swedish Report emphasises that Swedish case law and Swedish literature on the Brussels Ibis Regulation are very limited and statistics are often not available. The report refers to the decision of the Swedish Supreme Court in the case of NJA 2011 p. 499. This case concerned the habitual residence of a child who had moved, together with its mother who was its sole legal custodian, from Sweden to Indonesia. The father of the child started custody proceedings in Sweden. The court considered that, in line with the CJEU case law, no Member State had jurisdiction under Article 8 of the Brussels I Regulation. The reporter emphasizes that this decision shows that the Regulation is applicable even when the case does not involve any Member State other than that of the forum.

⁴⁴ National Report Bulgaria, question 1 and question 23.

⁴⁵ National Report Cyprus, question 1 and question 23.

⁴⁶ National Report the Czech Republic, question 1 and question 23.

⁴⁷ National Report Estonia, question 1 and question 23

⁴⁸ National Report Germany, question 1 and question 23.

⁴⁹ National Report Italy, question 1 and question 23. In the Italian report, it is observed that according to Italian literature Italian courts appear to be more careful than courts in other EU jurisdictions in evaluating the subjective requisite in establishing residence: the Italian courts require factual elements showing the intention to reside, irrespective of the time that has passed.

⁵⁰ National Report Lithuania, question 1 and question 23.

⁵¹ National Report Malta, question 1 and question 23.

⁵² National Report Romania, question 1 and question 23: the Romanian National Report reveals that there have been many cases concerning families with Romanian nationality and a habitual residence in another Member State. However, the Romanian courts relied on Article 8 and declared that there was no jurisdiction in these cases.

⁵³ National Report Spain, question 1: the Spanish report adds that in many cases the CJEU case law is not mentioned. Question 23: Another problem, according to the Reporter, is that the Spanish courts still tend to apply national rules regarding international jurisdiction instead of the Brussels Ibis Regulation.

⁵⁴ National Report Slovenia, question 1 and question 23.

⁵⁵ National Report Bulgaria, question 1 and question 23.

and Enforcement of Judgments in Matrimonial Matters’,⁵⁶ as well as the settled EU case law on habitual residence.⁵⁷ In general, the National Report suggests that the courts of Luxembourg have no difficulties in applying Article 8.⁵⁸

However, a number of National Reports do mention some problems. Thus, the National Report of Belgium suggests that the Belgian courts always take various factual circumstances into account when defining the concept of habitual residence in matters of parental responsibility. For instance, the Court of Appeal of Liège considered the following facts to be relevant in order to define the habitual residence of a child: the place where the children live, and the place where they go to school and undertake their extra-curricular activities.⁵⁹ The Belgian National Report also refers to the difficulty in determining the relevant moment to evaluate the determinative elements of habitual residence when there is an appeal against the ruling of the court of first instance: which is determinative, the moment of initiating proceedings or the time of the appeal? The Court of Appeal of Ghent has defined the child’s habitual residence on the basis of the circumstances existing at the time of the commencement of proceedings.⁶⁰

The Croatian National Report also reports a number of difficulties which may occur when sufficient reasoning is sought for determining the factual ground for the habitual residence of a child.⁶¹ This Report mentions a judgment by the Municipal Court of Zagreb. The court had to resolve an international jurisdictional issue in relation to a third state (Serbia) in a situation where, upon the separation of the parents (both lived in Croatia at the time), the child was ordered to live 30 days with the mother and 30 days with the father. After some time, the child’s father had moved to Serbia. The arrangements on joined parental care were maintained. At the time when the child had reached the age of having to attend elementary school, the child’s mother started a procedure at a Croatian court to amend the previous decision. Determining the habitual residence of the child defied a straightforward definition here according to this National Report as the argument could be made that the child had its centre of life equally balanced in two states, one of which is an EU Member State (Croatia) and one a third state (Serbia).⁶²

⁵⁶ Brussels II Convention, p. 2–18; National Report Luxembourg, question 1. The National Report refers to the Borrás Report. In this document, habitual residence is defined as ‘the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence’.

⁵⁷ National Report Luxembourg, question 23.

⁵⁸ *Ibid.*, for instance: Tribunal d’arrondissement de Luxembourg’, no. 141177, 2 May 2013; ‘Tribunal d’arrondissement de Luxembourg’, no. 102847, 11 December 2013; ‘Tribunal d’arrondissement de Luxembourg’, no. 147128, 18 February 2014.

⁵⁹ National Report Belgium, question 1 ; Court of Appeal of Liège 29 June 2010, *Actualités du droit de la famille* 2011, 94-96.

⁶⁰ *Ibid.*, question 23; Court of Appeal of Ghent, 10 December 2009, Revue@dipr.be 2010/1, 64.

⁶¹ National Report Croatia, question 23: County Court of Dubrovnik, Gž 1336/14 of 14.10.2015. (CRS20151014), available at EU Fam’s project database (www.eufams.unimi.it) under a specified code.

⁶² National Report Croatia, question 23: Unreported, First Instance Court of Zagreb P2 2256/13 of 3 December 2013).

The French National Report suggests that the absence of a definition of ‘habitual residence’ offers some (interpretative) advantages. In most cases the lack of a definition did not give rise to any specific problems, apart from child abduction cases, according to this Report.⁶³ It also hints at some problems stemming from ‘flexibility.’ Thus, it suggests that (some) parents could be encouraged to start disputes due to the uncertainty surrounding the meaning of habitual residence, thereby producing the unwelcome side-effect of unreasonably prolonging the procedure.⁶⁴

According to the Greek National Report, the interpretation of Article 8 has not generally resulted any particular difficulties.⁶⁵ However, the Report mentions that an autonomous determination of the child’s habitual residence can be a problem due to the fact that the child’s habitual residence depends on the habitual residence of the parent with whom the child lives.⁶⁶ The Greek courts accept an autonomous interpretation of habitual residence, in accordance with EU case law. The interpretation may differ according to each case’s actual circumstances and depending on the jurisdiction. The Report emphasises that in Greek case law ‘the creation of a new habitual residence is not possible (e.g. at the place of birth of the individual)’ when there is only a temporary connection with that place (e.g. temporary professional visits or visits of another nature) and no intention to change one’s former habitual residence can be proven.⁶⁷ Regarding habitual residence in relation to matters of parental responsibility, it is reported that the Greek courts consider that the length of residence should be taken into consideration together with other relevant circumstances. According to Greek case law if the child is considered to be sufficiently mature, the child’s opinion should also be taken into consideration.⁶⁸ Nevertheless, ‘objective criteria’ are considered to prevail over the expressed will of younger children.⁶⁹

The Hungarian National Report refers to situations whereby a family resides in more than one state. For example, a family lives near the Hungarian/Austrian border with a home in Hungary, but the parents work in Austria and the child also attends school over the border in Austria. The court has to weigh all of the factual circumstances, such as the place where the family lives, the parents’ intention, where the parents look after their children etc.⁷⁰

In determining the habitual residence of a child, the Latvian courts consider whether a child has a substantial connection to Latvia by taking all the criteria provided in Article 12(3) or 15(3) of the Brussels IIbis Regulation into account.⁷¹ In Latvia, a specific problem has emerged because of domestic procedural law. The Latvian Report has described the problem that results from the so-called ‘two-level system’, involving the ordinary Court and the Orphans’ Court. The ordinary Court deals with matters such as, for example, access rights, the

⁶³ National Report France, question 1.

⁶⁴ *Ibid.*, question 23.

⁶⁵ National Report Greece, question 23.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ National Report Hungary, question 23.

⁷¹ National Report Latvia, question 1.

place of residence, maintenance, while the Orphans' Court deals with issues such as, for example, the appointment of a guardian and the suspension of custody rights. The proceedings at the Orphans' Court are administrative proceedings.

According to the Dutch National Report, a typical problem in connection with the application of the concept of habitual residence under Article 8 has to do with the evaluation of the facts of the case at hand and this is something in which the role of the Dutch Supreme Court is limited. The reason for this is that the interpretation of the concept of habitual residence is very closely linked to findings of fact, whereas factual questions may not be examined in Dutch appeal on cassation proceedings (exclusively heard by the Dutch Supreme Court).⁷² In a recent case before the Dutch Supreme Court, the refusal by the Dutch courts to assert their jurisdiction regarding a divorce under Article 3 did not preclude the Dutch courts from assuming jurisdiction to issue an interim judgment regarding parental responsibility under Article 8 when the child's habitual residence was in the Netherlands. The Court could not ascertain jurisdiction regarding the divorce because the mother did not have her habitual residence in a Member State, but in India, where a divorce application had already been filed.⁷³

In Poland, the concept of habitual residence is allegedly subject to an 'autonomous interpretation.' Polish doctrine and the literature have developed this interpretation based on evaluating the factual circumstances which are decisive for determining the habitual residence. Three particular elements are mentioned in the Report in this context: 1) the centre of a person's life, 2) a certain degree of integration in the social and family environment, 3) all the concrete circumstances of the case, with respect to the personal, family and professional situation of a person and the duration of a stay.⁷⁴ The Report states that in 95% of cases there are no problems, but some difficult situations remain in practice.⁷⁵

According to the Portuguese National Report, the domestic courts have not encountered specific difficulties deriving from the lack of a definition of 'habitual residence' in the Regulation.⁷⁶ Yet this Report highlights two principles which are relevant both in matrimonial matters and in matters of parental responsibility.⁷⁷ These principles are of importance for obtaining a new habitual residence. First, a new and very recent 'habitual residence' in a country other than Portugal is not a ground to consider that the Portuguese courts are not competent.⁷⁸ Second, when the new 'habitual residence' in another country is somewhat longer (for instance, at least one year) the criteria are apparently often mitigated by the principle of the best interests

⁷² National Report the Netherlands, question 1 and question 23: as an example the report refers to the decision of the Dutch Supreme Court on 26 June 2015, ECLI:NL:HR:2015:1752 where the court considered that the Court of Appeal had correctly applied the autonomous meaning of 'habitual residence' under the Regulation as developed by the CJEU, i.e. the place which reflects some degree of integration by the child in a social and family environment.

⁷³ Dutch Supreme Court, 12th of January 2018, ECLI:NL:HR:2018:31, NJB 2018/217, judgment delivered and published after the submission of the National Report of the Netherlands in this study.

⁷⁴ National Report Poland, question 1.

⁷⁵ *Ibid.*, question 23.

⁷⁶ National Report Portugal, question 1.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, question 1. See the Ruling of the Second Instance Court of Porto of 29th April 2013 (Acórdão da Relação do Porto de 29-04-2013, available in Portuguese at www.dgsi.pt).

for the child, which will help to determine Portuguese jurisdiction if the child's family has strong links with Portugal (e.g., they have Portuguese nationality).⁷⁹

The UK National Report underlines that the non-presence of key persons connected to the child in the new state of the child's habitual residence may well signify that there are (still) continuing familial or social ties to the former habitual residence. In that respect, even though parental intentions may matter to some extent,⁸⁰ such 'parental intentions' ought to be considered as only one factor when determining habitual residence. The Report also refers to a recent decision by the Supreme Court (in *Re B* [2016]) based on CJEU case law,⁸¹ which confirms that the child's best interests were the key factor.⁸²

4.3 Difficulties in the application of Article 8 as regards habitual residence – CJEU case law

The CJEU has offered some important guidance on the application of the main jurisdictional rule contained in Article 8. The relevance of determining jurisdiction with respect to each claims submitted has already been touched upon *supra* in Chapter 2, under 3.7.1 '*Difficulties in the application of Article 3(1)(b) – CJEU case law*', when introducing the CJEU case of *PM v AH*⁸³. In the latter case, the Court established that the court seised of a claim for divorce may not decide upon the request relating to parental responsibility if it lacks jurisdiction under Article 8 (or any other provision of the Regulation), even if the national law of that Member States imposes the obligation to rule *ex officio* on the right of custody, access rights and alimony. This case involved two Bulgarian nationals, who moved to France after marrying in Bulgaria. Their child was born in France. After their separation, both parents and the child continued living in France. The mother (AH) filed a petition for divorce in a Bulgarian court, where she also applied for custody of the child, access rights to the father (PM) and maintenance (alimony). The proceedings reached the Supreme Court of Cassation in Bulgaria which referred a question to the CJEU. The question posed is whether the court competent to decide on over a divorce under Article 3(1)(b) of the Regulation can also decide on the applications concerning parental responsibility, when the conditions of Articles 8 and 12 are not met, but the national law of the Member State obliges the court to jointly decide on the matters of divorce and parental responsibility (as well as maintenance). Unsurprisingly, the Court gave precedence to the rule in Article 8(1) of the Regulation, according to which the courts of the Member State where the child has his/her habitual residence at the time the court is seised have jurisdiction in matters of parental responsibility (save for the cases when the conditions of Articles 9, 10 or 12 are met, as stated in Article 8(2) of the Regulation). The Court further noted that the latter court should also have jurisdiction over maintenance claims, as prescribed in Article 3(d) of the Maintenance Regulation.

⁷⁹ *Ibid.*, question 1.

⁸⁰ National Report of the United Kingdom, question 1.

⁸¹ *Ibid.*, question 23.

⁸² *Ibid.*

⁸³ CJEU Case C-604/17 *PM v AH* [2018] ECLI:EU:C:2018:10.

Regarding the interpretation of the concept of habitual residence, CJEU rulings have identified a number of relevant factors that have to be considered when determining the habitual residence of the child. Thus, the family and social relationships in a particular state must be taken into account as well as a number of other criteria. They include, *inter alia*, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and all other circumstances relating to the case at hand.

A pertinent case on this matter is the CJEU judgment in *A*.⁸⁴ The CJEU has held that the determination of habitual residence must be made in the light of the provisions and the objectives of the Regulation, including those following from Recital 12. The case concerned three children who originally lived in Finland with their mother and stepfather. In 2001 the family moved to Sweden. In the summer of 2005 they travelled to Finland, originally with the intention of going on holiday there. In Finland, the family lived on campsites and with relatives and the children did not attend school there. The family applied to the social services department of the Finnish municipality Y for social housing. In November 2005 a local welfare agency legally removed the children in order to place them in immediate care. They were placed in a child care unit, because the agency determined that the children had been abandoned. This was unsuccessfully challenged by the mother and the stepfather. They then brought an action before the Supreme Administrative Court of Finland, claiming that the Finnish authorities lacked competence to order such a placement in a child care unit. They claimed that the case fell within the jurisdiction of the Swedish courts. In support of this view they argued that the children had been Swedish nationals since 2 April 2007 and that their permanent residence had been in Sweden for a long time.

The Finnish *Korkein hallinto-oikeus* referred four questions to the CJEU for a preliminary ruling. One of the questions was how the concept of habitual residence in Article 8(1) was to be interpreted, in this particular situation: a child had a permanent residence in one Member State, but was staying in another Member State, living a peripatetic life there. The Court concluded that all the circumstances that are specific to each individual case must be taken into account when establishing the habitual residence of a child, within the meaning of Article 8(1). The Court held as follows:

‘the concept of “habitual residence” under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to

⁸⁴ CJEU Case C-523/07 *A*. [2009] ECR I-2805; Althammer, *et al.*, *op. cit.*, Article 8, Rn. 5, 7; Magnus/Mankowski/Borrás, *op.cit.*, Article 8, notes 6-9.

establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.’⁸⁵

In short, a child is habitually resident in the place in which he/she has his or her centre of interest taking into consideration all the factual circumstances, in particular the duration and stability of the residence and familial and social integration. Mere physical presence is not enough to establish habitual residence for the purposes of ascertaining jurisdiction under Article 8 of the Regulation.

In its subsequent decision in *Mercredi v Chaffe*,⁸⁶ the CJEU was asked to explain the concept of ‘habitual residence’ for the purposes of Articles 8 and 10 of the Regulation. The case concerned a French woman and a British man who were not married but cohabiting in England and who had become parents to a daughter in August of 2009. The daughter was a French citizen. A few days after the child was born the couple split. When the daughter was two months the mother left the UK for the Island of Réunion and thereafter moved with the child to France. The removal of the child was lawful since the mother had sole custody rights. A series of proceedings were instituted in both the UK and in France. When the father, a British national, realised that the mother and daughter had left the UK and that Ms Mercredi’s home had been vacated, he applied to the Duty High Court Judge. The mother subsequently commenced proceedings in France requesting that she be awarded exclusive parental responsibility over the child. She maintained that the English courts had no jurisdiction, as her daughter was no longer habitually resident in the UK, but in France, from the moment she was taken to Réunion. In turn, the father requested the same court in France to return the child to the UK. The question referred to the CJEU was how the concept of ‘habitual residence’ should be interpreted for the purposes of Articles 8 and 10 of the Regulation. It was decisive to determine the ‘habitual residence’ of the child in order to determine which court had jurisdiction to issue orders on matters relating to rights of custody. In the case at hand, the dispute concerned an infant who had been lawfully removed to a Member State other than that of her habitual residence and had only stayed there for a few days when the court in the State of departure became seised.⁸⁷

With reference to case A,⁸⁸ the CJEU reasoned that the concept of ‘habitual residence’ had to be interpreted as corresponding to the place which reflects some degree of integration by the child in a social and family environment, for the purposes of applying both Articles 8 and 10 of the Regulation. It further held that the habitual residence must be of a certain duration, although it did not indicate a minimum duration. The Court stressed the importance of the intention to give habitual residence a permanent character. To that end, the factors which must be taken into consideration include:

- first, the duration, regularity, conditions and reasons for the stay in the territory of that

⁸⁵ CJEU Case C-523/07 A. [2009] ECR I-2805, para 44.

⁸⁶ CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309; see further Lenaerts, K., ‘The best interests of the child always come first: The Brussels IIbis Regulation and the European Court of Justice’ (2013) 20(4) *Jurisprudence (Jurisprudencija)* pp. 1302, p. 1307; Dutta and Schulz, *op. cit.*, p. 13.

⁸⁷ CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, para 41.

⁸⁸ CJEU Case C-523/07 A. [2009] ECR I-2805.

- Member State and for the mother's move to that State and,
- second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State.

In the case of an infant, the habitual residence of the person looking after the child is decisive.⁸⁹ It is for the national court to establish the habitual residence of the child, taking into account all of the circumstances that are specific to each individual case. The Court concluded that 'the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some "degree of integration" by the child in a social and family environment'.⁹⁰ If the application of the abovementioned tests were to lead to the conclusion that the child's habitual residence cannot be established, jurisdiction would have to be determined on the basis of the criterion of the child's presence under Article 13 of the Regulation.

The Court generally clarified that the Regulation does not provide for a minimum period of residence when establishing habitual residence. It again stressed the relevance of the intention of the person concerned. In the words of the Court, 'it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character.'⁹¹ The Court underlined that the age of the child is of particular importance regarding the intentions of the child as to his or her residence and regarding their relevance.⁹² In the case of an infant, the habitual residence of a person looking after the child is decisive. Consequently, the criteria for a habitual residence – including the intentions as to residence – have to be checked with regard to that person.⁹³

In the case of *W and V v. X*,⁹⁴ the CJEU ruled that the courts of the Member State of the habitual residence of the child have jurisdiction to decide on a request for a variation of a decision that has become final concerning parental responsibility, as well as maintenance obligations.

W and X were a married couple living in the Netherlands from 2004 to 2006 after which they moved to Canada in 2007. X, the mother, was a Dutch and an Argentinian national, while the father, W was a Lithuanian national. They had a child, V, born in the Netherlands in 2006, who was a Dutch and a Lithuanian national. The couple separated in 2010.

X petitioned for divorce before a Canadian court. Several decisions were made by that court, including a decision in 2012 granting W and X a divorce and awarding X sole custody of V. However, neither the Lithuanian courts nor the Dutch courts recognised the decisions of the Canadian court. This led to several procedures both in the Netherlands and in Lithuania concerning the divorce and custody over V.

⁸⁹ *Ibid.*, para 55.

⁹⁰ *Ibid.*, para 56.

⁹¹ Dutta and Schulz, *op. cit.*, p. 10; CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, para 51.

⁹² CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, paras 52-55.

⁹³ *Ibid.*, para 55.

⁹⁴ CJEU Case C-499/15 *W and V v X* [2017] ECLI:EU:C:2017:118.

A set of proceedings were initiated in Lithuania. Firstly, in 2011 W applied to the First District Court of Lithuania for a divorce and for an order for the child to reside with him. The District Court granted W an interim order which stated that the child would reside with him for the duration of the proceedings. Thereafter in 2012 W instigated child abduction proceedings and applied for an order that the child be returned to him. That application was dismissed. Additionally, the interim order of 2011 was subsequently set aside by an immediately enforceable decision, against which an appeal was found to be inadmissible. In 2013 the District Court declared the divorce of W and X and determined that the child was to reside with X. At the same time, the Court determined child contact arrangements for W and the amount W was to pay in child maintenance. This decision was upheld by the Regional Court in Vilnius in 2014.

The District Court in Vilnius referred a question to the CJEU on the interpretation of Article 8 of the Brussels Ibis Regulation and Article 3 of the Maintenance Regulation. The question put to the CJEU was whether the courts of the Member State which have adopted a final decision on parental responsibility and maintenance obligations regarding a minor child retain jurisdiction to rule on an application to amend the orders made in that decision, even though the child is habitually resident in the territory of another Member State.⁹⁵

The Court observed that pursuant to Article 3(d) of the Maintenance Regulation, jurisdiction lies with the courts that have jurisdiction over parental responsibility under the Brussels Ibis Regulation if the matter relating to maintenance is ancillary to those proceedings.⁹⁶

Additionally, the Court emphasised that the Brussels Ibis Regulation had been drawn up with the objective of ensuring the best interests of the child and accordingly it favours the criterion of proximity.⁹⁷ Thus, in the first place jurisdiction should lie with the Member State of the child's habitual residence, except in certain cases of a change to the child's residence or pursuant to an agreement between the holders of parental responsibility.

Article 8 establishes general jurisdiction in favour of the courts of the Member State in which the child is habitually resident. According to Article 8(1), the jurisdiction of a court must be established 'at the time the court is seised'.⁹⁸ Furthermore, that jurisdiction must be determined and established in each specific case where a court is seised of proceedings.

By way of a derogation from Article 8, Article 9 provides for the courts of the Member State of the child's former habitual residence to retain jurisdiction. Another departure from the general rule can be found in Article 12(1). It provides for the prorogation of the jurisdiction for the court having jurisdiction to decide on an application for divorce, legal separation or a

⁹⁵ *Ibid.*, para 47.

⁹⁶ *Ibid.*, para 48.

⁹⁷ *Ibid.*, para 51; the EU legislature, in effect, considered that the court that is geographically close to the child's habitual residence is the court which is best placed to assess the measures to be taken in the interests of the child (CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, para 91).

⁹⁸ CJEU Case C-499/15 *W and V v X* [2017] ECLI:EU:C:2017:118, para 53; see, to that effect, CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246, para 38.

marriage annulment, which is not the court of the Member State where the child is habitually resident.⁹⁹

The Court stated that the determination of a child's habitual residence in a given Member State requires at least that the child has been physically present in that Member State.¹⁰⁰ Thus, the mere fact that one of the nationalities of the child is the nationality of that Member State, as it was in the present case, cannot suffice for the purpose of establishing the child's habitual residence in that Member State.

As the courts of the Member State of the child's habitual residence had jurisdiction in matters of parental responsibility, those courts also had jurisdiction to decide on applications seeking to change the child's place of residence, to vary the amount of maintenance or to change the contact arrangements for the parent concerned.¹⁰¹ Referring to the understanding of habitual residence as accepted in previous case law, the CJEU ruled that the determination of a child's habitual residence in a given Member State requires at least that the child has been physically present in that Member State. In the case at hand it was not in dispute that the child had never been to Lithuania. The mere fact that the child had the nationality of that Member State, besides the nationality of another Member State (the Netherlands), could not have sufficient weight for the purpose of establishing jurisdiction under Article 8 of the Brussels IIbis Regulation. Rather, since the child in question had maintained a habitual residence in the Netherlands, the referring court found that the Dutch courts had jurisdiction over the matters of parental responsibility brought before it.

The prevailing view appears to be that a 'multiple habitual residence' cannot be accepted.¹⁰² In the case of *A*, the CJEU ruled that when it is impossible to establish the Member State in which the child has his or her habitual residence and, if Article 12 is not applicable, jurisdiction is to be determined in accordance with Article 13. Thus, the courts of the Member State where the child is 'present' will then have jurisdiction.¹⁰³

Having emphasised the importance of the primary care provider's situation in helping to determine the child's habitual residence, the CJEU has also taken the view that linking the child's habitual residence to that of the primary care providers should not result 'in making a general and abstract rule according to which the habitual residence of an infant is *necessarily* (emphasis added) that of his parents'. Thus, an intention originally expressed by the parents as to the return of the mother accompanied by her newborn baby may also be considered.¹⁰⁴

The case of *OL v PQ*¹⁰⁵ makes it clear that the mere intention of a parent to establish a child's habitual residence in a particular jurisdiction will in itself not suffice to establish a child's habitual residence there. Factual presence may often also be an important indicator,

⁹⁹ CJEU Case C-499/15 *W and V v X* [2017] ECLI:EU:C:2017:118, para 55.

¹⁰⁰ See to that effect CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, paras 47-49.

¹⁰¹ *Ibid.*, paras 66-67.

¹⁰² Althammer, *et al.*, *op. cit.*, Rn. 8-9.

¹⁰³ CJEU Case C-523/07 *A*. [2009] ECR I-2805.

¹⁰⁴ See, *infra* in Chapter 4, under 3.1 'Difficulties in the application of Article 11(1) – CJEU case law', where the case of *OL v PQ* is further discussed.

¹⁰⁵ CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436.

especially in the case of newborn infants. At the same time, the CJEU emphasised that ‘the only element of the physical presence of the child in a Member State is not enough to determine the habitual residence of the child’.¹⁰⁶ In this case a mother, PQ, who was a Greek national, had given birth to a daughter in Greece. She and her husband, OL, were habitually resident in Italy. They had decided to stay in Greece for the child to be born with the intention to travel back to Italy thereafter. After the child’s birth, the mother had decided unilaterally to stay in Greece with the child. This led to the following parallel proceedings in both Italy and Greece.

On 20 July 2016, the father initiated divorce proceedings before the court of Ancona in Italy. He also sought to be awarded sole custody of the child with access rights for the mother, an order for the return of the child to Italy and that he be granted a maintenance allowance for the support of the child. By a judgment of 7 November 2016 the Court held that it had no jurisdiction regarding parental responsibility claims because the child had not been habitually resident in Italy. Upon the father’s appeal this judgment was upheld on 20 January 2017. Next, in its judgment of 23 January 2017, the Court of Ancona declined to hear the application for a maintenance allowance, again because the child had not been habitually resident in Italy. Finally, the divorce was granted on 23 February 2017, but in this decision no ruling on parental responsibility regarding the child was made.

In Greece, the following procedures were initiated. On 20 October 2016 the father applied before the Court of First Instance in Athens, Greece, for the return of the child. The Court held the child had been wrongfully retained in Greece without the approval of the father to change the habitual residence of the child when both parents shared parental responsibility regarding the child. Situations in which a child is born in a place which is unconnected to the place where that child’s parents are normally habitual resident, and is thereafter wrongfully removed or retained, give rise to blatant infringements of parental rights, according to the Court. Therefore, such situations should fall within the scope of the 1980 Hague Convention and the Brussels IIbis Regulation.¹⁰⁷ The Court held that the physical presence of a child should not therefore be a prerequisite for determining its habitual residence for the purposes of Article 11, because young children are absolutely dependant on those who look after them.¹⁰⁸ Furthermore, the Court observed that it would be more appropriate to look at the joint intention of the parents which can be inferred from the preparations made by them to welcome the child, in order to determine the habitual residence of a newborn child.¹⁰⁹

In those circumstances the court stayed its procedure and referred the following question to the CJEU: how the concept of ‘habitual residence’ within the meaning of Article 11(1) is to

¹⁰⁶ *Ibid.*, p. 455: ‘[...] it seems useful to refer to the fuller explanation offered by Kokott AG, whose general approach seems consistent with the principles adopted by the Court. She concluded that a child should be regarded as habitually resident in the place in which the child has his or her centre of interests, by reference to all factual circumstances, and in particular to the duration and stability of residence and familial and social integration. She explained that habitual residence must have a certain stability or regularity. Since [...] the ideas of the persons entitled to custody as to where the child is to reside may diverge [...]’

¹⁰⁷ CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, para 22.

¹⁰⁸ This is in line with an earlier judgment of the CJEU in Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309.

¹⁰⁹ CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, para 23-24.

be interpreted in order to determine whether there is a ‘wrongful retention’ in the circumstances of the case at hand. The child had resided for several months with her mother in the Member State where she was born in accordance with the joint wishes of her parents. That is a Member State other than that where the parents had been habitually resident before the child’s birth. Additionally, the Greek Court inquired whether the initial intention of the parents that the mother would return with the child to the latter Member State is a factor of crucial importance in determining the child’s habitual residence, although the child had never been physically present in that Member State.

Accordingly, if the intention initially expressed by the parents were to be regarded as a consideration of crucial importance this would establish a general and abstract rule that the habitual residence of an infant is necessarily that of the child’s parents. This would be contrary to the structure, the effectiveness and the objectives of the return procedure.¹¹⁰ Article 2(11) provides that a decision on the legality or illegality of a removal or a retention is to be based on the rights of custody awarded under the law of the Member State where the child was habitually resident before his or her removal or retention. Therefore, the determination of the place where the child was habitually resident precedes the identification of the rights of custody that may have been infringed. Consequently, the absence of the father’s consent is of no relevance.¹¹¹

It must be recalled that a return procedure is inherently an expedited procedure and must therefore be based on information that is quickly and readily verifiable and, as far as possible, unequivocal. For those reasons, the Court has held that Article 11(1) cannot be interpreted as meaning that the child was ‘habitually resident’ in the Member State where her parents were habitually resident before her birth. Consequently, the refusal of the mother to return together with the child cannot constitute a ‘wrongful removal or retention’ of the child.¹¹²

4.4 Article 8 and the *perpetuatio fori* principle

The question of jurisdiction in Article 8 is determined at the time the first instance court is seised, meaning the time when the document instituting the proceedings is lodged with the court.¹¹³ Article 16 recognises two starting points in this respect. A court shall be deemed to be seised (i) 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 necessary steps to serve the procedural document on the respondent; or (ii) 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 necessary steps to have the document lodged with the court. In general, for the seising of a court the moment of registering an application at the court will be decisive. The issue of seising a court will be extensively discussed *infra* in Chapter 5, under 1 ‘*Seising of a Court – Article 16*’.

¹¹⁰ *Ibid.*, para 50.

¹¹¹ This is confirmed by Article 10 of the Regulation, which envisages precisely the situation in which a child acquires a new habitual residence following a wrongful removal or retention.

¹¹² CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, para 69.

¹¹³ CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246; CJEU Case C-499/15 *W and V v X* [2017] ECLI:EU:C:2017:118.

Under the current Regulation jurisdiction is determined at the time the court of first instance is seised. Even at the appeal level the jurisdiction assumed at first instance will be preserved or ‘perpetuated.’¹¹⁴ According to Article 8, once a competent court is seised, the courts of that Member State will retain jurisdiction even if the child acquires habitual residence in another Member State during the course of the court proceedings (the so-called *perpetuatio fori* principle).¹¹⁵ This is a principle of procedural law according to which a court may continue to exercise jurisdiction until a final judgment is rendered, even if in the meantime there has been a change in the circumstances on which jurisdiction was originally based.¹¹⁶

A change of the habitual residence of the child from one EU Member State to another state or to a State Party to the 1996 Hague Convention which is not also an EU Member State,¹¹⁷ such as Morocco or Switzerland, does not therefore in itself entail a change of jurisdiction according to the *perpetuatio fori* principle. To give an example, when a child is habitually resident in Germany but becomes habitually resident in Switzerland after proceedings were instituted in Germany, under Brussels Ibis the German courts retain jurisdiction while the Swiss courts obtain jurisdiction over the same children. This may lead to a duplication of proceedings.¹¹⁸

Under the current Article 8(1) Brussels Ibis no exception to the *perpetuatio fori* principle is in principle permitted. However, Article 15 of the Regulation, by way of an exception, in a sense modifies the *perpetuatio fori* principle. This is because this provision makes it possible to transfer the case under certain conditions to a court of the Member State to which the child has moved if this is in the best interests of the child. If Article 7(1) of the 2016 Commission’s Proposal would be accepted, this principle would no longer be upheld, since jurisdiction would lie with the courts at the place of the child’s new habitual residence.

4.4.1 Difficulties in the application of *perpetuatio fori* – National Reports

The National Reports do not indicate that there are pervasive and recurring problems in the Member States regarding the application of the *perpetuatio fori* principle. Even so, the Belgian National Report points out that Belgian law presumes a so-called ‘continuous’ jurisdiction which gives the same court the competence to revise its own ruling in the light of new circumstances. This leads to the question of whether Article 8 allows the Belgian courts to exercise jurisdiction when the child is moved to another Member State after the court has already issued a ruling on the matter or when the initial proceedings can be considered to have terminated and therefore at which point the new proceedings should be started before the court

¹¹⁴ Rutten, S., ‘Perpetuatio fori in ouderlijk gezagskwesties’ [2005] NIPR, p. 11; Kruger, T., ‘Brussels IIa Recast moving forward’ [2017] NIPR, p. 473.

¹¹⁵ Unlike Article 5(2) of the 1996 Hague Convention which lays down that in case of a change of the child’s habitual residence to another Contracting State, the authorities of the state of the new habitual residence have jurisdiction.

¹¹⁶ See on the issue of the *perpetuatio fori* principle and its pros and cons: De Boer, ‘What we should *not* expect from a recast of the Brussels Ibis Regulation’, *op. cit.*, p. 10. See also Andrae, M., *Internationales Familienrecht* (Nomos 2014), p. 404.

¹¹⁷ See Althammer, *et al.*, *op. cit.*, Rn. 14.

¹¹⁸ Kruger and Samyn, *op. cit.*, p.153.

of the Member State where the child has his/her acquired habitual residence. The Supreme Court has opted for the first solution in a case where the child had legally moved from Belgium to Germany with his father.¹¹⁹ It ruled that the lower court should not have taken the change of habitual residence into consideration and should therefore have regarded itself as still being competent to hear the case.¹²⁰ The other National Reports do not refer to any other particular problems or indicate other issues in connection with the *perpetuatio fori* principle. This is, of course, not to say that there are no such problems at all in the application of this principle in the Member States.

4.4.2 Difficulties in the application of *perpetuatio fori* – CJEU case law

Cases in which the *perpetuatio fori* principle is wilfully ‘abused’ or ‘manipulated’ by one party to hinder or even prevent jurisdiction in the state of the new habitual residence of the child in another Member State are presumably rare. This does not mean, of course, that this is sufficient reason to uphold this principle. The lack of coordination between the jurisdictional rules of Brussels IIbis and the 1996 Hague Convention may be considered a more problematic aspect. This has been illustrated above.¹²¹ Thus, an alignment of Brussels IIbis with the 1996 Hague Convention in this respect would in our view help delineate the scope of application of each instrument. In addition, this may also help to avoid parallel proceedings in cases in which both instruments may apply. It would also presumably be generally easier for the competent court of the State of the new habitual residence to be informed about the child’s factual situation than for the court first (and previously) seised to be sufficiently informed once the child no longer has his/her habitual residence there. This latter argument militates against *perpetuatio fori* and seems, overall, to be more consistent with proximity as a guiding principle in jurisdictional matters regarding children.¹²²

4.5 Commission’s proposal

The general jurisdiction criterion in the 2016 Commission’s Proposal remains the child’s habitual residence (see new Article 7). However, the principle of proximity underlining this provision may reach further than it does today. Indeed, a child’s transfer of residence, when lawful, made with the consent of both parents entitled to determine the place of residence, also shifts jurisdiction.¹²³ Recital 15 clarifies that this also takes place with regard to pending proceedings. In this way, the traditional principle of *perpetuatio fori* is envisaged by the text currently in force and providing that the criterion applies ‘on the date on which [the judges] are seised’ will change.

¹¹⁹ National Report Belgium, question 23. Cour de Cassation 21 November 2007, *Revue trimestrielle de droit familial* 2008, 176.

¹²⁰ National Report Belgium, question 23. See also Court of Appeal of Brussels, 11 March 2013, *Revue@dipr.be* 2013/2, 40.

¹²¹ Kruger and Samyn, *op. cit.*, p.153.

¹²² Compare Kruger and Samyn, *op. cit.*, p. 474.

¹²³ 2016 Commission’s Proposal, p. 36.

5. Continuing jurisdiction of the State of the child's former habitual residence – Article 9

Article 9 relates to access rights to be given in the child's former habitual residence to ensure ongoing contact between the child and his/her parent, while the child's habitual residence has changed. This jurisdictional rule is particularly relevant in matters of child relocation, in the sense of a lawful move of the child with his/her care provider. Usually it will be the parent who lives with the child who moves to another Member State while the holder of access rights remains behind in the Member State of the child's former habitual residence.¹²⁴ If the removal is unlawful, Article 9 does not apply. For the meaning of unlawful, the 1980 Hague Convention and the 1996 Hague Convention are relevant, as well as the definition in Article 2(11) of the Regulation. According to Article 9 the courts of the previous habitual residence of the child continue to have jurisdiction for a period of three months following the move for the purpose of modifying a judgment on access rights issued in the Member State of the child's former habitual residence. This latter judgement must have been given prior to the removal of the child to another Member State. This means that if no decision on access rights has been issued by the courts in the Member State of the former habitual residence, Article 9 does not apply. However, if Article 9 is applied, it is not required that the request to modify this judgment has been submitted before the removal of the child. The jurisdiction of the court of the former habitual residence is limited deciding on access rights. During this period of three months the courts of the State of the new habitual residence of the child will have jurisdiction in all other matters of parental responsibility. Apart from that, the holder of access rights may always start proceedings in the courts of the Member State where the child has his or her new habitual residence. In that case the jurisdiction of the court of the previous habitual residence is renounced.¹²⁵

In connection with Article 9, the National Reporters in this research have been asked whether this rule is frequently applied in their jurisdiction and whether its application reveals any particular problems. This does not appear to be the case, as may be deduced from the following.

5.1 Difficulties in the application of Article 9 – National Reports

Some National Reports indicate that Article 9 is currently not or is only incidentally applied and, when it is applied, there are no specific issues.¹²⁶

¹²⁴ Magnus/Mankowski/Borrás, *op. cit.*, Article 9, notes 3-6; See also Stone, *op. cit.*, p. 457 and Rauscher, T., *Europäisches Zivilprozess – und Kollisionsrecht. EUZPR/EUIPR* (Sellier European Law Publishers 2010), p. 131-138.

¹²⁵ Magnus/Mankowski/Borrás, *op. cit.*, Article 9, notes 3-6.

¹²⁶ National Report Austria, question 24; National Report Belgium, question 24; National Report Bulgaria, question 24; National Report Cyprus, question 24; National Report Estonia, question 24; National Report France, question 24; National Report Finland, question 24; National Report Germany, question 24; National Report Hungary, question 24; National Report Ireland, question 24; National Report Latvia, question 24; National Report Lithuania, question 24; National Report Malta, question 24; National Report Poland, question 24; National Report Portugal, question 24; National Report Romania, question 24; National Report Slovenia, question 24 and National Report Sweden, question 24.

The Croatian National Report draws attention to an innovative aspect of Article 9's continued jurisdiction in the Croatian legal system. In Croatian case law there is allegedly just one unreported case concerning the application of Article 9. This case involved the removal of a child from one state to another which was lawful, with the full cooperation of the parents.¹²⁷ Furthermore, the Czech Report refers to just one decision. In that case, according to its limited scope it was not possible to establish jurisdiction on the basis of Article 9, since custody and not access right was the subject matter of the request.¹²⁸

The Greek National Report has observed that there can be doubts as to the moment when the holder of access rights must have accepted the jurisdiction of the courts of the child's new habitual residence. According to one opinion, it is better to apply this provision even in cases where the acceptance occurred before the acquisition of the new habitual residence.¹²⁹

The Italian National Report refers to the decision of the Court of Cassation (22238/2009) where it was considered that the term of three months starts from the time the minor has physically moved to the new country, and not from the time he or she acquires habitual residence. For this aim, notices given from one parent to the other are crucial.¹³⁰

The Luxembourg National Report describes some cases with regard to Article 9. In a court decision by the *Tribunal d'arrondissement de Luxembourg* a claim was based on Article 9.¹³¹ Some documents showed that the habitual residence of the children had been established in Luxembourg, although they were attending school over the border in Germany (apparently where they lived before). The claim having been filed five years after moving to Luxembourg, the court applied Article 8 of the Regulation in favour of the Luxembourg courts, explaining that Article 9 of the Regulation is only applicable when the legal change of residence occurs during the course of the proceedings. In some other cases the court refused to accept jurisdiction since there was no previous judgment on access rights.¹³²

The Dutch National Report suggests that in most cases the discussion regarding the application of Article 9 is limited in the court judgments to the (mere) statement that it is clearly not applicable.¹³³

The Spanish National Report mentions a problem in applying Article 9(2) regarding the acceptance of the jurisdiction of the authorities of the Member State of the new habitual residence of the child.¹³⁴

¹²⁷ National Report Croatia, question 24; Municipal Court of Beli Manastir, P-60/2014 of 4.3.2014. (CRF20140304) available at EU Fam's project database (www.eufams.unimi.it) under a specified code.

¹²⁸ National Report the Czech Republic, question 24. Regional Court of Prague, decision dated 27. 4. 2011.

¹²⁹ National Report Greece, question 24.

¹³⁰ National Report Italy, question 24.

¹³¹ National Report Luxembourg, question 24.

¹³² *Ibid.*

¹³³ National Report the Netherlands, question 24. For example, the Court of Appeal of Amsterdam in its judgment of 10 November 2015, ECLI:NL:GHAMS:2015:4318, seems to have taken the view that Article 9 was simply not applicable as the child still had his/her habitual residence in the Netherlands when proceedings were instituted.

¹³⁴ National Report Spain, question 24.

The UK National Report shows that there might be a problem regarding the transition between two habitual residences. It stresses the possibility that there may be contemporaneous litigation in two Member States.¹³⁵

5.2 Difficulties in the application of Article 9 – CJEU case law

Please see the discussion *supra* in this Chapter, under 4 ‘*General rule on jurisdiction based on the habitual residence of the child*’ and in particular under 4.3 ‘*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*’.

5.3 Commission’s proposal

As regards the issue of access rights the rule of Article will remain effective, continuing the jurisdiction of the judge of the previous residence for 3 months, with regard to a request to modify access conditions and subject to the condition that the holder of this right still lives in the state and has not accepted the jurisdiction of the judges in the state of new residence.¹³⁶

6. Jurisdiction in cases of child abduction and the return of the child – Articles 10 and 11

These Articles are set out and discussed in great detail *infra* in Chapter 4 ‘*Jurisdiction in cases of child abduction*’.

7. Prorogation – Article 12

Exceptionally, facts and circumstances may justify the possibility to choose a court of a Member State other than the state of the habitual residence of the child to decide on issues pertaining to parental responsibility. In such circumstances a choice of forum may be permitted, albeit a limited one.

The referred form of the attribution of jurisdiction to another court is called ‘prorogation’ (Article 12). The general principle underlying Article 12 appears to be to establish an *alternative forum* in parental responsibility proceedings.¹³⁷ Under this scheme, prorogation is possible within divorce proceedings (Article 12(1)) and *outside* divorce proceedings (Article 12(3)).

Article 12 determines the conditions under which such prorogation is permitted. These conditions are dealt with separately in paragraphs 1 and 3 of the Article. Yet some are common in both types of situations. These are the requirement of the consent of all parties and the interests of the child. Considering their relevance in both paragraphs, they will be addressed jointly, *infra* in this Chapter, under 7.3 ‘*Unequivocal acceptance and the best or superior interests of the child*’.

Paragraph 4 of this provision envisages the presumption of the best interests of the child for the purpose of the application of the prorogation of jurisdiction. This presumption is only valid in circumstances where the child has his/her habitual residence in a third state which is

¹³⁵ National Report the United Kingdom, question 24.

¹³⁶ 2016 Commission’s Proposal, p. 36-37. See further (*inter alia*) Honorati, The Commission’s Proposal For A Recast Of Brussels IIa Regulation, *op. cit.*

¹³⁷ See also Magnus/Mankowski/Pataut, *op. cit.*, Article 12, note 1.

not a party to the 1996 Hague Convention. Thereby, the Regulation's scope of application *ratione personae* in parental responsibility cases is extended, but only in this particular case of the prorogation of jurisdiction. Article 12(4) presumes that the requirement of the 'best interests of the child' is fulfilled 'in particular if it is found impossible' to hold proceedings in a third state in which the child has his or her habitual residence. It must be kept in mind that the said presumption is only valid, however, if the child has his/her habitual residence in the territory of a third State which is *not* a contracting party to the 1996 Hague Convention. In that respect, the Regulation extends its personal scope of application (scope *ratione personae*) to cases where a child habitually resides in a non-EU member state in the context of Article 12. The prorogation in favour of a court of an EU Member State within the meaning of Article 12 is not permitted if the child has her or his habitual residence in a third country which is a contracting party to the 1996 Hague Convention. Hence, the Convention has prevalence as it does not deal with prorogation in the same manner as the Regulation. Consequently, no similar presumption of the best interests of the child as defined in 12(4) of the Regulation would apply when the child has his/her habitual residence in a Member State of the 1996 Hague Convention.

7.1 Prorogation within matrimonial proceedings

Article 12(1) provides for the possibility to agree on the jurisdiction of the court in a Member State before which a divorce proceeding is pending. Paragraph 3 of this Article defines the conditions for the prorogation of jurisdiction in favour of another court of a Member State closely connected to the dispute on parental responsibility.

As for the former, the courts which are competent in international divorce proceedings may have jurisdiction *also* in matters of parental responsibility based on the will of the parties. As such it provides an alternative to habitual residence as a jurisdictional ground. It appears that the general idea behind prorogation is to strike a compromise between the favouring of the jurisdiction of the court of the habitual residence of the child and the concomitant need to ensure – albeit on an exceptional basis – some concentration of the various legal questions concerning the child before the court seised of the divorce.¹³⁸ Arguments of procedural economy may therefore also help to explain the need to allow this jurisdictional ground.¹³⁹

Accordingly, when divorce proceedings are pending in a court in a Member State, that court under the Regulation has jurisdiction in any matter of parental responsibility, even though the child concerned is *not* habitually resident in that Member State. This principle applies whether or not the child is the child of both spouses. The same applies where such a court has been seised of an application for separation or the annulment of marriage.¹⁴⁰

As such, Article 12(1) of the Regulation incorporates a jurisdictional ground which offers parties a limited and conditional choice for a court of a Member State seised of a

¹³⁸ Magnus/Mankowski/Pataut, *op. cit.*, Article 12, note 2; Honorati, The Commission's Proposal For A Recast Of Brussels IIa Regulation, *op. cit.*

¹³⁹ Gallant, E., *Responsabilité parentale et protection des enfants en droit international privé* in: Fulchiron H., Nourissat, C., *Le nouveau droit communautaire du divorce et de la responsabilité parentale* (no. 87) (Daloz 2005), p. 135 and Magnus/Mankowski/Pataut, *op. cit.*, Article 12, note 3.

¹⁴⁰ Carpaneto, *op. cit.*, pp. 264-265.

matrimonial dispute *other than that in which the child is habitually resident*. This court before which a divorce proceeding is pending may decide on *any* matter of parental responsibility. Two further conditions that must be fulfilled are the need for an agreement between all parties and that such a jurisdiction is in the best interests of the child. As already mentioned, these two conditions will be detailed *infra* in this Chapter, under 7.3 ‘*Unequivocal acceptance and the best or superior interests of the child*’, as they are the same as those provided in Article 12(3).

7.2 Prorogation unrelated to matrimonial proceedings

According to Article 12(3), a court in a Member State other than the state where the child has his/her habitual residence may be ‘prorogued’ and have jurisdiction in proceedings affecting parental responsibility other than in divorce, legal separation or marriage annulment proceedings. This provision indicates the conditions which must be cumulatively fulfilled for such a prorogation.¹⁴¹ This alternative jurisdictional ground may only apply if the child has a *substantial connection* with that Member State. That will be the case in particular when one of the holders of parental responsibility is habitually resident in that Member State or when the child is a national of that Member State. Additionally, it is required that the *jurisdiction* of the courts has been *expressly accepted* or otherwise *in an unequivocal manner by all the parties*¹⁴² to the proceedings at the time the court is seised and that the prorogation is in *the best interests of the child* (Article 12(3)).¹⁴³

The condition enunciated by Article 12(3) that the child should have a substantial connection with that Member State exists ‘in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State.’ Another condition is that the jurisdiction of the courts has been expressly accepted or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised. Again, if jurisdiction is to be asserted on that basis, it must also be determined in the best interests of the child. As already mentioned, these two conditions are identical to the requirements under paragraph 1. Accordingly, they are considered in a joint separate section in the following text.

¹⁴¹ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 41; The CJEU has stressed that the possibility of the prorogation of jurisdiction under Article 12(3) is an exception to the criterion of proximity and, therefore, has to be interpreted strictly.

¹⁴² Stone, *op. cit.*, p. 458, with a reference to an English case, *Bush v Bush* [2008], in order to illustrate the meaning of the concept of ‘unequivocal acceptance’: ‘[...] the filing by the respondent spouse in English divorce proceedings of a response to the petitioner’s statement of arrangements for the children does not amount to an unequivocal acceptance of the jurisdiction of the divorce court in respect of parental responsibility. [Thus] [...] the paradigm case will be an actual agreement by the parents at the time when the matrimonial proceedings are instituted.’

¹⁴³ *Ibid.*, pp. 458-459; see also *Bush v Bush* [2008] 2 FLR 1437 (CA); See further Carpaneto, *op. cit.*, p. 264; the author refers here to CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246 whereby the CJEU made clear, with regard to the interpretation of Article 12, that (i) in each specific case it shall evaluate whether the prorogation of jurisdiction is consistent with the best interests of the child (see para. 48) and that (ii) the prorogation of jurisdiction brought by mutual agreement by the holders of parental responsibility ceases following a final judgment in the proceedings.

7.3 Unequivocal acceptance and the best or superior interests of the child

There can be no doubt that the Regulation allows for a limited prorogation option for a party to choose to seise a court in a Member State. This may also be permitted under the Regulation when the child is not habitually resident in a Member State, but the child, nonetheless, has a substantial connection with the Member State where the case is brought, for example, in the case of two Dutch parents who, together with their child, have their habitual residence in Singapore and who not only wish to divorce in the Netherlands but also want to have a parental responsibility order regarding their child in that Member State. The jurisdiction of the court in the Member State must have been unequivocally accepted by all parties at the time the court is seised, however.

Moreover, a common element shared by Article 12(1) ('divorce') and Article 12(3) ('outside divorce') is the general and overriding requirement that the referred prorogation should be '*in the interests of the child.*'¹⁴⁴ Another requirement concerns the *acceptance of the forum choice* and this requirement applies in respect of both Article 12(1) and Article 12(3). Furthermore and, in distinction to Article 12(1) regarding matters of parental responsibility in proceedings regarding divorce, legal separation and a marriage annulment, jurisdiction based on 'other parental responsibility matters' – as referred to in Article 12(3) – should, as may be inferred from the foregoing, fulfil the additional requirement that the child should, furthermore, have a '*substantial connection*' with the Member State of the forum.

As for the requirement of an '*unequivocal acceptance*', it should be mentioned that it may not always be an easy and straightforward task to establish whether jurisdiction has been accepted 'unequivocally.' For example, it may be difficult to assess whether submitting to the court's jurisdiction in divorce proceedings constitutes prorogation with regard to parental responsibility when the claimant in a divorce proceeding also applies for measures relating to children and the defendant has failed to raise a formal objection of a lack of jurisdiction with regard to this latter area. According to Honorati the Italian Court of Cassation has ruled out this consequence, maintaining that in *subiecta materia* there is no room for a tacit prorogation.¹⁴⁵ In other words, a lack of an objection to jurisdiction regarding a specific measure to be taken in the context of parental responsibility does not constitute an 'unequivocal acceptance' of jurisdiction for all issues of parental responsibility within the meaning of Article 12.

What follows here is an overview of some of the difficulties with regard to the application of Article 12 in respect of prorogation on the basis of an analysis of the National

¹⁴⁴ Hekin, M., 'The Impact and Application of Brussels IIbis in Finland' in: Boele-Woelki and Beilfuss, *op. cit.* p. 97: 'Irrespective of the agreement between the parties the court shall not exercise jurisdiction under Article 12 if it is not in the best interests of the child. In other words, it is within the power of the court seized whether the unanimity of parties creates jurisdiction.' In paragraph 3 of Article 12 the 'best interests of the child' are referred to and paragraph 1 refers to the 'superior interest of the child'. There is no indication in the CJEU case law or in the literature that this distinct wording in the English version of the Regulation implies a difference in the substance of the concept and its interpretation or application.

¹⁴⁵ Honorati, The Commission's Proposal For A Recast Of Brussels IIa Regulation, *op. cit.*, with reference to the Italian Court of Cassation, 30 December 2011 n 30646, in *Riv dir int priv proc*, 2013, p 126 ss, and, similarly, CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 43.

Reports and the case law of the CJEU. This is done in respect of: general difficulties, those in respect of the ‘substantial connection’ (Article 12(3)) and the ‘best interests of the child.’

As will become clear, often the requirements allowing for prorogation will to a significant extent prove to be closely interconnected, subsumed as they may often be in the broadly defined criterion of what is in ‘the best interests of the child.’

7.4 Difficulties in the application of Article 12 – National Reports

It has been explored in the questionnaires how Article 12 is applied in the jurisdictions of the Member States and whether any problems have occurred in its application (e.g. with regard to the hearing of the child). The National Report for Austria indicates that Article 12 has been relied upon in a number of Austrian decisions. In two decisions,¹⁴⁶ the Austrian Supreme Court declined jurisdiction under Article 12 because a parent had already lodged a claim regarding parental responsibility with a court in another Member State. Accordingly the parent who had filed a claim concerning parental responsibility before the court of another Member State did not consent to the jurisdiction of the courts of the Member State in which the marital proceedings were pending.

The National Report for Belgium suggests that the nature of the requirement of an ‘unequivocal acceptance’ of the forum of another Member State by the parties has been debated to a considerable extent in Belgian case law. The Court of Appeal of Brussels has stated, for example, that the appearance in court of the parents without challenging the jurisdiction of the court could be regarded as a ‘clear and unequivocal acceptance’ of this jurisdiction.¹⁴⁷ In another case, a Belgian court affirmed that it was up to the parties to the proceedings to express that they have accepted jurisdiction. The fact that the public prosecutor had challenged the prorogated court’s jurisdiction was deemed irrelevant for the purpose of Article 12.¹⁴⁸ In the other Belgian cases mentioned no agreement between the parties in respect of prorogation was found to have been reached.¹⁴⁹

In France, in respect of Article 12(1), the *Cour de Cassation* has allegedly insisted that the jurisdiction of the divorce judge should be accepted in an unequivocal manner. It has been reported, however, that the lower courts in France have nonetheless been ‘tempted’ to consider that spouses divorcing by mutual consent have implicitly accepted that the jurisdiction of the divorce court extends to matters of parental responsibility. Recently, the French *Cour de Cassation* has therefore clarified that the ‘silent parent’ is not necessarily considered to agree to the jurisdiction of the divorce court.

¹⁴⁶ National Report Austria, question 25. Austrian Supreme Court [OGH] 16.03.2006 2 Ob 272/05x ECLI:AT:OGH0002:2006: 0020O00272.05X.0316.000; Austrian Supreme Court [OGH] 15. 05. 2012 2 Ob 228/11k ECLI:AT:0002OGH:2012:0020OB00228.11K.0515.000.

¹⁴⁷ National Report Belgium, question 25. Court of Appeal of Brussels, 28 November 2016 *Revue trimestrielle de droit familial* 2007, 223.

¹⁴⁸ National Report Belgium, question 25. Court of Appeal of Brussels, 28 November 2006, *Revue trimestrielle de droit familial* 2008, 90.

¹⁴⁹ National Report Belgium, question 25. Court of Appeal of Brussels, 25 June 2013, [Revue@dipr.be](http://www.dipr.be) 2013/3, 59 and Court of Appeal of Brussels, 21 June 2012, *Revue trimestrielle de droit familial* 2013, 263.

Similarly, a case has been reported from Hungary in which the first and second instance courts had refused a claim of jurisdiction under Article 12(3) due to their strict interpretation of the first part of Article 12(3)(b).¹⁵⁰ In that case, the defendant did not openly object, but did not directly accept the jurisdiction of the Hungarian court either. Yet the defendant did present a number of counterclaims on the merits of the case. In that case, the report seems to suggest that ‘the best interests of the child’ – the second requirement in Article 12(3)(b) – were apparently not scrutinised at all as a jurisdictional issue.

From the Republic of Ireland not a single case has been reported with regard to the application of Article 12. It follows that it cannot be established whether its application is problematic in this Member State, although there are no indications that this is the case. In this National Report it has been suggested, however, that the application is likely to be in line with the English decision of *VC v. GC*.¹⁵¹ This would mean that first the jurisdiction of the State of the petitioner’s habitual residence at the time of the institution of proceedings would have to be identified and, thereafter, it would have to be examined whether there has been an acceptance of jurisdiction by the other party to the proceedings. Finally, an enquiry would be made as to which jurisdiction is the ‘best suited’ to investigate what is in the best interests of the child’s welfare.

In the majority of the cases where the Luxembourg courts have established their jurisdiction on the basis of Article 12(1) of the Regulation, no express reasoning is (allegedly) adduced as to the requirements laid down by the provision of Article 12. However, in a few cases the domestic courts have expressly assessed compliance with the requirement of the spouses’ agreement set out in Article 12(1). Yet they omitted to elaborate upon the interests of the child and paid no special attention to the condition of ‘at the time the court is seised’.¹⁵²

In the Netherlands, Article 12, together with Article 10 of the 1996 Hague Convention, was recently considered before the Dutch Supreme Court. The proceedings involved the recognition of an American divorce, based on a judgment from Pennsylvania. The Dutch Supreme Court has taken the view that Article 12(3) of the Regulation incorporates an internationally accepted jurisdictional ground if one of the parents has his/her habitual residence in the foreign state and holds parental responsibility.¹⁵³ Reported Dutch case law offers no fewer than thirty decisions on Article 12. Most of these only state that the parties have agreed to jurisdiction under Article 12 or that the provision is not applicable. It is also known that the Dutch courts generally interpret the requirement regarding the ‘acceptance of the jurisdiction’ in Article 12(1) liberally and that jurisdiction based on prorogation may even be dealt with at the time of the first hearing.¹⁵⁴

¹⁵⁰ National Report Hungary, question 25.

¹⁵¹ *VC v. GC* [2012] EWHC 1246 / [2013] 1 FLR 244.

¹⁵² National Report Luxembourg, question 25.

¹⁵³ National Report the Netherlands, question 25; Hoge Raad 23 September 2016, RFR 2017/4.

¹⁵⁴ See, for example, District Court of The Hague, 15 October 2009, ECLI:NL:RBSGR:2009:BK5367, mentioned in: de Boer, Th. M. and Ibili, F., *Nederlands Internationaal personen- en familierecht, Wegwijzer voor de rechtspraak* (Wolters Kluwer 2017), p. 163.

Indeed, a fair number of ‘Dutch’ cases demonstrate that parties debate the question not only *whether* but also *when* jurisdiction has been accepted by both parties.¹⁵⁵ A considerable amount of case law in the Netherlands deals with the application of Article 12(3).¹⁵⁶

The National Report for Romania also provides some examples. In a Romanian decision from 2016, Targu Mures Local Court¹⁵⁷ stated that it had not been properly seised on the basis of Article 12(3). The court held that an unequivocal declaration that the defendant accepted the competence of the Court was lacking despite the defendant declaring that a substantial part of the claims were accepted. The Court considered the ‘best interests of the child’ and decided that they would be best served if the case would have been taken to the Belgian courts, in view of the habitual residence of the child, where all the assessments regarding the child’s living environment and its social and familial relations could be made directly, in a proper manner. The Mures County Court took a similar position in another case, albeit allegedly with weak reasoning which focussed on the importance of the principle of proximity and relying on the best interests of the child.¹⁵⁸

The applicability of Article 12(3) was also raised in a decision by the Galati Court of Appeal in 2014.¹⁵⁹ After mentioning the cumulative character of the conditions set out in a) and b) of Article 12(3), the Court analysed the nature of the mutual agreement. It stated that the mere presence of the defendant at two hearings, in which he asked for an adjournment of the case in order to find legal counsel, could not be interpreted as an ‘unequivocal acceptance’ of jurisdiction. The Court held that if it was to exercise its jurisdiction it would not be in the best interests of the child. In the Court’s view, this was particularly so since the assessment period regarding the living environment of the child and his family and social relations would develop more adequately and more easily in Italy – the state where the child had indeed been habitually resident since 2007. The Report suggests that the Romanian courts have decided that a ‘tacit agreement’ cannot be assumed when one of the parties (residing in Romania) and the other

¹⁵⁵ National Report the Netherlands, question 25. See e.g. Court of Appeal of The Hague, 12 January 2011, LJN: BP9606, where the husband’s claim that the wife had accepted jurisdiction (through oral statements by her lawyer) could not be ascertained as there was no record of those proceedings. The District Court of The Hague, 7 January 2011, LJN: BP9086 held that the husband had clearly not accepted jurisdiction. The Court of Appeal of The Hague 27 June 2012, LJN: BW9886, held that jurisdiction under Article 12(1) of the Brussels IIa was not in the superior interest of the child as there was insufficient information on the child’s circumstances (the child was with the mother outside Europe).

¹⁵⁶ National Report the Netherlands, question 25. See Court of Appeal of Arnhem-Leeuwarden, 26 March 2015, ECLI:NL:GHARL:2015:2625, in respect of a child with a habitual residence with its grandparents in Suriname while the custodian father had his habitual residence in the Netherlands. The court found that there was a link with the Netherlands as required under Article 12(3)(a) of the Brussels IIbis and found that the grandparents had not contested jurisdiction (as required by Article 12(3)(b) of the Brussels IIbis). In relation to Article 12 of the Brussels IIbis there were no references in the case law to the hearing of the child.

¹⁵⁷ National Report Romania, question 25. Targu Mures Local Court, Civil Division, civil decision no 3588 from 30 June 2016, denying the competence of the Romanian courts in a case concerning parental responsibility over a Romanian child residing in Belgium.

¹⁵⁸ National Report Romania, question 25. Mures County Court, Civil Division, civil decision no 172 from 25 February 2016; the case considered both the divorce of a Romanian couple and the parental responsibility over their children, who all had their habitual residence in Italy.

¹⁵⁹ National Report Romania, question 25. Galați Court of Appeal, civil decision no 106/R from 05 March 2014.

party and the child residing abroad, appears before the court in order to contest competence¹⁶⁰ or whenever the other party does not enter an appearance before the Romanian court.¹⁶¹

In the United Kingdom, in *I (A Child)* [2009]¹⁶² the UK Supreme Court declared that where parents have opted into the jurisdiction of an EU court, i.e. under Article 12(3), then the English courts are permitted to exercise jurisdiction in respect of the child, even where that child is not lawfully residing within a Member State.¹⁶³ In *VC v GC*,¹⁶⁴ the child in question had been born in France but had been living in England for 22 months with the agreement of her French father. Her mother sought an adjournment of the French proceedings and was also granted an English Residence Order. The French court, however, made an interim residence order in favour of the father. He accepted that the child was now habitually resident in England, but sought the application of Article 12(1)(b) so that the child's future might be determined by the French courts. The English High Court found that the child was habitually resident in England and that the court of habitual residence was best suited to determine issues of parental responsibility. Although an acceptance of jurisdiction did not necessarily have to be made in writing, later acts and contacts could 'illuminate the *quality of the acceptance* (emphasis added) at the time the court was seised.'¹⁶⁵ Acceptance would also have to be 'unequivocal': in the case at hand the child's mother had not unequivocally accepted French jurisdiction. In relation to the child's best interests, these had been addressed via 'any welfare hearing' and by the court's having considered the 'appropriate exercise of parental responsibility.' The English court was, in sum, the best placed to hear such matters and to make any necessary enquiries.

Likewise, it seems that the interpretation of the wording '*has been accepted expressly or otherwise in an unequivocal manner*' has stirred some uncertainty in the courts of Spain. A general overview of the cases dealing with this issue can be summarised considering three different positions. Thus, in some cases an agreement of the spouses could not be ascertained and the court assumed its competence without exhaustive reasoning.¹⁶⁶ However, there are other Spanish judgments which ostensibly check that this requirement has actually been fulfilled.¹⁶⁷ Finally, in a number of other instances, the Spanish courts competent for divorce under Article 3 declared that they lacked jurisdiction to deal with parental responsibility matters due to the absence of an agreement between the spouses.

¹⁶⁰ Bistrita Local court, civil division, civil decision no 10314 /2013, from 19 December 2013, confirmed by Bistrita Nasăud County court, 1st civil division, civil decision no 76/A/2014 from 28 May 2014; Buzău County Court, 1st Civil Division, civil decision no 57/2016, from 21 March 2016.

¹⁶¹ Bacău Local Court, Civil Division, civil decision no 2105 from April 2nd 2015.

¹⁶² National Report the United Kingdom, question 25.

¹⁶³ Hale LJ's interpretation seems to concur with the Practice Guide 2015. Differing judicial views were expressed as regards Article 12(3) meaning in terms of whether express or unequivocal acceptance by all of the parties to the proceedings 'at the time the court is seised' was required. See *Re H (Jurisdiction)* [2015] 1 FLR and *MA v MN* [2015] EWHC 3663 (Fam).

¹⁶⁴ National Report of the United Kingdom, question 25; [2012] EWHC 1246 (Fam); [2013] 1 FLR 244.

¹⁶⁵ *Ibid.*

¹⁶⁶ National Report Spain, question 25. See Case no 308/2010 of 20 December, Provincial Court of Barcelona.

¹⁶⁷ National Report Spain, question 25. See Case no 486/2006 of 29 November, Provincial Court of Salamanca or case no 182/2010 of 25 November, Provincial Court of Teruel.

7.4.1 The ‘substantial connection’ requirement – National Reports

The concept of having a ‘substantial connection’ has not been frequently invoked in practice. This has been explored to some extent by the Belgian courts. A Belgian Court accepted that the fact that members of the child’s family lived in Belgium, coupled with the fact that they had Belgian nationality, were sufficient to prove the existence of such a connection.¹⁶⁸

From Greece only one case is reported in the National Report concerning, more specifically, Article 12(3).¹⁶⁹ It was observed therein that nationality in itself could not be considered *per se* sufficient to indicate a child’s substantial connection with the Member State of his/her nationality.

The Lithuanian National Report similarly only mentioned one case. The case brought before the Court of Appeals of Lithuania concerned a parent’s claim for custody of the child; however, the court declined jurisdiction since the habitual residence of the child was in another Member State. The reasoning of the court was rather straightforward in that only the court of a Member State in which the child has his/her habitual residence is competent to hear the parties, including the child, and to decide on such claims.¹⁷⁰

7.4.2 The ‘best interests of the child’ in prorogation matters – National Reports

The National Report for Bulgaria indicates that in that Member State judicial practice is partly ‘controversial’¹⁷¹ and does not always or fully adhere to the requirements of Article 12. Allegedly, the Bulgarian courts assert their international jurisdiction, but very often demonstrate a lack of consideration of what the term ‘the best interests of the child’ entails. According to the National Report, it often seems to be the case that judges rather presume that the requirement is fulfilled without a thorough enquiry. Moreover, there is the judicial practice of the highest court (the Supreme Court of Cassation) which must be followed by the other courts in the country. In that regard, the Supreme Court of Cassation points out that the related national jurisdiction in cases on parental responsibility follows the jurisdiction of the matrimonial matters of the case.¹⁷² The Report suggests a clear tendency in such cases for the Bulgarian courts to assume the parties’ acceptance of jurisdiction in proceedings concerning parental responsibility.¹⁷³ National judicial practice seems to be controversial in that, in general, the best interests of the child seem to be assumed whereas, in some cases, a thorough assessment of the circumstances which are in the best interests of the child is required by the court, so the National Report suggests.

Thus, in a preliminary ruling of the CJEU in the *Gogova* judgment (discussed *infra* in this Chapter, under 7.5 ‘*Difficulties in the application of Article 12 – CJEU case law*’), the Bulgarian Supreme Court of Cassation requested more clarity about the meaning of Article

¹⁶⁸ National Report Belgium, question 25.

¹⁶⁹ National Report Greece, question 25.

¹⁷⁰ National Report Lithuania, question 25.

¹⁷¹ National Report Bulgaria, question 25.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

12.¹⁷⁴ It was uncertain whether the jurisdiction of the courts seised of an application in matters of parental responsibility could be regarded as having been ‘accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings’ when the legal representative of the defendant had not pleaded the lack of jurisdiction of those courts. It should be mentioned that the legal representative was appointed by the courts of their own motion in view of the impossibility of serving the document instituting proceedings on the defendant. The underlying question therefore appears to have been how ‘express’ or ‘unequivocal’ the acceptance of the prorogued court should be.

The Czech National Report states that the Czech Supreme Court also had the opportunity to interpret the ‘best interests of the child and, indeed, the ‘voice’ of the child in a procedural context’.¹⁷⁵ The Czech Supreme Court held that ‘...the best interest of the child in the procedural context implies the decision of the court which considers and emphasizes the interest of the child in order to achieve a stable and long-term ...’ and that ‘... the best interest of the child ... is already projected in the jurisdictional rules. Under recital No. 12 of the Regulation, the jurisdictional rules in parental responsibility matters take into account the best interest of the child, especially its proximity.’

Furthermore, mention has been made of a Hungarian case concerning Article 12(3) in which the mother and the father, both Hungarian nationals, decided to move to Ireland to live and work there.¹⁷⁶ Their child was also born in Ireland; together with the child who was then aged six months they visited Hungary and the father declared that he wanted to remain in Hungary and to raise the child there. The father had taken care of the child for a month during which both parents disputed the residence of the child.¹⁷⁷ Afterwards, as the father’s behaviour was considered to be wrongful, the child was taken back to Ireland where the child’s habitual residence was located. As both the applicant and the defendant relied on the Hungarian courts to decide on the parental responsibilities and the residence of the child the courts scrutinized whether Article 12(3) could have been applied. According to the court of second instance the requirements in Article 12(3)(a) and also in the first part of Article (3)(b) had been fulfilled but the requirement of serving the child’s best interests was contested. The second instance court concluded that as the applicant and the child lived in Ireland the rapid but complex evaluation of the child’s best interests with the aim of deciding on the child’s residence should have been concluded in Ireland. This decision was confirmed by the Hungarian Curia. In other words, although there might have been an unequivocal acceptance by the parties of the Hungarian court’s jurisdiction, still, in the eyes of the Hungarian Curia, this was not sufficient for prorogation because the best interests of the child barred the Hungarian court’s jurisdiction.

In Italy one decision has stated that even if jurisdiction in a petition for divorce is uncontested by the defendant, an application for the custody of a child may challenge the court’s

¹⁷⁴ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, see more in paras 42, 43, 47, operative part 2.

¹⁷⁵ National Report the Czech Republic, question 25 (citation of Judgment No. 21 Cdo 4909/2014 dated 19.3.2015.)

¹⁷⁶ National Report Hungary, question 25.

¹⁷⁷ *Ibid.*

jurisdiction.¹⁷⁸ According to other decisions, the hearing of the holder of visitation rights by the judges of the Member State does not constitute an acceptance of jurisdiction provided that he or she does not participate in the proceedings in a direct way or through a lawyer.

As for Malta, the criterion of the best interests is reportedly applied on a case-by-case basis. If possible and if deemed to be in the child's best interests, the child is heard in one way or another – this is done through an appointment/s with the child's advocate who then reports to the court what the child has said, or through the child actually speaking to the judge (either in chambers or via a video link).¹⁷⁹

In Poland, Article 12 is (allegedly) applied as an exception to the general rule of the jurisdiction of the courts of the Member State of the child's habitual residence in two situations: when a case concerning parental responsibility is connected with the ongoing matrimonial case and when the jurisdiction of a Member State is justified by the child's substantial connection with the forum state. The most common judgments refer to the application of both Articles 8 and 12. A literal interpretation of the phrase 'at the time the court is seised' means that consent to prorogation would have to take place before the initiation of the proceedings and none of the parties (participants) should be able to revoke it until the initiation of proceedings.¹⁸⁰

In a Romanian case from 2016, the Iasi County Court decided that the appearance of the respondent before the court, at different sessions, without contesting its competence, could be interpreted as an unequivocal acceptance of the court's competence.¹⁸¹ In this case, the court also referred to other requirements for prorogation, however. The requirement pertaining to the 'best interests of the child' was also considered to have been fulfilled for linguistic reasons, as the proceedings were held in Romanian, the common language of the parties involved, which meant that no further costs for communication and the translation of documents would have to be incurred.

In the Slovenian National Report the question is raised if jurisdiction based on Article 12 is in the child's superior interest,¹⁸² because the general jurisdiction in Article 8 derives from the child's best interests, which could in some cases be undermined because of the application of Article 12. The Slovenian courts, generally, also reportedly follow the guidance given by the case of *E v B*¹⁸³ (discussed *infra* in this Chapter, under 7.5 '*Difficulties in the application of*

¹⁷⁸ National Report Italy, question 25, reference to Cass. S.U. 30646/2011.

¹⁷⁹ National Report Malta, question 25.

¹⁸⁰ National Report Poland, question 25. Decision of the Krakow Court of Appeal dated 11 January 2016, I ACz 2406/15; Decision of the Krakow Court of Appeal dated 12 August 2015, I Acz 1298/15, in which the child's habitual residence was clearly in the UK but Article 12(1) was still applied.

¹⁸¹ National Report Romania, question 25. Iași County court, 1st civil division, civil decision no 258/2016 from 8 June 2016; see also Braila Local Court, Civil Division, civil decision no 59 from 23 January 2013, deciding that the defendant had unequivocally accepted the Romanian court's competence, since her lawyer was present in court without contesting it.

¹⁸² The Brussels IIbis Regulation uses the term 'the superior interests of the child' in Article 12 and not the term introduced by the United Nations Children's Rights Convention: '*the best interests of the child*' (compare Article 3(1) of the United Nations Children's Rights Convention). The Slovenian translation of the term '*the superior interests of the child*' is (allegedly) more inappropriate, because it is just translated as the '*child's interest*' (slo. *otrokova korist*).

¹⁸³ CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246.

Article 12 – CJEU case law) that the prorogation under Article 12 should only last for the duration of this proceeding.

7.4.3 Limitation of jurisdiction to the time the court is seised – National Reports

In the case of *L v M*, the CJEU made it clear that the prorogation of jurisdiction as provided for in Article 12(3) in matters of parental responsibility may be applied without it being required that those proceedings be related to any other proceedings already pending before the court in whose favour the prorogation of jurisdiction is sought.¹⁸⁴ See for greater detail *infra* in this Chapter, under 7.5 ‘*Difficulties in the application of Article 12 – CJEU case law*’. This dispelled uncertainty among some Member States prior to this decision. For example, in a case submitted to the Court of Appeal of Bucharest in 2012,¹⁸⁵ the Romanian Court found that it was required that there were pending related proceedings before the court in order to prorogue jurisdiction within the meaning of Article 12(3). The Romanian court took the restrictive view and concluded that prorogation would only have been possible if the court had already been seised in a related action.

The National Report for the Czech Republic indicates that the condition ‘at the time the court is seised’ is interpreted in a way that does not necessarily imply that both parents should always consent at the very beginning of the proceedings, i.e. when the application is submitted.¹⁸⁶ It has been suggested that it would be reasonable to allow the second parent (the ‘non-applicant’) to express his or her consent until he/she is informed about the proceedings and having had an opportunity to react and to agree to prorogued jurisdiction.

In Romania, the Moreni Court discussed the ‘agreement’ requirement, mentioned in Article 12(3) under b) of the Regulation and stated that the conventional/voluntary prorogation of jurisdiction cannot operate as a result of the exclusive will of a single party (the claimant who had filed the application);¹⁸⁷ the court required that the parties’ agreement on the jurisdiction of the Romanian courts must intervene *before* the date when the court is seised (i.e. the date of the registration of the application).

7.5 Difficulties in the application of Article 12 – CJEU case law

In the case of *E v B*,¹⁸⁸ the CJEU ruled on the interpretation of Article 12(3). The case concerned a child, S, who was born in Spain to a British mother and a Spanish father. The parents had separated in 2009 and on 6 February 2010 the mother moved with S to the United Kingdom. This led to repeated court proceedings in Spain and in the United Kingdom to reach an

¹⁸⁴ *Ibid.*, paras 45-46.

¹⁸⁵ National Report Romania, question 25. Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no 1054 from 7 June 2012.

¹⁸⁶ National Report the Czech Republic, question 25; e.g. judgment of the Regional Court in Ostrava No 50 Co 58/2012 dated 26.3.2012, judgment of the Supreme Court No 26 Nd 261/2007 dated 17.10.2007.

¹⁸⁷ National Report Romania, question 25. Moreni Local Court, civil decision no 1098 from 17 December 2012; Moreni Local Court, civil decision no 311, from 23 June 2014; Bacău Local Court, Civil Division, civil decision no 2105 from 2 April 2015 (application concerning parental responsibility over a child habitually resident in Greece, made by the Romanian mother, residing also in Greece; the father, legally served, did not participate in the proceedings).

¹⁸⁸ CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246.

agreement on sharing their rights over S. On 21 July 2010, the parents reached an agreement on the rights of custody, which was submitted for approval to the court in Spain. The latter adopted a decision confirming the terms thereof on 20 October 2010.

On 17 December 2010, the mother lodged an application seeking to alter the agreement of 21 July 2010 and of the decision of 20 October 2010. On 31 January 2011, the father submitted an application before the High Court seeking the enforcement of the decision of 20 October 2010, pursuant to Articles 41 and 47 of the Regulation.

At the High Court hearing on 16 December 2011, the mother acknowledged that there had been a prorogation of the jurisdiction under Article 12(3) in favour of the Juzgado de Primera Instancia, Torrox, On 20 December 2011, the mother brought proceedings before the Juzgado de Primera Instancia, Torrox, on the basis of Article 15, seeking to transfer the prorogued jurisdiction to the courts of England and Wales. On 29 February 2012, the Juzgado de Primera Instancia, Torrox, made an order in relation to the mother's application, which provided that '[t]he [decision of 20 October 2010] delivered in these proceedings having become final, the proceedings [having been] concluded and there being no other family proceedings pending between the parties in this court, there [was] no reason to declare the lack of jurisdiction applied for'.

On 30 June 2012, the mother again brought the matter before the High Court. She sought a declaration that the courts of England and Wales henceforth had jurisdiction in matters of parental responsibility concerning S under Article 8 on the ground that the child had his habitual residence in the United Kingdom. By a decision of 25 March 2013, the High Court declared that it had jurisdiction. On 21 May 2013, the referring court granted permission to the father to appeal against this judgment.

According to the father, a prorogation of jurisdiction pursuant to Article 12(3) continues after the relevant proceedings have been concluded. The mother submitted that a prorogation of the jurisdiction of the courts of a Member State under Article 12(3) continues until there has been a final judgment in those proceedings, but not thereafter.

The referring court then asked if jurisdiction in matters of parental responsibility which has been prorogued under Article 12(3) ceases following a final judgment in those proceedings or if that jurisdiction continues beyond the delivery of that judgment.

The CJEU observed that Article 12(3)(b) requires in particular that, at the time the court is seised, the jurisdiction of the courts of a Member State other than that of the habitual residence has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings. It follows that the jurisdiction of a court in matters of parental responsibility must be verified and established in each specific case, where a court is seised of the proceedings, which implies that it does not continue after pending proceedings have been brought to a close.¹⁸⁹

¹⁸⁹ *Ibid.*, paras 38-40.

Recital 12 and Article 8(1) provide that general jurisdiction in matters of parental responsibility is to be established on the basis of the child's habitual residence. Thus, jurisdiction other than that general jurisdiction is to be accepted only in certain cases in which the residence of the child changes.¹⁹⁰ In this context, the Court referred to Article 9(1) as an example of a permitted departure from the general rule on the habitual residence of the child. This provision makes it clear that, in the event of a change to the habitual residence of the child, the courts of the Member State of the child's former habitual residence shall retain jurisdiction only for the purpose of modifying a judgment issued by those courts before the child moved. In any event, that court shall not retain that jurisdiction beyond a period of three months. Additionally, the CJEU noted that jurisdiction in matters of parental responsibility must be determined, above all, in the best interests of the child.¹⁹¹

While a prorogation of jurisdiction accepted by the holders of parental responsibility over a young child for specific proceedings may be considered to be in the best interests of that child, it cannot be accepted that, in every case, such a prorogation of jurisdiction remains in that person's best interests. Accordingly, the best interests of the child can only be safeguarded by a review, in each specific case, of the question whether the prorogation of jurisdiction which is sought is consistent with those best interests.¹⁹²

It must accordingly be held that a prorogation of jurisdiction on the basis of Article 12(3) is only valid in relation to the specific proceedings for which the court whose jurisdiction is prorogued is seised. Such prorogued jurisdiction comes to an end following the final conclusion of the proceedings from which the prorogation of jurisdiction derives. Thereafter, jurisdiction lies with the court benefiting from general jurisdiction under Article 8(1) of the Regulation.¹⁹³

The CJEU ruled in the case of *L v M*¹⁹⁴ that it follows from Recital 12 that the grounds of jurisdiction are shaped in the light of the best interests of the child, in particular with regard to the criterion of proximity. The Regulation proceeds from the idea that the best interests of the child must come first.¹⁹⁵ Therefore, the possibility of having recourse to the prorogation of jurisdiction provided for in Article 12(3) is limited so as to exclude the possibility of having recourse to that prorogation in numerous situations, even where that prorogation of jurisdiction might be in the best interests of the child concerned. If there is recourse to prorogation, this option should not in any case be contrary to those best interests of the child.¹⁹⁶ In this case, the Court was also asked to provide clarity on the interpretation of Article 12(3).

The main proceedings took place between Ms. L and Mr. M. Although unmarried, they were the parents of R and K and they lived in the Czech Republic at the time of the birth of their two children. These children acquired Czech citizenship. In February 2010, Ms. L took up

¹⁹⁰ *Ibid.*, paras 40-42.

¹⁹¹ *Ibid.*, para 45.

¹⁹² *Ibid.*, para 47.

¹⁹³ *Ibid.*, para 49.

¹⁹⁴ CJEU Case C-656/13 *L v M* [2014] ECLI:EU:C:2014:2364.

¹⁹⁵ See to that effect CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 51.

¹⁹⁶ CJEU Case C-656/13 *L v M* [2014] ECLI:EU:C:2014:2364, para 49.

employment in Austria while Mr. M remained in the Czech Republic, thus the children alternately lived with their mother or their father.¹⁹⁷ Two years later, Ms. L registered the children as being Austrian permanent residents and informed the children's father that they would not return to the Czech Republic.¹⁹⁸ When the children were visiting their father in October 2012, Mr. M filed for custody of the children and maintenance with the District Court whereafter, in spite of the agreement with Ms. L, he did not return the children.¹⁹⁹ Consequentially, Ms. L applied to the District Court as well as to the Austrian courts for custody of the children and maintenance.²⁰⁰ In November 2012, the Czech court ordered the children to be returned to their mother on the basis of a provisional measure and this provisional measure was confirmed by the Czech Regional Court.²⁰¹ In February 2013, the District Court terminated the proceedings, since it found that the Czech courts lacked jurisdiction, in favour of the Austrian courts based on Article 8(1), as children R and K were Austrian residents when the proceedings commenced.²⁰² However, the Czech Regional Court later overturned the order of the District Court since it found that the Czech courts did have international jurisdiction in accordance with Article 12(3). The court reasoned that the children most definitely had a substantial connection with the Czech Republic and the jurisdiction of the Czech courts had been accepted by both parents as well as the children's guardian appointed during the proceedings. Also, the Court held that the jurisdiction of the Czech courts was in the best interests of the children.²⁰³ Ms. L then appealed to the referring court, asking it to deny the enforcement of the Czech Regional Court decision.²⁰⁴ She claimed that she only made her initial application to the District Court after being advised to do so by the Czech authorities since she did not know of her children's whereabouts.²⁰⁵ In addition, her appeal to the competent Austrian Court proved that she did not accept the international jurisdiction of the Czech courts. As a result, the requirements of Article 12(3) were not met.²⁰⁶

The Supreme Court of the Czech Republic asked the CJEU whether Article 12(3) should be interpreted so as to establish jurisdiction over proceedings concerned with parental responsibility despite the lack of other related proceedings.²⁰⁷ Secondly, it asked whether Article 12(3) should be interpreted as meaning that 'acceptance expressly or otherwise in an unequivocal manner' includes situations in which the defendant in the initial proceedings separately applies for the initiation of proceedings in the same case where after he objects that the court lacks jurisdiction in the proceedings commenced by the other party to the case.²⁰⁸

¹⁹⁷ *Ibid.*, para 17.

¹⁹⁸ *Ibid.*, para 18.

¹⁹⁹ *Ibid.*, paras 19 – 20.

²⁰⁰ *Ibid.*, para 21.

²⁰¹ *Ibid.*, para 22.

²⁰² *Ibid.*, para 23.

²⁰³ *Ibid.*, para 25.

²⁰⁴ *Ibid.*, para 27.

²⁰⁵ *Ibid.*, para 28.

²⁰⁶ *Ibid.*, para 28.

²⁰⁷ *Ibid.*, para 29.

²⁰⁸ *Ibid.*, para 30.

In answering the first preliminary question, the CJEU referred to Recital 12 of the Preamble which highlights the fact that the Regulation is shaped in light of the best interests of the child.²⁰⁹ This child's best interests must thus come first and it would be impossible to achieve this objective if the prorogation of jurisdiction is impossible without the case concerning parental responsibilities being related to other proceedings.²¹⁰ The CJEU also mentioned Recital 5 of the Preamble which states that in order to ensure the equal treatment of all children, the Regulation is to cover all decisions made regarding parental responsibility, without the need for a link to any matrimonial proceedings whatsoever.²¹¹ For these reasons, in relation to proceedings in matters of parental responsibility, Article 12(3) is to be interpreted as allowing the jurisdiction of a court of a Member State in which a child does not have his/her habitual residence to be established despite the lack of other proceedings pending before that court.²¹²

In its answer to the second question, the CJEU referred to Article 16 of the Regulation which states that a court is considered to be seised at the time when the document instituting proceedings, or any similar document, is lodged before the court. This would require an expressed and/or unambiguous agreement between all parties to the case on the prorogation of jurisdiction.²¹³ This, however, is impossible when a court is seised by one of the parties starting the proceedings, whereupon the other party brings other proceedings before the same court and, when taking the first steps required in these second proceedings, argues that the court lacks jurisdiction.²¹⁴ Therefore, Article 12(3)(b) must be interpreted in such a way that when a defendant in a case starts a second set of proceedings and, when initiating these proceedings, contends that the court lacks jurisdiction, it cannot be considered that the jurisdiction of the seised court has been 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings'.²¹⁵ The matter of the extent of the term 'parental responsibility' was addressed in the CJEU judgment of *Gogova*.²¹⁶ The facts of this case have been discussed *supra* in Chapter 1, under 2.3 '*Difficulties in application – CJEU Case law*'. The Regional Court of Blagoevgrad (Bulgaria) had held that although the defendant had not challenged the jurisdiction of this court, he had taken part in the proceedings only through the representative appointed by the court in his absence. The legal representative of the defendant was appointed by the court seised of its own motion because it had proved to be impossible to serve the document instituting proceedings on the defendant and so the appointed representative had not pleaded that this court lacked jurisdiction. Amongst the questions that the Bulgarian Supreme Court submitted for a preliminary ruling was whether a failure by the legal representative of a party not participating in the proceedings could be considered as an acceptance of jurisdiction within the meaning of Article 12.

²⁰⁹ *Ibid.*, para 48.

²¹⁰ *Ibid.*, para 48.

²¹¹ *Ibid.*, para 50.

²¹² *Ibid.*, para 52.

²¹³ *Ibid.*, paras 55 – 56.

²¹⁴ *Ibid.*, para 57.

²¹⁵ *Ibid.*, para 59.

²¹⁶ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710.

The CJEU held that there had been no compliance with the conditions provided under Article 12(3)(b): a failure by the legal representative to object against the lack of jurisdiction does not amount to the requirement that ‘the jurisdiction has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings’ within the meaning of that provision.

The following points raised in the reasoning of the Court may provide relevant guidelines for subsequent cases:

Regarding the moment of the ‘acceptance’ of jurisdiction, the Court referred ‘at the latest’ to the time when the document instituting the proceedings or an equivalent document is lodged with the chosen court.²¹⁷

Referring to Recital 12 of the Preamble to the Regulation, the Court underlined the exceptional nature of the rule contained in Article 12(3) of the Regulation, i.e. as a permitted departure from the principle of proximity reflected in Article 8. The purpose of this prorogation rule is to allow parties a certain degree of autonomy in matters of parental responsibility, albeit under clearly defined conditions, with an express or unequivocal acceptance of jurisdiction being one such condition. Therefore, the unequivocal acceptance of the jurisdiction of the court seised by all the parties to the proceedings must be interpreted strictly. The Court reasoned as follows:

‘On this point, it should be noted, first, that such acceptance presupposes at the very least that the defendant should be fully aware of the proceedings taking place before those courts. While that awareness is not in itself a sufficient indication for his or her acceptance of the jurisdiction of the courts seised, an absent defendant on whom the document instituting proceedings has not been served and who is unaware of the proceedings that have been commenced cannot in any event be regarded as accepting that jurisdiction.’²¹⁸

‘Secondly, the wishes of the defendant in the main proceedings cannot be deduced from the conduct of a legal representative appointed by those courts in the absence of the defendant. Since that representative has no contact with the defendant, he cannot obtain from him the information necessary to accept or contest the jurisdiction of those courts in full knowledge of the facts.’²¹⁹

As regards the prorogation issue in the latter case, an analogy could also be drawn to the ‘older’ case of *Hendrikman and Feyen*²²⁰ considering that ‘where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seised on his behalf but without his authority, such a person is quite powerless to defend himself’.²²¹

²¹⁷ *Ibid.*, para 40, referring further to CJEU Case C-656/13 *L v M* [2014] ECLI:EU:C:2014:2364, para 56.

²¹⁸ *Ibid.*, para 42; see, by analogy, with reference to Article 24 of the Brussels I Regulation, the judgment in CJEU Case C-112/13 *A. v B. and others* [2014] ECLI:EU:C:2014:2195, para 54.

²¹⁹ *Ibid.*, para 43; see to that effect also the CJEU judgment referred above in CJEU Case C-112/13 *A. v B. and others* [2014] ECLI:EU:C:2014:2195, para 55.

²²⁰ CJEU Case C-78/95 *Hendrikman en Feyen/Magenta Druck & Verlag* [1996] ECR I-4943, para 18.

²²¹ See further also the judgment in CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246, para 46.

7.6 Commission's proposal

In the 2016 Commission's Proposal prorogation is referred to as 'choice of court for ancillary and autonomous proceedings.'²²² The jurisdiction of the courts may under the proposed Article 10(2)(b) be accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the latest at the time the court is seised, or, where the law of that Member State so provides, during those proceedings. A similar change has been proposed, in proceedings unrelated to matrimonial proceedings, in the proposed Article 10(3); this jurisdiction shall cease as soon as proceedings have led to a final decision (Article 10(4)). Finally, where all the parties have agreed to the proceedings in relation to parental responsibility accept the jurisdiction (whether related to matrimonial proceedings or not), the agreement of the parties shall be recorded in court in accordance with the law of the Member State of the court (Article 10(5)).

8. Jurisdiction based on the child's mere presence in a Member State (Article 13(1)) and in respect of refugee children or internationally displaced children (Article 13(2))

In exceptional cases, and if jurisdiction cannot be determined on the basis of an agreement under Article 12 of the Regulation, the national courts of the Member State in which the child is 'present' may acquire jurisdiction to hear and determine the substance of the case pursuant to Article 13(1) of the Regulation.

Article 13 is directly inspired by Article 6 of the 1996 Hague Convention.²²³ It deals with two situations that are close, *albeit* different. The difference thereby depends on the reason for the unavailability of a habitual residence. The mere presence of the child in the territory of the Member State is a sufficient factor to provide jurisdiction to the courts of that state in some cases. Paragraph 1 creates a 'jurisdiction of necessity' (*forum necessitatis*). This means that the courts of the state where the child is present are given jurisdiction only because no other court appears to be able to hear the case on other jurisdictional grounds.²²⁴

Where the link between the child and a Member State is strong enough to qualify as habitual residence, then the necessity for any specific jurisdiction grounded on the mere presence of the child disappears. In such circumstances, the courts are deprived of the jurisdiction they were given by virtue of Article 13(1). The same solution is achieved if the child acquires a habitual residence in a third state. In that situation, a court in an EU Member State could deal with a case of parental responsibility only on the basis of there being a specific ground of jurisdiction, in a similar vein as in Article 12.²²⁵

Article 13(2) specifically concerns refugee children or children who are internationally displaced because of disturbances or conflicts in their country of origin. It is inspired by Article 6(1) of the 1996 Hague Convention.²²⁶ It concerns children, often separated from their parents,

²²² 2016 Commission's Proposal, p. 38.

²²³ Stone, *op. cit.*, p. 459.

²²⁴ Magnus/Mankowski/Pataut, *op. cit.*, Article 13, note 1-4. Compare: Lagarde, P., Explanatory Report on the 1996 Convention, *op. cit.*, p. 553-555.

²²⁵ Magnus/Mankowski/Pataut, *op. cit.*, Article 13, note 4.

²²⁶ *Ibid.*, Article 13, note 7-11.

who have left their country of origin and who need specific protection in the state to which they have fled. These children have severed the link attaching them to their State of origin. At the same time, they have often not been in the state to which they have moved for a sufficient time to be able to acquire habitual residence there. The provisional nature of the jurisdiction emerges when it is realised that habitual residence is acquired due to the fact that the child's protection is organised and the child has settled in a Member State. Such circumstances will deny jurisdiction to the courts of the State where the child is present. Again, if the child settles in a third country, then the issues pertaining to parental responsibility regarding this child will fall outside the scope of the Regulation, unless other grounds of jurisdiction, in particular Article 12, can be found.

As part of this research project, the question was explored whether (and how) the ground for jurisdiction in Article 13 is used with regard to refugee children in the jurisdictions of the Member States, including the question whether the definition of 'refugees' in the UN Convention on the Status of Refugees (1951) is relied upon in this respect.

8.1 Difficulties in the application of Article 13 – National Reports

The majority of National Reports indicate that there is a rather limited number of cases in which jurisdiction is based on Articles 13(1) and 13(2). Nonetheless, most National Reports also indicate that the courts in the Member States are familiar with the existence of this jurisdictional ground. Furthermore, National Reports of important European transit countries for refugees and displaced persons such as Austria and Greece have predicted that this jurisdictional ground may become more important in the foreseeable future, in the wake of the refugee crisis. In the Bulgarian translation of the Regulation reference is unjustifiably only made to classical refugees and not 'internationally displaced persons.'²²⁷ The National Report for the Czech Republic has also reported some cases, while judicial decisions from Italy have not been made available to the general public. In the National Report for the United Kingdom, in a multi-jurisdictional English-Scottish case, Articles 13 and 15 were deemed not to apply. Consequently, the child in question had reportedly initially been left in a 'legal limbo' because of the lack of an internal UK procedure akin to Article 15.²²⁸

As for some other Member States, such as France and Germany, it does not seem that Article 13 has often been used with regard to refugee children. Rather, Article 13 appears to have been used sporadically and in a very controversial way. In that particular case the child had his habitual residence in a third State, but was 'present' in France where his mother had temporarily settled. This interpretation of Article 13 has received criticism, because allegedly the facts were not such that the child's habitual residence could not be established. Rather it could (arguably) have been established in a third State, whilst the child was indeed 'present' in France.

²²⁷ National Report Bulgaria, question 26.

²²⁸ National Report the United Kingdom, question 26 citing *An English Local Authority v X, Y and Z (English Care Proceedings – Scottish Child)* [2015] EWFC 89.

8.2 Difficulties in the application of Article 13 – CJEU case law

In the aforementioned case of *OL v PQ* the CJEU was asked to answer the question whether the determination of the habitual residence of an infant in a given Member State requires the child to have been present in that Member State. A further question was whether, when the child has not been present, other factors, such as a previous common habitual residence of the parents in that Member State, can be granted such importance so that it can be determinative for the purposes of establishing the habitual residence of a child.²²⁹ According to Advocate General Wahl, the use of criteria such as whether the parents intended to establish the child's habitual residence in a given Member State or whether the parents previously resided together in a Member State, even though the child was never physically present there, would be likely to jeopardise the best interests of the child since, in cases relating to the child, jurisdiction would be conferred on a court of a Member State which had no link of geographical proximity to the child. That would contradict a primary objective of the Regulation, which is to determine jurisdiction in matters of parental responsibility on the basis of proximity. The judgment affirmed the (factual) importance of presence (as opposed to the parents' initial intention, being a criterion which could be more difficult to assess in hindsight) as a key element in determining the child's habitual residence, although no abstract definition of the concept was provided.

8.3 Commission's proposal

No substantive changes have been proposed.²³⁰

9. Residual jurisdiction with regard to parental responsibility

Article 14 provides for residual jurisdiction in accordance with the law of the Member States where no court of a Member State is seised pursuant to Articles 8 to 13. This situation may arise when the courts of none of the Member States have jurisdiction on the basis of the Community jurisdiction rules established by the Regulation (Articles 8-13). This implies that the child does not have a habitual residence in the Member State.²³¹ Thus, if a child's habitual residence is in France, a French court will hear the case, even though the child may have Dutch nationality. If the child lives in Belarus, however, no court within the EU will be able to hear the case on these grounds and residual jurisdiction may or may not be found on the basis of the national jurisdictional rules of a Member State. Closely connected to the issue of residual jurisdiction is the question of whether a ground for having a *forum necessitatis* (discussed hereafter) exists in national jurisdictional rules and whether the Regulation should include a jurisdictional ground amounting to a *forum necessitatis* (i.e. at the European level) in respect of parental responsibilities.

The view seems to be widely accepted that Article 14 has to be read in conjunction with Articles 6 and 7 of the Regulation.²³² The general idea behind Articles 6, 7 and 14 appears to be that no connection with the EU is required in order to determine whether Community or

²²⁹ CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, Opinion of Advocate General Wahl.

²³⁰ 2016 Commission's Proposal, p. 38-39.

²³¹ Stone, *op. cit.*, p. 459; CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436.

²³² Magnus/Mankowski/Pataut, *op. cit.*, Article 14, note 1.

national rules of international jurisdiction are applicable. Rather, the Community rules are *always* applicable and *always supersede* national rules.²³³ If the connecting factor used by the applicable jurisdictional provision is located within the European Union, the jurisdiction will always be determined by the application of the relevant provision of Brussels IIbis.²³⁴ Even so, some national jurisdictional rules may still have a *residual role* to play and they will be available for the national courts when no court of a Member State has jurisdiction, *i.e. when the connecting factor of the relevant jurisdictional rule is located outside the EU*. In that case, the court can in principle decide on its own jurisdiction by applying its ‘own’ national jurisdictional rules. Thus, a strict hierarchy between the ‘normal’ European jurisdictional rules to be found in the Brussels II provisions and other ‘exorbitant’ rules can be found.²³⁵ Such ‘exorbitant’ rules may be based, for example, on nationality when the child’s habitual residence is located outside the European Union. This possibility is not limited by Article 14, unlike Articles 6 and 7.²³⁶

Another difference is that there is no extension of the national grounds of jurisdiction under Article 14.²³⁷ Whereas for matrimonial matters Article 7(2) allows for a European citizen resident in another Member State to avail him/herself of the rules of jurisdiction applicable in the State where he/she is habitually resident, this extension is *not* permitted with regard to parental responsibility proceedings according to Article 14. Therefore, jurisdictional rules can be based on having a certain nationality, like Article 14 of the French Civil Code, which can only be used by French nationals and not by nationals of other Member States for the purpose of parental responsibility proceedings.

Moreover, the importance of the national system of international jurisdictional rules should probably not be overstated, not least because the 1996 Hague Convention has been ratified by all Member States and therefore the jurisdictional rules of the Convention will be applicable when the child is habitually resident in a Contracting State which is not a Member State.²³⁸

In what follows we will explore the question of whether there are cases in which the courts have determined jurisdiction in reliance on national rules on jurisdiction within the

²³³ Hekin, *op. cit.*, in: Boele-Woelki and González-Beilfuss, *op. cit.*, p. 99.

²³⁴ Magnus/Mankowski/Pataut, *op. cit.*, Article 14, note 3 with a comparison with the Brussels I Regulation, in which the main principle is that the Community grounds of jurisdiction are only to be used when the case is closely linked to the European Union, whereas national rules of jurisdiction have almost been ‘eliminated’ from the Community system laid down by the Brussels II Regulation.

²³⁵ See also Hekin, *op. cit.*, in: Boele-Woelki and González-Beilfuss, *op.cit.*, p. 99.

²³⁶ See Magnus/Mankowski/Pataut, *op. cit.*, Article 14, note 7 for the example of Article 14 of the French Civil Code which allows the French courts to hear a case on parental responsibility involving a French plaintiff and any defendant, whether he/she is a European citizen or one habitually resident in a Member State, something which would not be possible in matrimonial matters since European citizens and European residents are protected from any form of national grounds (Article 6).

²³⁷ Carpaneto, *op. cit.*, p. 273.

²³⁸ Compare Magnus/Mankowski/Pataut, *op. cit.*, Article 14, note 8; see also Stone, *op. cit.*, p. 460: ‘[...] By Article 61, in a Member State which is a party to the Hague Convention 1996, the residual jurisdiction under Article 14 is restricted by that Convention in cases where the child is habitually resident in a non-member country which is also a party to that Convention.’

meaning of Article 14 of the Brussels Ibis Regulation. Furthermore, and in connection to Article 14 (and 13), the question is explored whether *forum necessitatis* should be incorporated.

9.1 Difficulties in the application of Article 14 – National Reports

The National Reports corroborate the view that Article 14 is used as a jurisdictional ground rather exceptionally. This may be accounted for by the rare use of residual jurisdictional grounds which may currently derive from the national private international law of the Member States. Indeed, in most Member States no such cases have been reported at all. In Austria, however, a national rule on jurisdiction within the meaning of Article 14 of the Brussels Ibis Regulation has been applied in a procedure relating to the right of access.²³⁹ The child had both Austrian and Serbian citizenship and was already in Serbia at the time of application. In Germany, if the child has his or her habitual residence abroad but German nationality,²⁴⁰ then Article 14 is also relied upon. In Estonia, there has allegedly been a case where the court did consider Article 14, although the grounds provided therein had not been fulfilled.

From Belgium, a number of cases have also been reported in connection with Article 14. Thus, in a dispute on the rights of custody and the residence of the children brought before the entry into force of the 1996 Hague Convention in Belgium, the Brussels Court of Appeal held that it lacked jurisdiction under Brussels Ibis since the children were habitually resident in Niger. The court found that according to Article 14 Brussels Ibis Regulation, jurisdiction was to be determined on the basis of the Belgian rules on international jurisdiction. Since both children had Belgian nationality at the moment the case was brought before the Belgian court, the court stated that it had jurisdiction according to Article 33 and Article 32 Belgian PIL Code.²⁴¹ According to these two provisions the Belgian courts have jurisdiction to hear actions regarding parental authority or guardianship if the children are Belgian at the moment the action is introduced.

In another Belgian case dating from 25 June 2013, the Brussels Court of Appeal confirmed this ruling. The Court ruled that since the children were not habitually resident in a Member State of the European Union at the moment the divorce proceedings were instituted and since one party had rejected jurisdiction based on Article 12, neither Article 12 nor Article 8 of the Brussels Ibis led to jurisdiction under the Regulation. Consequently, the Court held that the Belgian PIL Code had to be applied according to Article 14 Brussels Ibis. The court accordingly established its jurisdiction based on Articles 33 and 32 of the Belgian PIL Code.²⁴²

However, in a subsequent case, the Court of Appeal of Brussels rejected the application under Article 14 of the Brussels Ibis. The mother had initiated divorce proceedings in Belgium against the father living in Belgium. The mother also lodged a claim to obtain a modification of the custody regime, which she later decided to withdraw. The father introduced a

²³⁹ National Report Austria, question 28. Austrian Supreme Court [OGH] 30.05.2011 2 Ob 19/11z ECLI:AT:OGH0002:2011:0020OB80000.19.11Z.0530.000; RIS-Justiz RS0127153 ECLI:AT:OGH0002:2011:RS0127153.

²⁴⁰ See Sec. 99(1)1 No. 1 of the German Act on Family and Non-Contentious Proceedings.

²⁴¹ National Report Belgium, question 28.

²⁴² *Ibid.*

counterclaim to obtain primary custody of their only child. The child had his habitual residence with his mother in the USA. The mother contested the international jurisdiction of the Belgian courts, based on Article 14 of the Brussels Ibis. The court however established jurisdiction on the basis of Article 12 of the Brussels Ibis rather than Article 14. The court held that the child had a substantial connection with Belgium and that the mother expressly accepted the jurisdiction of the Belgian courts before initiating proceedings before the Belgian courts.²⁴³

Recourse to residual jurisdiction pursuant to Article 14 Brussels Ibis Regulation appears to be also quite exceptional in Greece, so the National Report for Greece suggests. One case is reported where Greek judges established their jurisdiction on the basis of the Greek nationality of the mother of the child relying on Article 601 Code of Civil Procedure.²⁴⁴ In Greece, this is understood to be a national rule creating a *forum necessitatis*. In such a case it will be the courts of Athens which will be considered competent. As for the National Report for Sweden, one decision by the Swedish Supreme Court in the case of *NJA 2011 p. 499* is considered to be of some interest as the habitual residence of the child had moved from Sweden to Indonesia, together with the mother who was the child's sole legal custodian. The case revolved around the jurisdiction of the Swedish courts to deal with custody proceedings initiated in Sweden by the child's father. The Swedish court noted that no Member State had jurisdiction under Article 8 of the Brussels Ibis Regulation taking into consideration the criteria of habitual residence formulated by the CJEU case law. The father's action was dismissed, as there was no Swedish jurisdiction according to Article 14 either. The decision confirms that the Regulation is applicable even when the case does not involve any Member State other than that of the forum.

At the national level of the Member States, it can be deduced from the information submitted that only a minority of Member States allow for a *forum necessitatis*. Its use may be contingent upon the existence of the property of the child located in the Member State, as appears to be the case in Lithuania.²⁴⁵ The same holds true when there is more generally a link to the Member State and/or there is evidence that there is no other available forum. Sometimes the urgency in caring for a child is a condition for ordering protection measures (Cyprus). In Finland, the best interests of a child who is not habitually resident in Finland is also referred to within this context.²⁴⁶ Article 11 of the Belgian PIL Code contains a provision on *forum necessitatis* when the matter presents 'close connections with Belgium' and proceedings abroad seem 'impossible' or when it would be 'unreasonable' to require that the action be brought abroad.

A further example can be found in Article 62(c) of the Portuguese Civil Procedure Code.²⁴⁷ It contains the rule on the international jurisdiction of the Portuguese courts 'when the claimed right cannot become effective unless the action is filed in Portuguese territory or the

²⁴³ *Ibid.*

²⁴⁴ National Report Greece, question 28.

²⁴⁵ National Report Lithuania, question 28.

²⁴⁶ National Report Finland, question 28.

²⁴⁷ National Report Portugal, question 28.

plaintiff has a considerable difficulty in filing the action abroad, since between the subject of the dispute and the Portuguese legal system there is a ponderous element of connection, either personal or real (*causa rei*). Similarly, in Romania Article 1070 of the Civil Procedure Code states that the Romanian courts at the place which has a sufficient connection with the case become competent to hear that case, even if the Romanian courts are not normally internationally competent. However, it must be proven that it is impossible to have that case submitted to a foreign court or that it is not reasonable to require that a foreign court be seised. If the claimant is a Romanian citizen or is a stateless person domiciled in Romania, the competence of the Romanian courts is mandatory.

There are also Member States which lack any such clear ground of jurisdiction, but a *forum necessitatis* is nonetheless exceptionally established, usually on the basis of residual national jurisdictional rules. In France, for example, there is no formal legal provision on *forum necessitatis* but there is nonetheless a recognition of *forum necessitatis* by the judiciary. It has, however, reportedly never been applied in family matters.²⁴⁸

As for Austria, the National Report indicates that there is no *forum necessitatis* for procedures concerning parental responsibility.²⁴⁹ Even so, international jurisdiction can be assumed, *inter alia*, if the minor has property in Austria and a measure affects his/her property. In Hungary, the Hungarian Act on Private International Law (Law Decree 13 of 1979) contains some rules on choice of forum, but parties may stipulate jurisdiction only in respect of *property-related* legal disputes. In Germany, for example, there is residual jurisdiction if '*das Kind der Fürsorge durch ein deutsches Gericht bedarf*'. In Spain, the courts may not decline their jurisdiction if the dispute is '*connected with Spain*' and provided that the courts of the state connected with the case have declined to hear the case. In Sweden, although this jurisdiction reportedly lacks a clear *forum necessitatis* rule, in one case the notion of habitual residence was interpreted very extensively.²⁵⁰

In Italy, a similar result has been achieved, albeit through a different route – through the ruling of the Cassation Court. With reference to Article 6 of the European Convention on Human Rights (on the 'right to a fair trial'), the Court has held that in exceptional cases the Italian courts may assume jurisdiction even if there is no ground according to Italian law. The Court has held that the Italian judge must be considered competent if there is no foreign court that has jurisdiction, resulting in a denial of justice.²⁵¹ At the same time, Member States such as Ireland, Latvia and the United Kingdom lack a *forum necessitatis*.

In the National Report for Luxembourg, it has been submitted that the grounds of jurisdiction in the Brussels IIbis Regulation, complemented by the grounds of jurisdiction under national law, cover all situations linked to matrimonial matters in the European Union, making it very difficult for a situation of a 'denial of justice' to occur.

²⁴⁸ National Report France, question 28.

²⁴⁹ National Report Austria, question 28.

²⁵⁰ National Report Sweden, question 28.

²⁵¹ National Report Italy, question 28, reference to Cass. 17 July 2008.

As for the Netherlands, *forum necessitatis* only concerns children who do not ('actually') have their habitual residence in the EU within the meaning of Article 8 and who are also not present in the EU within the meaning of Article 13.

The National Report for the UK submits that Articles 13 and 14 of the Regulation seem to provide sufficient protection, even though a number of significant issues still exist in respect of child protection, including the often very differing approaches of EU Member States.²⁵² McEleavy has also observed (albeit in respect of the Hague Convention) that 'there have been many high profile examples where the new rules have failed to operate as intended, or indeed have been ignored entirely.'²⁵³

It must be borne in mind, however, that such opinions do not necessarily reflect a prevalent doctrinal view in a Member State.

9.2 Difficulties in the application of Article 14 – CJEU case law

As the issue of residual jurisdiction left by Article 14 may lead to the (incidental) attribution of jurisdiction to Member States on the basis of national rules of private international law, it is understandable that the delineation of the scope of this jurisdictional ground has not been specifically addressed by the CJEU.

9.3 Commission's proposal

The Proposal does not present any (substantive) changes.²⁵⁴

10. Transfer of jurisdiction – Article 15

The current Regulation contains a remarkable rule according to which a court which has been seised of a case and which has jurisdiction on the substance is permitted, by way of an exception, to *transfer the case to a court* of another Member State if the latter is *better placed to hear that case*. This rule resembles *forum non conveniens*, which is well known in common law countries including the United States. It provides that such a transfer is subject to certain conditions.²⁵⁵

This provision supplements the rules of jurisdiction in Articles 8 to 14 of that chapter by introducing, as a means of cooperation, the possibility of transferring the case to a court of another Member State which is better placed to hear that case.²⁵⁶

For the purpose of the transfer of the case, the courts should co-operate either directly or through their central authorities. They communicate and assess whether in the specific case the requirements for a transfer have been fulfilled, in particular if the transfer of the case would

²⁵² National Report the United Kingdom, question 28.

²⁵³ McEleavy, P., 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?' (2015) NILR 366, p. 373, available at: <<https://link.springer.com/article/10.1007/s40802-015-0040-z>>.

²⁵⁴ 2016 Commission's Proposal, p. 39.

²⁵⁵ Magnus/Mankowski/Pataut, *op. cit.*, Article 15, note 1-3; De Boer in: De Boer and Ibili, *op. cit.*, p. 176.

²⁵⁶ See further CJEU Case C-455/15 PPU *P v Q* [2015] ECLI:EU:C:2015:763, para 44.

be in the best interests of the child.²⁵⁷ If judges speak and/or understand a common language, it has been suggested that they should not hesitate to contact each other directly by telephone or e-mail.²⁵⁸

One of the questions put forward to the national reporters was whether, when Article 15 has been applied in a jurisdiction of a Member State, this has been mainly an outgoing or incoming transfer. Thus, pursuant to Article 15, the request to transfer a case from a court in one Member State to another court in another Member State may be referred to as ‘outgoing’ or ‘ingoing’.²⁵⁹ The national reports seem to indicate that most requests under Article 15 are ‘outgoing’.²⁶⁰

The general idea behind Article 15 accordingly appears to be to allow for transfers of cases from one Member State court to another Member State court, when the court first seized considers that the other court is ‘better placed’ to hear the case.²⁶¹

The rather open formulation which is implicit in the words ‘better placed court’ is not without the risk of a subjective and partial interpretation. Indeed, it allows for wide judicial discretion and is therefore open to criticism.²⁶² Thus, the argument has been raised that both legal culture and familiarity with the *forum non conveniens* theory may have an influence on decisions regarding the transfer of jurisdiction.²⁶³ A court seized may stay the proceedings and invite the parties to introduce a request before the court of that other Member State (Article 15(1)(a)). A time limit is set by which the courts of the other Member State will be seized in accordance with paragraph 1 (Article 15(4)).

An important component of the child’s interests is the possibility of obtaining a decision within a short period of time. For this reason, Articles 15(4) and 15(5) lay down an expeditious procedure by which the transfer should be completed as quickly as possible. However, nothing is specifically said about the court not having jurisdiction asking for permission to hear the case pursuant to Article 15(2)(c).

²⁵⁷ Stone, *op. cit.*, p. 461; See also CJEU Case C-523/07 A [2009] ECR I-2805.

²⁵⁸ Practice Guide 2015, p. 35-36.

²⁵⁹ Stone, *op. cit.*, p. 460: ‘Somewhat similar provision for discretionary transfer of a case between courts of different countries is made by Article 8 and 9 of the Hague Convention 1996.’

²⁶⁰ See for example the National Reports of Austria, Belgium, Cyprus, the Czech Republic, Italy, Poland and the United Kingdom. In the Republic of Ireland, ‘Article 15 operates in relation to both incoming (see Child Care Law Reporting Project 2016 concerning a child in care being transferred to Ireland) and outgoing (HSE v. SF [2012] EWEHC 1640.’ In Latvia, the ‘outcome is 50/50.’ In neighbouring Lithuania, there has only been a single case where a local court denied its jurisdiction and applied to another Member State court according to the provisions of Article 15. This also appears to be the case in Slovenia. In Luxembourg and Portugal, Article 15 is allegedly rarely applied.

²⁶¹ Stone, *op. cit.*, nr. 3, p. 165; De Boer, in: De Boer and Ibili, *op. cit.*, p. 176; see also Vassilakakis, E., and Kourtis, V., ‘The Impact and Application of Brussels Ibis in Greece’ in: Boele-Woelki and Beilfuss, *op. cit.* p. 142: ‘Introducing the *forum non conveniens* into Continental Europe is one of the major novelties of the Regulation, even if its added value has to be assessed in the light of the hostile judgment delivered within the framework of the Brussels Convention by the European Court of Justice in the *Owusu* case.’ See further CJEU Case C-281/02 *Andrew Owusu v N. B. Jackson* [2005] ECLI:EU:C:2005:120.

²⁶² For example, in De Boer, Th. M. ‘Enkele knelpunten bij de toepassing van de Verordening Brussel II-bis’ (2005) 27 FJR (under paragraph 5).

²⁶³ Magnus/Mankowski/Pataut, *op. cit.*, Article 15, note 12.

The initiative for the transfer of the case may be taken by the parties themselves or by the national court or even by the foreign court. If the initiative comes from the court, then the transfer should be accepted by at least one of the parties, according to Article 15(2), last sentence. Subsequently the requested court must become involved with the case. This will be achieved through direct communication or through the Central Authorities: Article 15(1)(b). Yet Article 15(1)(a) also allows the parties to submit a request to the foreign court. The requested court should then accept its jurisdiction or reject it within six weeks. This period will sometimes be too short. In both situations, as Article 15(4) suggests, the case should be lodged within a certain time period before the court of the other Member State. A transfer of the case by a court may become problematic and jeopardise the child's interests if the parties do not cooperate, especially because if the courts are not seised, the court which had been seised continues to exercise jurisdiction in accordance with Articles 8 to 14 (see Article 15 paragraph 2 last sentence).²⁶⁴

10.1 'Particular connection' regarding the transfer of jurisdiction – National Reports

Unlike Article 8(2) of the 1996 Hague Convention which permits a transfer to a state with which the child has a 'substantial connection', under the Regulation the list of connecting factors has been circumscribed. Either the new habitual residence or the former habitual residence of the child may indicate a particular connection to that state (sub-paragraphs a and b). Another 'particular connection' is a connection with the courts of the Member State of the nationality of the child (sub-paragraph c). Furthermore, a possibility exists under sub-paragraph d) to transfer the case to the courts of a State where a holder of parental responsibility is habitually resident or where the property of the child is located (sub-paragraph e).

In one case, for example, the mother challenged the international jurisdiction of the Belgian courts, seeking the application of Article 15 and the transfer of the case to the Polish courts, which were deemed to be particularly connected to the child's situation, since the child was residing in Poland and had in the interim been registered in a nursery school.²⁶⁵ A weak connection to the person of the child is established if only the property of the child is located within the Member State to which the case should be transferred (Article 15(3)(e)). In that respect, it should be borne in mind that if there has been no application by a party, a transfer requires acceptance by at least one party (Article 15(2) sentence 2).²⁶⁶ With regard to the 'particular connection' condition, the Belgian courts have noted in different cases that such a connection existed independently of the time spent in the other country. In one case the children had been living in the other country for only a few months, but they went to school there and had made friends and thus had already created social links which indicated the existence of a particular connection.²⁶⁷ While in another case before the same court the child had already been

²⁶⁴ De Boer, 'Enkele knelpunten in de toepassing van de Verordening Brussel II-bis', *op. cit.*, p. 22 *et seq.*

²⁶⁵ CJEU Case C-498/14 PPU *David Bradbrooke v Anna Aleksandrowicz* [2015] ECLI:EU:C:2015:3, para 20.

²⁶⁶ Rauscher, 'Parental Responsibility Cases under the new Council Regulation Brussels IIa', *op. cit.*, I-42.

²⁶⁷ National Report Belgium, question 27.

living in the other country for two years and this demonstrated the existence of a particular connection.²⁶⁸

In Belgium in a case where the living circumstances of the child needed to be inspected, a court stated that the courts of the State where the child was actually living were better placed to hear the case.²⁶⁹ However, the opposite conclusion was reached in another Belgian case involving a child who had moved from Belgium to Germany during the proceedings. The court found that the courts in Germany were not better placed to hear the case considering that the Belgian court had already ordered provisional measures and the hearing of the child by an expert.²⁷⁰ In assessing whether the other courts are indeed ‘better placed to hear the case’, the Belgian courts will assess what the best interests of the child are and may take into consideration different relevant aspects such as the possibility for the court seised to be able to gather information on the child’s situation.²⁷¹

In the United Kingdom there appears to have been considerable debate as regards the question of when a court may actually be considered to be ‘better placed’ to hear a case and, if so, whether this necessarily means that the transfer is in the best interests of the child. McCarthy and Twomey have suggested that in this area, much of the UK’s recent case law has perhaps served ‘to dilute the meaning of best interests in Article 15...it has become little more than a repetition of ‘*better placed to hear the case*’,²⁷² leading to too narrow a focus on issues of forum.²⁷³ In *Re N (Children)* [2016], the issue before the Supreme Court was the proposed removal of care proceedings from the UK to Hungary: the two girls in question had been born in the UK and from infancy had been placed with foster carers. They were likely to be eventually adopted by their careers, should the proceedings have remained within the UK. The Court found that the best interests of the children clearly required ‘that their future should be decided as soon as possible.’ Overruling the lower courts’ decision to transfer jurisdiction, the Court provided guidance on how the best interests principle was to be properly interpreted under Article 15. Concern was expressed over the use of an ‘attenuated welfare test’, with Lady Hale noting that ‘...the question is whether the transfer is in the child’s best interests. This is a different question from what eventual outcome to the case will be in the child’s best interests. The focus of the inquiry is different, but it is wrong to call it ‘attenuated’... there is no reason at all to exclude the impact upon the child’s welfare, in the short or longer term, of the transfer itself...’ The Court opted not to await forthcoming guidance from the CJEU, but to proceed instead on the basis of its own interpretation of Article 15, which was grounded in a ‘practical evaluation’ of what appeared to be an increasingly urgent situation.

Article 15 may also concern circumstances where – exceptionally – the court which has been seised (‘the court of origin’) is *not* actually the best placed to hear the case, or does not consider itself to be the best placed. But the opposite may also occur. The Romanian Report

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² National Report the United Kingdom, question 27.

²⁷³ *Ibid.*

indicates that the provision has been invoked even though the conditions provided therein were far from being fulfilled. Thus, Article 15 has been invoked as a ground for the Romanian courts' jurisdiction as the 'better placed courts' even in cases where the habitual residence of the parties and of the child was located in another Member State. The general position of the Romanian courts was to reject such claims.

10.2 The 'child's best interests' regarding the transfer of jurisdiction – National Reports

In British legal literature there has been some discussion as regards the need to distinguish between the short-term and long-term effects of a transfer of jurisdiction respectively, bearing in mind the best interests of the child over the course of time. As Kruger and Samyn observe, if the concept of the child's 'habitual residence' is 'to have an autonomous and uniform meaning based on it being a factual concept',²⁷⁴ then, arguably, decisions to transfer proceedings which have the potential to detrimentally affect the child's *longer-term best interests* should be equally grounded in factual concerns (such as, for example, a loss of contact – or any opportunity to seek contact – with siblings or grandparents). To ignore potentially harmful (long-term) outcomes that might occur post-transfer would risk sidelining the best interests of the child principle: human rights violations (for example, under Article 6 or 8 of the European Convention on Human Rights) could also arise.

10.3 Acceptance by the parties – National Reports

In the *baby D* surrogacy case, the Court of Appeal of Ghent (Belgium) dealt with the 'acceptance' condition.²⁷⁵ Thus, according to this condition a transfer made by the court on its own motion must be accepted by at least one of the parties. In this case the habitual residence of the child was in the Netherlands. It was not disputed that the Dutch courts had jurisdiction on the basis of Article 8 Brussels Ibis. Nevertheless, the Belgian Juvenile Court of Oudenaarde asked the Dutch Juvenile Court of Utrecht to transfer the case according to Article 15 Brussels Ibis. It was of the opinion that the Belgian courts were better placed to hear the case. The Court of Appeal of Ghent ruled that the transfer had not taken place according to the conditions of Article 15 as it had not been correctly accepted by at least one of the parties to the proceedings. In this case the Dutch Council for Child Protection ('Raad voor Kinderbescherming') had agreed to the referral through a letter which was sent 'subsequent' to the court decision referring the case. The Court of Appeal of Ghent took the view that this acceptance was not valid. Consequently the Belgian courts referred the case back to the courts in the Netherlands.²⁷⁶

In Luxembourg legal literature Article 15 is considered to be problematic in respect of countries that, like Luxembourg, are not familiar with the notion of *forum conveniens*.²⁷⁷

²⁷⁴ Kruger and Samyn, *op.cit.*, p. 141.

²⁷⁵ Court of Appeal of Ghent, 5 September 2005, [Revue@dipr.be](#) 2005/3.

²⁷⁶ National Report Belgium, question 27; Court of Appeal of Ghent, 5 September 2005, [Revue@dipr.be](#) 2005/3, 26. For a critical comment, see: Kruger, T., 'Kinderhandel: welke rechters moeten/mogen de zaak horen?' (2006) *Tijdschrift voor Vreemdelingenrecht*, pp. 171-174.

²⁷⁷ National Report Luxembourg, question 27.

10.4 Difficulties in the application of Article 15 – CJEU case law

The case of *Child and Family Agency (CAFA) v J. D.* concerned the possibility of transferring proceedings from Ireland to the UK in order to decide on the future of a very young child, R.²⁷⁸ Prior to his birth, R's mother resided in the UK, where she had another child, R's older brother, who had been placed in foster care. During the pregnancy, the mother had deliberately left the UK and moved to have her baby in Ireland in order to avoid care proceedings in the UK. However, soon after R's birth, an Irish court ordered the provisional placement of R in foster care. The Supreme Court had several doubts as to how it should proceed. First of all, the court was unsure whether Article 15 applies to child protection proceedings based on public law where such proceedings are brought by a local authority in a first Member State although it is an institution of another Member State that will have to bring separate proceedings, under different legislation and possibly relating to different factual circumstances, if the court of that other Member State assumes jurisdiction (first preliminary question). Furthermore, the UK Supreme Court explored the issue whether the 'best interests of the child' should be interpreted, and what issues are to be considered in determining which court is best placed to determine the matter (preliminary questions 2-6). Advocate General Wathelet considered that although parental responsibility as provided for in the Regulation is formally concerned with 'civil matters', the classification used in national legislation is irrelevant.

Factors such as *the language of the proceedings*, the availability of relevant evidence concerning, for example, the *ability of the parent or the parents to provide education and maintenance* to the child, the possibility of calling *appropriate witnesses* and the probability that those witnesses will appear in court, the *availability of medical and social reports* and the *possibility of updating those reports*, where appropriate, and even the *period of delivery of the judgment* may all be factors that may have a direct impact on the ability of a court to assess the case in the best interests of the child according to Wathelet.²⁷⁹ One of the questions submitted for a preliminary reference further asked whether the desire of a mother to move beyond the reach of the social services of her home State to another Member State with a social services system she considers to be better, should be given certain weight. The Advocate General considered that that does not, in itself, seem relevant in determining the court which is best placed to hear the case. It may only be considered if it is capable of having an impact on the ability of the court to hear the case in the interests of the child.²⁸⁰

In relation to the first question placed before the Court, it considered that although parental responsibility, as provided for in Article 1(1) and (2) of the Regulation, is formally concerned with 'civil matters', the classification used in national legislation is irrelevant.²⁸¹ Therefore, Article 15 of Regulation 2201/2003 is applicable when an application concerning child protection is brought under public law by the competent authority of a Member State regardless of whether it is necessary that when a court of another Member State assumes

²⁷⁸ CJEU Case C-428/15 *Child and Family Agency v J. D.* [2016] ECLI:EU:C:2016:819.

²⁷⁹ *Ibid.*, para 96.

²⁸⁰ *Ibid.*, para 93.

²⁸¹ *Ibid.*, Opinion of Advocate General Wathelet, para 36.

jurisdiction, an authority of that other Member State must start separate proceedings from those brought in the first Member State, pursuant to its own domestic law and possibly taking different factual circumstances into account.²⁸²

Regarding the second question referred to the Court by the Supreme Court of Ireland, it was held that Article 15(1) of the Regulation must be interpreted as meaning that in order for a court having jurisdiction to determine that another court in another Member State with which the child has a better connection is more suitable to hear the case, the first seised court must be certain that the transfer of the case will provide genuine and specific added value for the examination of the case.²⁸³ In order for such a transfer to be in the best interests of the child, the court first seised must be satisfied that the transfer of the case will not be detrimental to the child. According to Advocate General Wathelet, factors such as *the language of the proceedings*, the availability of relevant evidence concerning, for example, the *ability of the parent or the parents to provide education and maintenance* to the child, the possibility of calling *appropriate witnesses* and the probability that those witnesses will appear in court, the *availability of medical and social reports* and the *possibility of updating those reports*, where appropriate, and even the *period of delivery of the judgment* may all be factors that may have a direct impact on the ability of a court to assess the case in the best interests of the child according to Wathelet.²⁸⁴

Finally, when the court having jurisdiction is to determine whether there is a court that is better placed to determine the matter, during its examination the court should neither take into account the effect of a transfer of the case to the court of another Member State on the right of freedom of movement of the persons concerned other than that of the child in question, or the mother's motivation for exercising this right prior to the court being seised, unless such considerations may have negative consequences for the situation of the child.²⁸⁵

A viewpoint which can be deduced from the case law of the CJEU is that, as far as the protection of the best interests of the child so requires, the national court which of its own motion has declared that it does not have jurisdiction must inform, either directly or through the Central Authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction.²⁸⁶

10.5 Commission's proposal

A role has been expressly attributed to the European Judicial Network in civil and commercial matters in the proposed Article 14(6). Otherwise, no substantive changes have been proposed.²⁸⁷

²⁸² *Ibid.*, para 38.

²⁸³ *Ibid.*, para 61.

²⁸⁴ *Ibid.*, Opinion of Advocate General Wathelet, para 96.

²⁸⁵ *Ibid.*, para 67.

²⁸⁶ CJEU Case C-523/07 A. [2009] ECR I-2805, paras 68-70.

²⁸⁷ 2016 Commission's Proposal, p. 40.

GUIDELINES – Summary

Article 8

In its case law the CJEU has developed a flexible analytical framework in order to determine habitual residence as a key connecting factor. All kinds of elements, both objective as well as subjective, should be taken into consideration by the national courts when examining habitual residence in respect of the concrete situation of the child. This flexible attitude allows the court to consider jurisdiction in the light of the best interests of the child. This underlines the fundamental idea of the CJEU that when defining habitual residence as a connecting factor the factual context of the provision and the purpose of the Regulation are the leading considerations.

By and large, the domestic courts in the Member States appear to observe the determined EU case law in their interpretation of this crucial legal concept. The leading doctrine maintains that ‘habitual residence’ should be interpreted autonomously, without reference to the construction based on national rules.

The interpretation of the concept of the ‘child’ has been left to the discretion of legal practice. There is a common understanding, however, that for the purposes of the Regulation a ‘child’ refers to a person younger than 18 years of age. Different approaches in international instruments (for example, regarding the concept of a ‘child’ as being under 16 years of age in the 1980 Hague Convention and under 18 years of age in the 1996 Hague Convention) may give rise to legal uncertainty not only for legal practitioners but also for parents and children. However, there is no CJEU case law which reveals this problem.

Article 9

At the time of writing, Article 9 still seems to be applied in the Member States in only a small number of cases and without specific problems.

Article 12

The prorogation rules have an exceptional nature and form a departure from the principle of proximity. The purpose of the prorogation rules is to allow the parties to have some degree of autonomy in matters of parental responsibility, albeit only under clearly defined conditions, the express or unequivocal acceptance of jurisdiction being one of them. Therefore, the unequivocal acceptance of the jurisdiction of the courts seised by all the parties to the proceedings must be strictly interpreted. However, it seems acceptable to raise this point regarding the acceptance at the time of the first hearing. The agreement to prorogate the divorce court’s jurisdiction should not be anticipated, unless it is renewed at

the time the court is seised. Another common element shared by both Article 12(1) and Article 12(3) is the overriding requirement that the referred prorogation should be ‘in the best interests of the child.’ The interpretation of this criterion will vary according to the facts and circumstances of the case but it seems safe to say that the acceptance of jurisdiction by the parties (often the parents) will also be an element that may be considered to be part of the child’s interests.

Article 13

Article 13 is a residual jurisdictional ground that, although used rarely, is useful especially with regard to refugee children. The child’s presence in a Member State should only be considered in cases in which presence rather than habitual residence in a Member State can be established on the basis of the facts and circumstances of the case.

Article 14

Notwithstanding the exceptional character and the rare use of the residual jurisdictional ground of *forum necessitatis*, its inclusion, if only primarily used as a ‘safety net’, in the Regulation is recommended, especially in view of reasons of EU-wide consistency with the other Regulations as well as the overall completeness of the jurisdictional grounds within the Regulation itself.

Article 15

A distinction can be drawn between situations in which the case is transferred from the court seised to a court in another country – Article 8 of the 1996 Hague Convention – and the reverse situation (Article 9).

For reasons of procedural efficiency and due confidence in the judiciary of the Member States, it is important to restrict the right of the parties to have a say in issues regarding a transfer, as provided for in Article 15(2), particularly by abolishing the requirement that the transfer proposed by a court should be accepted by at least one of the parties. The courts should be able to decide this more expediently bearing in mind the genuine risk that relations between the parties may deteriorate in the course of the proceedings and, as a consequence, will undermine or threaten the child’s interests.