

CHAPTER 4: Jurisdiction in Cases of Child Abduction

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1. Introduction

It was exactly the issues pertaining to parental responsibility ‘independently of any link with a matrimonial proceeding’,¹ and in particular introducing the provisions on child abduction, that represented the reasons for revising the Brussels II Regulation. Especially the idea of extending the substantive scope² so as to cover child abduction³ was met with criticism by some authors.⁴ Considering that various aspects of child abduction are regulated in the 1980 Hague Convention, it could be perceived as being redundant to extend European Union legislative functions to this matter.⁵

The intention of complementing provisions of the 1980 Hague Convention with the purpose of obtaining the return of the child without delay clearly follows from the wording of Recital 17. Thus, the incentive is rather to pursue more effectively the underlying principles and objectives of the Convention. Conversely, the Convention may have an impact on the application, interpretation and effectiveness of the Regulation’s rules.⁶

Yet the purpose of enhancing the effectiveness of the Convention has not been achieved. The complementary provisions of the Regulation and especially Article 11 have proved to be counterproductive, causing a dichotomy in the application of the Convention.⁷

¹ Brussels IIbis Regulation, Recital 5. Brussels II Regulation regulated only the matter of parental responsibility over a child of both spouses within the proceedings for divorce, legal separation or marriage annulment, Article 3.

² On the negotiations of the ‘Recast’, see Trimmings, K., *Child abduction within the European Union* (Hart Publishing 2013), pp. 13-24.

³ The Brussels II Regulation only mentioned child abduction in Article 4 referring to the application of the 1980 Hague Convention in particular its provisions in Articles 3 and 16.

⁴ See e.g., McEleavy, P., ‘The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?’ (2005) 1:1 *Journal of Private International Law*, pp. 5-6; The author emphasises here that the balance between certain policy aims and the rights of the stakeholders involved under the Convention was affected by the Brussels IIbis Regulation: ‘this equilibrium was ended in respect of cases where children are abducted within the European Community’; Pertegas Sender, M., *La responsabilité parentale, l’enlèvement d’enfants et les obligations alimentaires*, in Wautelet, P. (ed.), *Actualités du contentieux familial international*, (Larcier 2005), p. 183; For more criticism see Jäterä-Jareborg, M., ‘A European Family Law for Cross-border Situations – Some Reflections Concerning the Brussels II Regulation and its Planned Amendments’ (2002) *Yearbook of Private International Law* 67, p. 78.

⁵ Rauscher, ‘Parental Responsibility Cases under the new Council Regulation Brussels IIA’, *op. cit.* p. I-42: ‘[...] some Member States were afraid that particular EC-rules [...] might weaken the effect of the quite successful CCA[...]; Meeusen, J. and Schmidt, G., ‘Mededelingen van de Nederlandse Vereniging voor Internationaal Rechts’ (Asser Press 2006) p. 85: ‘It would have been better if Brussels IIbis would have sufficed with referring to the relevant provisions of the Hague Convention (or perhaps the copying of these provisions) and the addition of only those issues the European legislators truly want to see governed differently.....The reformulation of provisions in Brussels IIbis leaves scholars, practitioners and judges without clear necessity with extra questions and problems.’ See also, Trimmings, *op. cit.*, p. 22, where the author emphasises that the mechanism of the Regulation ‘has justly been criticised for essentially altering the Convention scheme rather than only complementing it.’

⁶ See the Opinion of the Court (Grand Chamber) of 14 October 2014 1/13, 11 October 2014, ECLI:EU:C:2014:2303 stating that ‘[m]oreover, because of the overlap and the close connection between the provisions of Regulation 2201/2003 and those of the Convention, in particular between Article 11 of the regulation and Chapter III of the Convention, the provisions of the Convention may have an effect on the meaning, scope and effectiveness of the rules laid down in Regulation No. 2201/2003’. See also McEleavy, ‘The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?’, *op. cit.*, p. 372.

⁷ Trimmings, *op. cit.*, p. 22; Here, the author notes that many objections have been raised against the mechanism established by Article 11 since ‘the scheme undermines the principle of mutual trust between Member States [...]’.

Therefore, the 2016 Commission's Proposal suggests a number of changes to these provisions which must be met with approval.⁸ This issue will be addressed in greater detail *infra* in this Chapter, under 3 '*Jurisdiction under Article 11(1)-(5)*' and 4 '*Jurisdiction under Article 11(6)-(8)*' and suggested improvements in the Recommendations, under 4 '*Child Abduction and Return Procedures*'. Some guidance is thereby provided for the application of this provision as it follows from the relevant case law, in particular decisions of the CJEU and the ECtHR⁹. Some suggestions for improving the existing procedural regulatory scheme of the Regulation are offered in the Recommendations. They may prove to be useful within the context of the current discussion on the revision of the Regulation.

2. Jurisdiction under Article 10

Article 10 aims to restrict the possibility of transferring jurisdiction from the courts of the Member State of origin to the courts of the Member State of refuge in cases of child abduction. At the same time, it provides that the change of circumstances after a certain period can acquire a sustainable character so that it is functional for the courts of the Member State of the new habitual residence of the child to attain jurisdiction.¹⁰ The relevant provisions of the Regulation are meant to discourage parental child abduction amongst Member States and to safeguard the prompt return of the child to the Member State in which he or she had his or her habitual residence immediately before the abduction.¹¹ The expression 'child abduction' encompasses both wrongful removal and wrongful retention. Article 2(11) of the Regulation provides for the definition of 'wrongful removal or retention', which is modelled along the lines of Article 3 of the 1980 Hague Convention. Yet the definition in Article 2(11) is somewhat broader than the definition in Article 3 of the Convention.¹²

According to the definition in Article 2(11), the removal or retention is wrongful when it is carried out in breach of the rights of custody provided that such rights were actually exercised at the moment of abduction, or would have been exercised if it had not been hindered by the removal or retention.¹³ In comparison with Article 3 of the 1980 Hague Convention, the Regulation in Article 2(11)(b) defines when custody is considered to be exercised jointly. Thus, joint custody exists when one of the holders of parental responsibility is not allowed to decide on the residence of the child without the consent of the other holder of parental responsibility. The right of custody may be acquired either by operation of law, by a court judgment or by an agreement.

⁸ For more information about the suggested changes, see the 2016 Commission's Proposal, pp. 2-17.

⁹ European Court of Human Rights (hereinafter – the ECtHR).

¹⁰ For the commentary on this provision, see Vonken, P. *Internationaal Privaatrecht* (Asser series 10-II, Wolters Kluwer 2016) p. 328; see also Holzmann, C., *Brussel IIa VO: Elterliche Verantwortung und internationale Kinderentführung* (Janaer Wissenschaftliche Verlagsgesellschaft 2008), p. 181.

¹¹ Practice Guide 2015, p. 49. See also, McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?', *op. cit.*, p. 372. The author mentions here that: 'Deterrence is at the heart of the new regime [...]'. For more information see also CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 52: 'The Regulation seeks, in particular, to deter child abductions between member states and, in cases of abduction, to obtain the child's return without delay.'

¹² For more particulars on this issue, see Dutta and Schulz, *cit. op.*, p. 6.

¹³ Article 2(11) of the Regulation.

In order to determine whether a removal or retention was ‘wrongful’ within the meaning of the Regulation it is decisive to ascertain the habitual residence of the child. In other words, it is decisive whether the child did habitually reside in the Member State from which he/she is removed. Thus, the concept of habitual residence is relevant in the context of determining jurisdiction under Articles 10 and 11, as well. The issue of habitual residence and its interpretation have already been discussed *supra* in Chapter 3, under 4 ‘*General rule on jurisdiction based on the habitual residence of the child*’. As already detailed in Chapter 3, having regard to the relevant CJEU case law, the concept of habitual residence is generally to be established taking the following factors into consideration:

- (i) It corresponds to the place which reflects some degree of integration of the child in a social and family environment,
- (ii) It has to be established by domestic courts,
- (iii) It has to be established on the basis of all the circumstances which are specific to the particular case.¹⁴

The analysis presented there, as well as the relevant CJEU case law, are fully applicable in the context of Article 10. The same holds true for Article 11. Namely, it is self-explanatory that Article 10 only applies if the child actually had his or her habitual residence in a Member State other than the State to which he or she was removed or is being retained. If the child did not have habitual residence in the Member State from which he/she was removed, the courts in that Member State obviously cannot ‘retain’ jurisdiction as they were not competent in the first place. Consequently, Article 10 is not relevant for determining the jurisdiction of the court in the Member State to which the child has been removed or retained if the child was not actually a resident of the Member State from which he/she was removed. In other words, the courts in the Member State of removal or retention may establish jurisdiction irrespective of whether or not the requirements of Article 10 are met. In such a case the sole criterion is the main rule on jurisdiction provided in Article 8, i.e., the habitual residence of the child.

The idea incorporated in Article 10 is that the court of the Member State where the child was habitually resident immediately before his/her wrongful removal or retention in principle retains jurisdiction to decide on the custody of a child.¹⁵ This is an exception to the main rule as provided in Article 8(1).¹⁶ The court in the Member State to which the child was wrongly removed or retained may only be vested with jurisdiction if the child has acquired a habitual

¹⁴ CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309; CJEU Case C-523/07 A. [2009] ECR I-2805; see also, Carpaneto, *op. cit.*, p. 261.

¹⁵ Lenaerts, *op. cit.*, p. 1313; The author refers to the *Povse* judgment (para 43) where the Court made it clear that ‘[...] the Brussels IIbis Regulation seeks to deter child abduction and to obtain the child’s return without delay’; See also Devers, A., *Les enlèvements d’enfants et le règlement Bruxelles IIbis*, in: Fulchiron, H., *Les enlèvements d’enfants à travers les frontières* (Bruylant 2004) p. 37.

¹⁶ For more particulars on this issue see, Vlas, P., Ibili, F., ‘Echtscheiding en ouderlijke verantwoordelijkheid volgens de nieuwe EG-Verordening Brussel IIbis’ (2005) WPNR136, no. 6616, p. 263. See also, Stone, *cit. op.*, p. 469; Lazić, V., ‘Family Private International Law Issues before the European Court of Human Rights: Lessons to Be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation’ in Paulussen, C, Takács, T, Lazić, V, Van Rompuy, B (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (Springer, 2016), pp. 166-168.

residence in that Member State and provided that one of the alternative conditions under Article 10 is met. The Regulation thereby ensures that jurisdiction is retained by the courts of the ‘Member State of origin’ regardless of the wrongful removal or retention of the child in another EU Member State.¹⁷ As such, it prevents child abduction from leading to a transfer of jurisdiction from the courts of the Member State of origin to the courts of the Member State to which the child was wrongfully removed.¹⁸

Thus, the new habitual residence of the child is in itself not sufficient to transfer jurisdiction from the courts of the Member State of the child’s habitual residence immediately before his/her wrongful removal or retention. Instead, the newly acquired habitual residence must be accompanied by one of the conditions provided in Article 10 in order to vest jurisdiction upon the courts of the Member State where the child has been removed or retained.¹⁹ According to Article 10(a), the courts in a Member State preceding the removal or retention will have no competence if the child has acquired a habitual residence in the Member State in which he/she has been removed or retained, and all persons having rights of custody have acquiesced in the removal or retention. Besides, Article 10(b) provides that jurisdiction will be bestowed upon the courts of the Member State where the child has acquired habitual residence if the child has resided in that Member State for a period of at least one year after the person having the right of custody has had or should have had knowledge of the whereabouts of the child, and the child has settled in his or her new environment. The condition has to be accompanied with at least one of the following conditions:

- (1) Within 1 year after the holder of the right of custody has had or should have had knowledge of the whereabouts of the child there is no request for the child’s return submitted to the competent authorities of the Member State where the child has been removed or is being retained.
- (2) Within the same period of 1 year, a request for the child’s return has been withdrawn and no new request has been filed.
- (3) Proceedings before the courts of the Member State where the child was habitually resident immediately before his/her wrongful removal or retention have been closed, due to the inactivity of the interested party in obtaining the return of the child as provided in Article 11(7).
- (4) There is a judgment rendered by a court of the Member State where the child was habitually resident immediately before his/her wrongful removal or retention and

¹⁷ Practice Guide 2015, p. 51; See also McEleavy, ‘The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?’, *op. cit.*, p. 372; In order to ensure that the Member State of the child’s habitual residence retains control over the child’s future, ‘a combination of the review or ‘trumping’ mechanism in Art.11(6)-(8), the strict jurisdiction rule in Article 10 and the automatic enforceability rule in Article 42’ is used; See also CJEU Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2011] ECR I-14247, para 44.

¹⁸ Vlaardingerbroek, P., ‘Internationale kinderontvoering en het EHRM’ (2014) 32 1 NIPR, p. 12-19.

¹⁹ For more information on the competent court in child abduction cases, see also Lenaerts, *op. cit.*, p. 1312; see also Lowe, Everall, Nichols, *op. cit.*

this judgment does not entail the return of the child.²⁰

Accordingly, under Article 10(b) a cumulative application of the following conditions is required:

- (1) The child has acquired a habitual residence in the EU Member State where he/she has been removed or retained;
- (2) the residence has lasted for at least 1 year after the person who holds the right of custody has had or should have had knowledge of the whereabouts of the child; and
- (3) the child has settled in his or her new environment.

When these conditions are complied with, one of the requirements under (i)–(iv) of Article 10(b) must be met in order to vest jurisdiction in the courts of the Member State where the child has been wrongfully removed or retained. All the requirements of Article 10 essentially prescribe that the abduction has to have been accepted as an irrefutable fact.²¹

The jurisdictional rules under Article 10 apply in cases where an action is filed on any issue pertaining to parental responsibility.²² Thus, in these cases the courts of the Member State of the child's habitual residence immediately before his/her removal or retention in principle remain competent for claims concerning parental responsibility, such as rights of custody or rights of access.²³ However, Article 10 has no relevance for determining jurisdiction in proceedings for the return of child.²⁴ With respect to the latter, jurisdiction is determined by the 1980 Hague Convention, as supplemented by Article 11 of the Regulation.²⁵

Thus, a request for the return of the child is to be submitted to the Member State in which the child has been wrongfully removed or returned. These courts may only decide on the return of the child, but not on the merits of a right pertaining to parental responsibility. Accordingly, they cannot decide on the matter such as the right of custody or the right of access. Only where the conditions provided in Article 10 are met will the courts in the latter state have jurisdiction to decide on both claims – request for return and the claim on the substance of

²⁰ On this point, see the comment of Meeusen and Schmidt, *op. cit.*, p. 84, stating that 'even without such a provision this would be self-evident. Even more so: the addition of point (iv) leads to a situation the legislator cannot have meant for. A strict application of the provision leads to a change in custody as is meant here can only transfer jurisdiction to the courts of the Member State of the new habitual residence after a year has passed and the child is settled in its new environment. The addition of point (iv) thus is an example of improvident legislation.'

²¹ See e.g., judgment of the Dutch Supreme Court, HR 28-02-2014, ECLI:NL:HR:2014:443, note de Boer, *op. cit.*, note 4.

²² See also, Stone, *op. cit.*, p. 468.

²³ *Ibid.*, pp. 468-469.

²⁴ See also, Hekin, M., 'The Impact and Application of Brussels IIbis in Finland' in Boele-Woelki and Beilfuss, *op. cit.*, p. 96: 'Article 10 of the Regulation [...] is based on the continuity of jurisdiction.'

²⁵ For comparison between the Regulation Brussels IIbis and its predecessor, see Stone, *op. cit.*, p. 468: 'The Brussels IIA Regulation provides a more radical solution than the Hague Convention 1980 in cases of child abduction between EU Member States. [...] This contrasts with the Brussels II Regulation, which (by Article 4) had merely required a court exercising ancillary custody jurisdiction under Article 3 to respect the Hague Convention 1980'.

parental responsibility.²⁶ Conversely, the courts in the Member State where the child had his or her habitual residence immediately before his/her wrongful removal or retention are competent to decide on any claim relating to the substance of parental responsibility, but they have no jurisdiction to decide on a request for the return of the child. The courts in the Member State to where the child has been wrongfully removed or retained are competent to decide on this issue first. Only if the latter would render a judgment of no return would the courts of the Member State of the child's habitual residence immediately before his/her abduction have jurisdiction to order the return of the child on the basis of Article 11(8) of the Regulation.

2.1 Difficulties in application – National Reports

From the National Reports it seems that, in general, the application of Article 10 by the Member States' courts do not encounter substantial difficulties. Nevertheless, the National Reports put forward examples when problems occasionally occur.

The circumstances of the case decided by the District Court of Breda as referred to in the National Report for the Netherlands²⁷ are illustrative of the difficulty that the judiciary sometimes faces when applying Article 10. After the mother had removed the child from the Netherlands to Belgium, the father approached a court in the Netherlands requesting an order for the return of the child. The requested District Court of Breda found, *inter alia*, that the investigations by the Belgian Central Authority were still in a preliminary phase when the case was being heard in the Netherlands and it concluded that it nevertheless had jurisdiction to grant an order for the return of the child under the 1980 Hague Convention. In the interest of the law Advocate General Strikwerda filed an action in cassation and asserted that under Articles 8 to 12 of the 1980 Hague Convention the District Court of Breda had no jurisdiction to order the return of the child under Article 10 of the Regulation. The Dutch Supreme Court²⁸ held that jurisdiction under Article 10 would only concern decisions on the merits in respect of parental responsibility. The decision on the return of the child under the 1980 Hague Convention was not a decision on the merits, but a disciplinary measure. The Supreme Court then went on to consider that under the system of the 1980 Hague Convention a return order could only be given by the court of the state where the child was present and that was in Belgium. The District Court of Breda, being the court of the child's habitual residence immediately before removal, therefore wrongly assumed jurisdiction for a return order under the 1980 Hague Convention. The facts of this case are a clear example of how the purpose and substance of Article 10 can be misunderstood and misinterpreted.

The length of the proceedings is seen as problematic in a number of National Reports. An interesting aspect is the reference to something that could be viewed as 'judicial nationalism' in the French National Report. There appears to be a tendency for lower court judges to establish jurisdiction in cases concerning 'parental responsibility'. This may occur irrespective of whether the child resides on national territory due to an unlawful removal or

²⁶ CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268, para 40, second sentence.

²⁷ National Report the Netherlands, question 34.

²⁸ NL SC 9 December 2011, NIPR 2012, 2, LJN: BU2834, p. 16.

retention. In addition, custodial rights over the child are even ‘too easily’ bestowed upon the abducting parent and there is often a lack of reasoning as to whether the wrongful removal has actually taken place or not. The problem here may also be connected to the application and/or interpretation of foreign law. In the situation where a child has been unlawfully taken to France, jurisdiction lies with a court in the state of the child’s habitual residence immediately before his/her wrongful removal or retention. These concerns, according to the national reporter, may be remedied by a ‘strict allocation of powers among the Member States’. Nevertheless, in practical terms the interpretation as such is deemed to be too complicated.

The role of the Central Authorities in effectively cooperating and communicating is of importance in avoiding the prolonging of a situation where that entails a wrongful retention or removal.²⁹ Evidently, the lack of consent by either parent who holds custodial or visitation rights amounts to a wrongful act. The ‘actual circumstances’ of the child’s environment and residence play an important role’.³⁰ This all boils down to, once again, determining the child’s habitual residence as the basis of jurisdiction in Article 8 of the Regulation. The application of these provisions forms one of the grounds to establish the jurisdiction of the courts that can decide on the matter at hand. This is also one of the main issues in practice according to the Hungarian National Report. Specifically, the ‘moment in time’ when the new habitual residence is acquired follows the CJEU jurisprudence in the *Mercredi v Chaffe*³¹ case. The reference to a ‘certain amount of time’ does not mean that the habitual residence may also be acquired in the new Member State.

The Hungarian National Report discusses the case where a couple had moved to England with their child for prosperity purposes whilst maintaining their property in their home state. A key element here is the intention of the parents to move temporarily, thus with no intention to settle permanently. After the parents’ relationship had come to an end, the mother moved back to their *de facto* home state taking their child with her. Before the court in Hungary the father filed a request for the return of the child due to that child’s wrongful removal. At first, the general court determined that the habitual residence of the child would be in Hungary and the state to which they had moved with an intention to remain there temporarily was considered to have a ‘transitory status.’ Nevertheless, the appeal court overturned its reasoning and determined that, on the basis of the ‘factual locality of the family’s co-habitation’, their habitual residence was to be in England. This line of reasoning has been followed by other Hungarian courts, where the concrete circumstances, the parents’ decision and common intent have primary relevance, but not the period of time spent in a particular Member State.

The temporal and substantive conditions and the determination of the child’s habitual residence after he/she has moved for a period of time make it more complex to decide on which court has jurisdiction.³² As it follows from the already discussed case in the Netherlands, the

²⁹ National Report Malta, question 34: initial problems have been overcome with the help of the Central Authorities and good documentation.

³⁰ National Report Italy, question 34.

³¹ CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.

³² National Report Romania, question 34.

application of Article 10 is likely to raise difficulties when the 1980 Hague Convention 1980 comes into play.³³

2.2 Difficulties in application – CJEU case law

Some problems with the application of Article 10 are identified through an analysis of the relevant CJEU case law.

The judgments of both the CJEU³⁴ and the ECtHR³⁵ in the *Povse* case offer a clear example of the problems encountered in practice when applying the procedural legal framework of the Regulation relating to child abduction. In its judgment of 1 July 2010,³⁶ the CJEU provided guidance on the interpretation of a number of provisions of the Regulation, in particular Articles 10, 11(8), 40, 42 and 47. Accordingly, only the relevant parts of the decision on the interpretation of Article 10 are analysed in this part. Other aspects of this judgment are discussed *infra*, in the context of the analysis of the other provisions, i.e. Articles 11(8), 40, 42 and 47. The facts are rather complicated and involve multiple legal proceedings in Italy and Austria.³⁷ They are detailed *infra* in Chapter 9, under 4.2 ‘*Difficulties in application of Article 42 – CJEU case law*’.

One of the questions submitted for a preliminary ruling in *Povse* case concerned the interpretation of Article 10(b). The question was whether in the circumstances of the case at hand the Austrian courts, as courts of the child’s new habitual residence, could establish jurisdiction on the basis of Article 10(b)(iv) of the Regulation. Before the proceedings were initiated in Austria, the Venice Youth Court in Italy in its judgment of 23 May 2008 authorised the residence of the child with the mother. The Austrian court submitted the question to the CJEU whether the judgment of the Venice court was to be considered as a ‘judgment on custody that does not entail the return of the child’ within the meaning of Article 10(b)(iv).

The CJEU held that that Article 10(b)(iv) must be interpreted as meaning that a provisional measure issued in the decision of the Venice court did not constitute a ‘judgment on custody that does not entail the return of the child’. Consequently, it cannot be the basis of the transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed’.³⁸ Thus, a ‘judgment on custody that does not entail the return of the child’ must be a final judgment, which can no longer be subjected to other administrative or court decisions. The final nature of the decision is not affected by the fact that the decision on the

³³ National Report the Netherlands, question 34: referring to judgment NL SC 9 December 2011, NIPR 2012, 2, LJN: BU2834, p. 16.

³⁴ CJEU Case C-211/10 PPU *Povse v Alpaço* [2010] ECR I-6673.

³⁵ *Sofia and Doris Povse v. Austria* App no 3890/11 (ECtHR, decision on admissibility, June 18, 2013).

³⁶ CJEU Case C-211/10 PPU *Povse v Alpaço* [2010] ECR I-6673.

³⁷ This part is based on the research presented in an earlier publication, Lazić, V., ‘Family Private International Law Issues before the European Court of Human Rights: Lessons to Be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation’ in Paulussen, *op. cit.*, pp. 163; See also Lazić, V., Legal Framework for International Child Abduction in the European Union – The Need for Changes in the Light of *Povse v. Austria*, in: Župan, M. (ed.), *Private International Law in the Jurisprudence of European Courts - Family at Focus* (Osijek 2015), pp. 295-317.

³⁸ CJEU Case C-211/10 PPU *Povse v Alpaço* [2010] ECR I-6673, para 50.

custody of the child may be subjected to a review or reconsideration at regular intervals.³⁹ Holding that a decision of a provisional nature was to be considered as a decision within the meaning of Article 10(b)(iv) of the Regulation, would result in a loss of jurisdiction of the issuing court over the custody of the child. The CJEU rightly observed that such a loss of jurisdiction is likely to be the reason for the courts of the Member State of the child's previous habitual residence to be reluctant to render such provisional judgments even though they may be needed in the best interests of the child.⁴⁰

Consequently, in the present case jurisdiction could not have been vested with the Austrian court on the basis of Article 10(b)(iv) of the Regulation as the decision of the Venice Youth Court of 23 May 2008 was not to be considered as 'a judgment on custody that does not entail the return of the child.' In conclusion, a decision which concerns measures that are provisionally granted pending a final decision on parental responsibility cannot be considered 'a judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of the Regulation.

As already stated, the reasoning of the CJEU concerning the definition of 'habitual residence' in the relevant case law discussed in the context of Article 8 is completely relevant for the application of Article 10. The reasoning of the CJEU in *Mercredi*⁴¹ is briefly presented here as well, since one of the questions submitted relates to the interpretation and application of Article 10. For all the details of this case, see *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*'. In this judgment, the CJEU had an opportunity to refine the definition of 'habitual residence' developed in case *A*⁴².

With the third question submitted to the CJEU, the referring court sought to ascertain whether Article 10 has a continuing application after the courts of the requested Member State have rejected an application for the return of the child under the 1980 Hague Convention. In other words, does a judgment of a court of a Member State refusing to order the return of a child under the 1980 Hague Convention affect or influence a decision of a court of another Member State having jurisdiction over parental responsibility for that child.

The CJEU concluded that the French court's judgment refusing the return of the child to the United Kingdom had no effect on determining the merits of the rights of custody, even if that judgment had become final.⁴³ In other words, a judgment of a court of a Member State which refuses the return of a child under the 1980 Hague Convention has no effect on a judgment which has to be delivered in that other Member State in proceedings relating to parental responsibility which were brought earlier and are still pending in that other Member State.⁴⁴

³⁹ *Ibid.*, para 46.

⁴⁰ *Ibid.*, para 47; for the comment on this issue, see Lenaerts, *op. cit.*, p. 1313.

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

⁴² CJEU Case C-523/07 *A* [2009] ECR I-2805.

⁴³ *Ibid.*, para 65.

⁴⁴ *Ibid.*, para 71.

Additionally, the judgment of the French court of 23 June 2010 resulted in a conflict between two courts in different Member States: there are two proceedings relating to parental responsibility over a child with the same cause of action. Such a conflict must be resolved by applying the *lis pendens* rule in Article 19(2) of the Regulation. According to this provision, the court second seised of a matter is to stay its proceedings until such time as the jurisdiction of the court first seised is established.⁴⁵ So, in the present case the French court had no authority to rule on the action brought by the mother concerning custody rights, since it was the court second seised.

In conclusion, Article 10 was inapplicable in the case at hand since the removal was lawful. Consequently, the English court had to decide whether or not it had jurisdiction in the case at hand on the basis of Article 8 according to criteria formulated by the CJEU.

3. Jurisdiction under Article 11(1)-(5)

Although some Member States have argued that the 1980 Hague Convention was adequate to ensure the safe return of the child,⁴⁶ in regulating certain aspects of the return of the child Article 11 of the Regulation modifies and supplements the provisions of the 1980 Hague Convention.⁴⁷ As explicitly provided in Article 60(e), the Regulation prevails over the provisions of the Convention in matters governed by it. Thus, the EU legislator chose the route of ‘reverse subsidiarity’.⁴⁸ Supremacy is thereby conferred on the Regulation and the 1980 Hague Convention becomes secondary in matters regulated by both legal instruments.⁴⁹ Considering that in all other aspects the Convention remains applicable, it can be said that these two sources are ‘complementary’.⁵⁰ Concepts that are found in both the Regulation and a multilateral Convention should be interpreted in a uniform manner, so as to guarantee that they are ‘consistently demarcated from each other’.⁵¹

In accordance with Article 11(1), a competent authority in an EU Member State will apply the 1980 Hague Convention so as to adjust them in a manner provided in Articles 11(2)–11(8) of the Regulation. Consequently, such a modified application of the 1980 Hague Convention in the EU Member States to a certain extent differs from the way in which the Convention applies in non-EU contracting states.

⁴⁵ *Ibid.*, paras 67-70.

⁴⁶ Jänterä-Jareborg, *op. cit.*, p. 6; Tenreiro, M., *L’espace judiciaire européen en matière de droit de la famille, le nouveau règlement Bruxelles IIbis*, in Fulchiron, *op. cit.*, p. 19.

⁴⁷ For a general view on the relationship between the Regulation and the Convention, see Gallant, E., *Responsabilité parentale et protection des enfants en droit international privé* (Defrénois, Coll. Droit et Notariat, t. 9, 2005) pp.77 et seq., and Schulz, A., ‘The new Brussels II Regulation and the Hague Convention of 1980 and 1996’, *IFL* (2004), pp. 22; Vlaardingerbroek, *op. cit.*, pp. 12-19; Meeusen and Schmidt, *op. cit.*, p. 84.

⁴⁸ See Beaumont, P. ‘International Family Law in Europe – The Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity’ (2009) *Rebels Zeitschrift* 509.

⁴⁹ Rumenov, *op. cit.*, p. 61.

⁵⁰ McEleavy, ‘The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?’, *op. cit.*, p. 17; see also: Dutta and Schulz, *op. cit.*, 2; see also Martiny, D. ‘Hague Conventions in Private International Law and on International Civil Procedure’ in: *Max Planck Encyclopaedia of Public International Law*, vol. 4 (OUP 2012).

⁵¹ CJEU Case C-523/07 A [2009] ECR I-2805, Opinion of Advocate General Kokott, paras 22 and 23.

It should again be emphasised that the Regulation does not apply to or supplement any other provision of the Convention or aspect of the return of the child procedure except those issues dealt with in Article 11(2)-(8).⁵² The adjustments in Article 11(2)-(8) are intended to enhance the effectiveness of the 1980 Hague Convention amongst the EU Member States. Thus, Article 11(2) modifies and supplements Articles 12 and 13 of the 1980 Hague Convention so as to require that the child is given the opportunity to be heard ‘unless this appears inappropriate having regard to his or her age or degree of maturity’. Additionally, the Regulation obliges the Member States to ascertain the wishes of the child, thus creating a subtle but important distinction compared to the 1980 Hague Convention. On the one hand, the Convention allows a court to refuse the return of a child if the child objects to being returned and has reached an age and degree of maturity. On the other hand, the Regulation imposes a specific obligation on the courts or authorities to actually comply with such procedures.⁵³ However, the Regulation remains vague as to what happens if the child expresses a desire to remain, for example, in the host state with the abducting parent, where this is deemed manifestly contrary to the child’s best interests.⁵⁴

In a similar vein, the 1980 Hague Convention is adjusted by the requirement contained in Article 11(3) imposing an obligation upon the courts of the Member State of wrongful removal or retention to act expeditiously and to decide upon an application for a return of the child within 6 weeks. Thereby they should follow the most expeditious procedure that may be available under national law (Art. 11(3))⁵⁵. Further restriction is provided in Article 11(4). This provision limits the applicability of Article 13(b) of the Convention relating to the reason for which a return of the child may be refused. According to Article 13(b), the return of the child can be refused if there is a grave risk that the return would expose the child to physical or psychological harm or would place the child in an intolerable position. According to Article 11(4), this reason may not be invoked if adequate arrangements have been made to ensure that the child is sufficiently protected in the country of origin after his/her return. Moreover, a decision not to return may only be given if the person requesting the return has been given an opportunity to be heard (Article 11(5)). These provisions of the Regulation in Article 11(2)–(5) supplement the 1980 Hague Convention and prevail over the relevant rules of the Convention contained in Articles 11–13.⁵⁶

Under the Convention the jurisdiction to decide on the return of the child is vested with the courts or other competent authorities in the country where the child has been wrongfully removed or retained. As expressly provided in Article 19 of the 1980 Hague Child Abduction

⁵² CJEU Case C- 400/10 PPU *McB* [2010] ECR I-8965, para 31.

⁵³ Stalford, H., ‘*EU Family Law: a Human Rights Perspective*’, in Meeusen, J., Pertegas, M., Straetmans, G. and Swennen, F. (eds.), *International Family Law for the European Union* (Intersentia 2007) p. 120.

⁵⁴ *Ibid.*, p. 123.

⁵⁵ Brussels IIbis Regulation, Recital 17; see also Dutta and Schulz, *op. cit.*, p. 2 and comment of Lenaerts, *op. cit.*, p. 1314: ‘If the authorities of the Member State of enforcement do not act expeditiously, they will not only breach Article 11(3) of the Brussels IIbis but also the fundamental rights of the parent suffering from the wrongful removal or retention’. See to this effect *Karoussiotis v Portugal* App no. 23205/08 (ECtHR, 1 February 2011), para 88 *et seq.*

⁵⁶ For a detailed overview of the modifications and alterations in the application of the relevant provisions, see Practice Guide 2015, p. 57.

Convention the competence of the court is reduced to rendering a decision concerning the return of the child and it ‘shall not be taken to be a determination on the merits of any custody issue’.⁵⁷ The Regulation modifies the Convention only with respect to those aspects dealt with in Article 11(2)-(8) in which cases the Regulation prevails over the Convention. In these matters the Convention applies ‘differently’ in the EU Member States than in non-EU states. For all other issues, the Convention applies in exactly the same manner in all States that are parties thereto.

3.1 Difficulties in the application of Article 11(1) – CJEU case law

In a recent case, *OL v PQ*,⁵⁸ the CJEU provided an interpretation of the concept of ‘habitual residence’ for the purpose of applying Article 11(1) of the Regulation in order to determine whether a retention was ‘wrongful’. For a detailed outline of the facts of this case, see *supra* in Chapter 3, under 4.3. ‘*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*’. A child was born and for several months she resided continuously with her mother in a Member State other than that where the parents had been habitually resident before the child’s birth and where they intended to reside after the birth of the child. Thus, in the case at hand the child was neither born in nor even resided in the country where the parties had intended to live after the child’s birth.

The Court noted that it is clear from Articles 2(11) and 11(1) that the concept of ‘habitual residence’ constitutes a key element in assessing whether an application for a return is well founded. Such an application can only succeed if a child was, immediately before the alleged removal or retention, actually habitually resident in the Member State to which the return is sought.⁵⁹ The CJEU reasoned that the intention of the parents cannot as a general rule by itself be crucial to the determination of the habitual residence of a child, within the meaning of the relevant provisions of the Regulation. Instead, such an intention merely constitutes an ‘indicator’ capable of complementing a body of other consistent evidence.⁶⁰ The Court went on to say that the concept of ‘habitual residence’ essentially reflects a question of fact. Consequently, it would be difficult to reconcile the concept of ‘habitual residence’ with adopting the position that the initial intention of the parents that a child should reside in one given place should take precedence over the fact that the child has continuously resided in another State since birth.⁶¹ In other words, to consider that the initial intention of the parents is a factor of crucial importance in determining the habitual residence of a child would be detrimental to the effectiveness of the return procedure and to legal certainty.⁶² Interpreting the concept of ‘habitual residence’ in such a way that the initial intention of the parents as to the place which ‘ought to have been’ the place of that residence constitutes a fundamental factor would be contrary to the objectives of the return procedure.⁶³

⁵⁷ CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268, para 40.

⁵⁸ CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436.

⁵⁹ *Ibid.*, para 38.

⁶⁰ *Ibid.*, para 47; CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309; CJEU Case C-523/07 A. [2009] ECR I-2805.

⁶¹ CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, para 51.

⁶² *Ibid.*, para 56.

⁶³ *Ibid.*, paras 59-60.

On those grounds, the Court has ruled that in the circumstances of the case at hand, Article 11(1) must be interpreted as not permitting the conclusion that the child was ‘habitually resident’ in a Member State where the parents intended to live after the child’s birth. In the present case, a child was born and lived continuously with her mother for several months, in accordance with the joint wishes of her parents, in a Member State other than that where those parents were habitually resident before her birth and where they intended to live after the child’s birth. These facts could not allow the conclusion that that child was ‘habitually resident’ there, within the meaning of the Regulation.⁶⁴ Consequently, in such a situation, the refusal of the mother to return to the latter Member State together with the child cannot be considered to be a ‘wrongful removal or retention’ of the child, within the meaning of Article 11(1).⁶⁵

In *C v M*,⁶⁶ the proceedings concerned a child born in France on 14 July 2008 to a French father and a British mother. The facts of this case have been described in detail in Chapter 1, under 3.11.2. ‘*Difficulties in application – CJEU case law*’. The parents’ marriage broke down shortly after the birth of the child and a divorce was pronounced by the Regional Court (*Tribunal de Grande Instance*) of Angoulême (France) on 2 April 2012. Parental responsibility was to be exercised jointly. Thereby, the habitual residence of the child was with the mother from 7 July 2012, and the father was to have the right of access. The mother was permitted to ‘set up residence in Ireland’ and the judgment was declared ‘enforceable as of right on a provisional basis as regards the provisions concerning the child’. On 23 April 2012, the father appealed against the judgment. On 5 July 2012, the First President of the *Cour d’appel* of Bordeaux dismissed the father’s request for a stay of the provisional enforceability of the judgment. On 12 July 2012, the mother travelled with the child to Ireland. On 5 March 2013, the *Court of Appeal (Cour d’appel)* of Bordeaux overturned the judgment. On 29 May 2013, the father brought an action before the Irish High Court seeking an order, under Article 12 of the 1980 Hague Child Abduction Convention and Articles 10 and 11 of the Brussels IIbis Regulation for the return of the child. On 10 July 2013, the family judge of the Regional Court (*Tribunal de grande instance*) of Niort awarded the father exclusive parental authority, ordered the return of the child and prohibited the child to leave France without the permission of the father. By a judgment of 13 August 2013, the Irish High Court dismissed the father’s petition for the return of the child, finding the child to have been habitually resident in Ireland from the time her mother took her to Ireland with the intention of settling there. The father appealed against that judgment on 10 October 2013 and on 18 December 2013 made an application to the High Court (Ireland), on the basis of Article 28 of the Brussels IIbis Regulation, for the enforcement of the judgment of 5 March 2013 by the Court of Appeal of Bordeaux. That application was successful, but the mother, who on 7 January 2014 appealed against that judgment on a point of law before the *Cour de cassation* (France), made an application on 9 May 2014 to the High Court for a stay of the enforcement proceedings. On 31 July 2014, the Irish Supreme Court issued a request for a preliminary ruling on the interpretation of Article 2(11) and Article 11. In the case at hand, the removal of the child has taken place in accordance

⁶⁴ *Ibid.*, paras 69-70.

⁶⁵ *Ibid.*, para 70.

⁶⁶ CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268.

with a judgment which had been provisionally enforceable, but was thereafter overturned on appeal. The latter judgment determined the residence of the child at the home of the parent who lived in the Member State of origin. The court of the Member State to which the child has been removed, and which is seised of an application for the return of the child, had to determine whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention.

The CJEU rules that the concept of the child's 'habitual residence' in Article 2(11) and Article 11 of the Regulation cannot differ in content from that given in the former judgments⁶⁷ with regard to Articles 8 and 10 of the Regulation. The Court states that it is the task of the court of the Member State to which the child had been removed to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful retention, using the assessment criteria provided in the previous judgments. As part of that assessment it is important to take into account that the court judgment authorising the removal could be provisionally enforced and that an appeal has been brought against it. In this case the mother had moved to Ireland on the basis of a French court order, but was ('subjectively') aware at the time of leaving that the order had been appealed. Accordingly, the CJEU sought to strike a fair balance in this case between both objective and subjective factors and placed emphasis on factual elements.⁶⁸

3.2 Difficulties in the application of Article 11(2)-(5) – National Reports

From the National Reports it follows that the notion of 'the opportunity to be heard' in respect to child abduction cases does not seem to have the same understanding and application amongst the EU Member States.⁶⁹ Evidently, the respective national laws vary on how this notion is safeguarded, applied and enforced in matters concerning the return of the child. In some Member States, no difficulties are encountered in the application of Article 11(2)-(5) of the Regulation. This may be due to the concentration of justice that deals with return proceedings so that competent authorities have become specialised and have built up their expertise.⁷⁰

However, it should be kept in mind that the Regulation's provisions which seek to reinforce the child's rights to be consulted are only meaningful if domestic child consultation procedures are sufficiently accessible and effective.⁷¹ Therefore, the extent to which the 'competent' child will have a meaningful input in family decisions depends entirely on where these children happen to be at the time when procedures are instituted.⁷²

⁶⁷ CJEU Case C-523/07 A. [2009] ECR I-2805; CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.

⁶⁸ Kruger and Samyn, *op. cit.*, p. 147.

⁶⁹ Beaumont, *et. al.*, 'Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the effect of Brexit on Future Child Abduction Proceedings', *op. cit.*, p. 5: 'Only 20% of the children in these cases were heard.'

⁷⁰ National Report Germany, the complete answer to this question can be found under question 33.

⁷¹ For further information consult McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?', *op. cit.*, p. 27: 'The difficulty for judicial authorities will be in ensuring that sufficient resources are made available to ensure that children can be heard in accordance with the procedures normally applicable in the Member State in question'.

⁷² Stalford, *op. cit.*, p. 125.

A number of Member States have, to date, no reported cases or lack any data on difficulties which have been encountered⁷³ or problems have simply never occurred.⁷⁴ The difficulties identified do not only relate to the notion itself but must be seen together with the meaning of the concept ‘degree of maturity’ or the weight that should be attached to the opinion of a ‘child’. In some jurisdictions, it is the application of national laws, the Regulation and the 1980 Hague Convention that may cause difficulties for the judiciary. For example, in France and Slovenia there are two different types of procedures that are followed in cases of child abduction. In Slovenia, the practice in conducting proceedings for the return of the child differs. The National Reporter refers to ‘the rules of non-contentious procedure’ used by some courts⁷⁵ and to the procedure under the Claim Enforcement and Security Act used by other courts.⁷⁶ In the view of the National Reporter, the latter provides for more expedient procedures for the enforcement of a decision to return the child. In addition, the National Reporter remarks that ‘the non-hearing of the child could lead to the refusal of recognition of the foreign judgment’ and that ‘Slovenia is working on the improvement of child hearings standards’.

In France, Article 388-1 of the Civil Code, just like Article 11(2) of the Regulation, provides that there is an ‘obligation to give [the child] the opportunity to be heard’. On the basis of this provision, there are two streams in judicial practice. Either a child is not heard on a systematic basis⁷⁷ or it happens by omission when there is no request for the hearing of the child.⁷⁸ It seems that the reason for the latter practice is the time constraint of six weeks provided in Article 11(3). Thus, a duty to comply with the time requirement may result in omitting to strictly comply with the requirement to hear the child.⁷⁹ In Luxembourg the National Reporter has raised the concern that the courts generally do not provide children with an opportunity to be heard.⁸⁰ However, in two instances this has taken place through their representatives and the children have not been directly heard by a judge.

The age of and the manner in which the child is heard differ amongst the Member States.⁸¹ In Romania there is no obligation to hear the child if the child has not reached the age of 10 years.⁸² In Estonia, the ‘child has to be heard by the judge’, whereby the child is

⁷³ National Report the Czech Republic, question 35 and National Report Poland, question 35.

⁷⁴ National Report Austria, question 35; National Report Sweden, question 35 and National Report Bulgaria, question 35; National Report Ireland, the complete answer to this question can be found under question 35; National Report Malta, the complete answer to this question can be found under question 35; National Report Portugal, the complete answer to this question can be found under question 35.

⁷⁵ Končina Peternel, M., ‘Mednarodna ugrabitev otrok’ (2013) 3 Prayosodni bilten, p. 53.

⁷⁶ Zakon o izvršbi in zavarovanju (Claim Enforcement and Security Act (hereinafter: CESA)): Uradni list RS, št. 3/07 OCV with later changes.

⁷⁷ National Report France, question 35: ‘Since the motivation of the French decisions refusing to hear the child proved to be insufficient, French courts were invited by way of a ministerial circular to motivate carefully all their decisions in relation to matters of parental responsibility’.

⁷⁸ *Ibid.*: ‘These judges make an emergency request in order to have a lawyer assisting the child during the hearing and the child is heard on the very same day as the trial so that his opinion is taken into account in the adversarial debate’.

⁷⁹ *Ibid.*

⁸⁰ National Report Luxembourg, question 35.

⁸¹ Farrugia, R., ‘The Impact and Application of Brussels Ibis in Malta’ in Boele-Woelki and Beilfuss, *op. cit.*, p. 212: ‘It is a state of fact that different courts view interviewing children very differently [...]’.

⁸² National Report Romania, question 35.

represented by a lawyer and in the presence of the ‘local child protection authorities.’ Under Belgian law, if a child has attained the age of 12, the judge will inform the child about his/her right to be heard. This right will consequently be exercised if the child so wishes. The point of concern here is that children who have not yet attained the age of 12 are not informed about the right to be heard. In addition, there is currently uncertainty as to whether this law is also applicable in proceedings dealing with the return of the child.⁸³ The Croatian Report refers to the obligation for the competent authorities to make it possible for the child to ‘express its views’.⁸⁴ In Finland the competent authority must obtain the opinion of the child in cases involving proceedings for the return of the child.⁸⁵

According to the National Report of Italy, the courts must give a reasoned decision whilst determining which authority will hear the child. The procedural guarantee is that the case may be appealed when there is insufficient reasoning for the decision.⁸⁶ However, it must be noted that none of the cases dealing with return orders have so far reported that a child has been directly heard. Consequently, the Reporter emphasises that this may be contrary to Article 42(2)(a).⁸⁷ The organisation of hearings is carried out in accordance with the provisions of national procedural law. In Polish civil procedure, this is determined by Article 2161 CCP, under which the hearing (if it concerns a minor child) takes place outside the courtroom.⁸⁸ In Greece it seems that the hearing of the child is mandatory. A failure to ensure that the child is heard amounts to a ‘procedural irregularity’ which represents a basis for filing an appeal in cassation.⁸⁹

What remains, however, as mentioned earlier, is the age of the child linked to the degree of maturity of the child as well as the weight that should henceforth be attached to the child’s opinion. The national reporter of Spain refers to this issue by providing various case examples of how the courts have dealt with the opinions of minors and how they have taken the child’s age into account. Nevertheless, national law has been amended and in cases concerning the return of the child the ‘judge shall hear the child before adopting the decision at any moment during the procedure’. In the situation where the hearing may not be conducted due to the age and maturity of the child in question, the judge will have to state this in a ‘reasoned decision’.⁹⁰

The Italian Report states that upon hearing the child the ‘weight is not just cognitive’ and ‘the distinction made in Article 13(2) of the 1980 Hague Convention between age and the degree of maturity appears vague and the opinion of a minor who is able to express his or her views, emotions and needs may be, according to the judge’s opinion, an obstacle to the child’s return’. Even though Italian law now prescribes that it is the ‘individual right of the child to be

⁸³ National Report Belgium, question 35.

⁸⁴ National Report Croatia, question 35.

⁸⁵ National Report Finland, the complete answer to this question can be found under question 35.

⁸⁶ National Report Italy, question 35.

⁸⁷ *Ibid.*: ‘directly or through experts’; National Report Latvia: either by the judge or otherwise they will use the ‘report of a psychologist/psychiatrist’.

⁸⁸ National Report Poland, the complete answer to this question can be found under question 35.

⁸⁹ National Report Greece, question 35; National Report Italy, question 35 and National Report Finland, the complete answer to this question can be found under question 35.

⁹⁰ National Report Spain, question 35.

heard’,⁹¹ the courts predominantly review the maturity of the child and his/her ability to express him/herself in a rather cursory manner. Nonetheless, procedural guarantees are provided by the obligation that the decision contains the results of the hearing or else the case can be appealed.⁹² The national reporter of the United Kingdom refers to a case involving an abduction to Russia in which the Court of Appeal made clear that the issue of the weight that was to be attached to the view of a child should be distinguished from the issue of the child having to be heard.⁹³ Lastly, the Belgian reporter also expressed the view that exactly how the child’s opinion is to be assessed is vague. However, some guidance may be obtained from a case dealt with by the ECtHR where the Court ‘however recognises that the objecting child should have a voice, but points out that the opinion of the child cannot amount to a veto in the process of deciding whether he/she will be returned’.⁹⁴

With regard to the aforementioned outcomes of the National Reports some recommendations and references have also been made. These predominantly relate to Article 12 of the Convention on the Rights of the Child,⁹⁵ which requires the opinion of the child to be taken into account regardless of judicial or administrative proceedings that concern them.⁹⁶ Either this provision of the Convention of the Rights of the Child has been transposed into national law⁹⁷ or it is mentioned that the national legislator should bring the law into line with this international standard⁹⁸ or that the courts should apply it.⁹⁹ In conclusion, the recommendation has been made that ‘a revised version of the Regulation would explicitly refer’ to the ‘Convention on the Rights of the Child as well as the EU Charter¹⁰⁰’.¹⁰¹ This will further protect and safeguard the rights of children who are involved these troublesome situations.

⁹¹ National Report Belgium, question 35, the right of the child to be heard in abduction cases has been laid down in Article 22bis of the Belgian Constitution.

⁹² National Report Italy, question 35.

⁹³ National Report the United Kingdom, the complete answer to this question can be found under question 35.

⁹⁴ *Blaga v Romania* App no. 54443/10 (ECtHR, July 1 2014) para 801.

⁹⁵ Convention on the Rights of the Child, Article 12(1)(2) reads: ‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law’.

⁹⁶ Vlaardingbroek, P., ‘Changing Parenthood after Divorce’ in Erauw, J., Tomljenović, V. and Volken, P. (eds), *Liber Memorialis Petar Šarčević: Universalism, Tradition and the Individual* (Sellier European Law Publishers 2006), p. 358.

⁹⁷ National Report Croatia, question 35.

⁹⁸ National Report Belgium, question 35.

⁹⁹ National Report Slovenia, the complete answer to this question can be found under question 35.

¹⁰⁰ EU Charter of Fundamental Rights.

¹⁰¹ National Report Belgium, question 35.

3.3 Difficulties in the application of Article 11(3) – National Reports

The average time of the procedure in child abduction cases leads to various outcomes across the European Member States.¹⁰² There are several Member States where the procedure takes up to 6 months on average.¹⁰³ However, it should be noted that the information on the procedures in Austria ‘does not distinguish between the procedures under the Hague Convention and the Brussels IIbis Regulation’. In Luxembourg, the data on the average time relate to first instance cases whereas cases on appeal are dealt with urgently so that the average time is not greatly prolonged. The issuing of a decision within 6 weeks as required under Article 11(3) seems to be difficult to attain. In Latvia, the national law is arranged in such a way that the 6-week requirement can be met. Nonetheless, the National Reporter mentions that in practice the majority of cases are not decided within 6 weeks.¹⁰⁴

The National Report of Hungary states that there is a ‘specialized court of first instance’ whereby ‘the Pesch Court’ has exclusive competence to hear child abduction cases. This approach contributes to the 6-week timescale being complied with or otherwise limits time extensions in such cases. In appeal cases Hungarian law does not regulate the procedure, but only states that such an appeal shall be heard expeditiously.¹⁰⁵ In the Netherlands, there is an ‘accelerated procedure’.¹⁰⁶ This means that there are ‘6 weeks for the intake phase by the CA (Central Authority), 6 weeks before the District Court, and 6 weeks before the Court of Appeal’. In general, the overall duration of the proceedings until the court of first instance reaches a decision does not comply with the Regulation.¹⁰⁷

In the Czech Republic, France and Spain, the average procedure also amounts to 2-3 months.¹⁰⁸ Moreover, the National Reporter of France indicates that ‘it seems that no jurisdiction is able to respect the six weeks’ delay’ and that there are big differences between court practices.¹⁰⁹ Some Member States take considerably longer to hear proceedings involving the return of the child.¹¹⁰ In Romania the average time is 10 months and that includes the procedure in the case of an appeal,¹¹¹ In the Member States of Cyprus, Poland and Portugal the

¹⁰² Shannon, ‘The Impact and Application of Brussels IIbis in Ireland’ in Boele-Woelki and Beilfuss, *op. cit.*, p. 155: ‘This time limit has proven to be ‘quite unrealistic’’; See further Thorpe L.J. statement in *Re W. (Abduction: Domestic Violence)* [2005] 1 FLR 7272.

¹⁰³ National Report Austria, question 38; National Report Italy, question 38; National Report Luxembourg, question 38 and National Report Poland, question 38.

¹⁰⁴ National Report Latvia, question 38.

¹⁰⁵ National Report Hungary, the complete answer to this question can be found under question 38 and National Report Slovenia, the complete answer to this question can be found under question 38: most cases will take longer than 6 weeks but an attempt is made to abide by the 6-week time limit.

¹⁰⁶ National Report the Netherlands, question 38.

¹⁰⁷ *Ibid.*

¹⁰⁸ National Report the Czech Republic, question 38; National Report France, question 38; National Report Spain, question 38 and National Report Belgium, question 38, which also indicates a 3-4 month average based on the input of the lawyer.

¹⁰⁹ National Report France, question 38.

¹¹⁰ National Report Cyprus, question 38; National Report Portugal, the complete answer to this question can be found under question 38; National Report Poland, question 38 and National Report Romania, question 38.

¹¹¹ National Report Romania, question 38.

average duration of the proceedings is 12 months, and up to 18 months in Cyprus.¹¹² Other Member States have not been able to provide information due to a lack of data or case law or due to other reasons.¹¹³

What can also influence the variety in the length of proceedings are factors such as ‘the amount of witnesses involved’,¹¹⁴ the ‘willingness of the parties to cooperate with the court’ or the gathering of ‘evidence’.¹¹⁵

3.4 Difficulties in the application of Article 11(4) – National Reports

Article 11(4) provides that the courts of the Member State to which a child has been abducted is under an obligation to order the immediate return of the child *if* it has been ascertained that appropriate measures have been put in place to protect the child. This invalidates the corresponding provision in the 1980 Hague Convention which states that the Court is not obliged to order the return of the child if he/she would be exposed to physical or psychological harm.¹¹⁶ This distinction is clearly a safeguard to prevent abducting parents from exploiting the exception in the 1980 Hague Convention; however, it does raise the issue of whether sufficient checks and appropriate protective safeguards can be put in place within the strict six-week return deadline.¹¹⁷

Adequate arrangements may thus give rise to ambiguity as to what kind of arrangement needs to be in place before a child can be returned. The Austrian National Reporter indicates that in general there are no problems with the application of Article 11(4). However, practice may still demonstrate that it is not as easy as it may seem. There is the example of a case that included an arrest warrant against the mother of the child. The Supreme Court of Austria was not satisfied with the court’s lack of guarantees to protect the children upon their return to France and took the view that mere information on the ‘legal situation and possible procedures’ was not sufficient.¹¹⁸ The mere possibility to adopt adequate arrangements will also not suffice for the Belgian authorities. The state should demonstrate that those protective measures have already been adopted.¹¹⁹ This is in accordance with the Regulation. The Belgian reporter has pointed to two issues. One of them is a question of who has the duty to ensure that the protective arrangements are in place, whereas the other is whether those measures, as such, live up to the standards of the state before an order for the child’s return is made. In accordance with Belgian

¹¹² National Report Cyprus, question 38 ; National Report Poland, question 38 and National Report Portugal, question 38.

¹¹³ National Report Bulgaria, question 38; National Report Estonia, question 38; National Report Finland, the complete answer to this question can be found under question 36; National Report Germany, the complete answer to this question can be found under question 38; National Report Greece, question 38; National Report Lithuania, question 38; National Report Sweden, question 38 and National Report the United Kingdom, the complete answer to this question can be found under question 38.

¹¹⁴ National Report Malta, the complete answer to this question can be found under question 38.

¹¹⁵ National Report the Czech Republic, question 38.

¹¹⁶ 1980 Hague Convention, Article 12(1)(b).

¹¹⁷ Stalford, *op. cit.*, p. 123.

¹¹⁸ *Ibid.*, National Report Austria, question 36; See also Austrian Supreme Court [OGH] 27.04.2015 6 Ob 67/15.

¹¹⁹ National Report Belgium, question 36.

standards the foreign court should obtain the necessary information from the Belgian court so as to ensure that the arrangements are in place.¹²⁰

The Czech National Report provides an example where measures have been agreed upon between the parents.¹²¹ Thus, there may be an obligation for the parent who has been left behind to provide housing and maintenance for the child and the abducting parent, or not to hinder contact between the child and the abducting parent. Nevertheless, when the agreements are not adhered to, it becomes more difficult to enforce them. This is unless, as the Czech National Reporter states, a ‘mirror order is granted there’.¹²² Perhaps the mutual trust between the courts with regard to respecting another state’s measures when those measures meet their own standards may mean that the time within which the child is returned can be shortened. The French National Report expresses a different view pointing out that it may be difficult for the courts in one jurisdiction ‘to appreciate the adequateness of the arrangements’ taken by foreign courts.¹²³ Moreover, the French courts do not review the ‘adequate’ nature of the measures taken in the Member State of the child’s habitual residence. This seems to be a more invasive approach. It becomes apparent from the input and the case examples in the Latvian National Report that concentrating on justice in child abduction cases contributes to the judicial system operating properly and the well-being of the child being safeguarded.¹²⁴ In Luxembourg there is one case where the return of the child was refused on the basis of Article 11(4) due to the child’s father being dependent on the social services and the child having insufficient ‘stable social ties’ with the father’s habitual residence.¹²⁵

The Dutch National Reporter raises the point that the problem may not lie in the legal concept, but more on whether adequate arrangements can actually be taken. Two instances are mentioned where this problem was raised. In the first case the central authorities had held that no adequate measures could be put in place in respect of the child if that child were to return to Bulgaria. The Netherlands Child Care and Protection Agency had been unable to make contact and develop cooperation with the Bulgarian authorities. The second case involved duress and the father abusing the mother and one of her children whilst living in Poland. This child was from another relationship and had autism. The mother successfully persuaded the court that a harmful situation existed. For the Dutch court, the notion of ‘adequate arrangements’ became irrelevant due to the events experienced by the mother and her autistic child.¹²⁶

The National Report of Spain draws attention to two other points of discussion. Firstly, every decision considers measures which have already been taken as required by the Regulation, but a few of them also refer to ‘future measures’ that the requiring state is willing to adopt. Secondly, there is a case-by-case approach in establishing whether those measures have been adopted and in which cases they are deemed to be ‘adequate’. The Report refers to

¹²⁰ *Ibid.*

¹²¹ National Report the Czech Republic, question 36.

¹²² *Ibid.*

¹²³ National Report France, question 36.

¹²⁴ National Report Latvia, question 36.

¹²⁵ National Report Luxembourg, question 36.

¹²⁶ National Report the Netherlands, question 36.

extensive case law.¹²⁷ The Czech National Report mentions that in respect of those measures ‘obligations’ are provisional.¹²⁸ This gives the courts and the authorities the flexibility to issue any such measure in the future by providing necessary adjustments or revisions that may appear appropriate in the circumstances of a particular case. All in all, the absence of a definition does indeed give the courts the flexibility to determine which measures are adequate and suitable on a case-by-case basis so as to guarantee the protection of the child at that moment in time.¹²⁹

In Sweden, the scope of ‘adequate arrangements’ has been broadened by the reasoning of an appellate court in the following case:

‘An appellate court refused in *RH 2014:5* to order the return of a child abducted from Italy. The refusal was due to alleged health problems of the child, in spite of the fact that the competent Italian welfare authorities guaranteed that proper care could and would be offered in Italy. The court interpreted Article 11(4) of the Regulation as to mean that it only had in mind protection from a harmful environment and not the child’s health issues’.¹³⁰

The National Report of the UK refers to ‘conventional welfare principles’¹³¹ as the approach used by its courts. Renton is thereby quoted, stating that ‘an Article 11 return order may be an unrealistic goal on the facts of a particular case’.¹³² The National Report of Austria also states that ‘a series of measures are enumerated in a commentary on Article 11 of the Brussels IIa Regulation, which are considered to be ‘adequate arrangements’ within the meaning of the Brussels IIa Regulation’.¹³³

From the National Reports it can be concluded that the majority of the Member States do not have a national guideline in place to assess the ‘best interests of the child’ when deciding on whether ‘adequate arrangements have been made to secure the protection of the child after his or her return’. The majority view is that such a guideline would be helpful. Recommendations include the application of General Comment No. 14¹³⁴ that provides an explanatory note on the objectives, interpretation and application of Article 3(1) on the Convention on the Rights of the Child.¹³⁵ The Article reads as follows:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.’

¹²⁷ National Report Spain, question 36.

¹²⁸ National Report the Czech Republic, question 36.

¹²⁹ National Report Slovenia, the complete answer to this question can be found under question 36.

¹³⁰ National Report Sweden, question 36.

¹³¹ National Report the United Kingdom, the complete answer to this question can be found under question 36: Renton, C., ‘Orders Relating to Children Within the European Union under BIIR’ (2009) Family Law Week, n. 262.

¹³² *Ibid.*

¹³³ National Report Austria, question 36; Commentary provided in: Kaller-Pröll in Fasching/Konecny (editors), Commentary on civil procedural law [Kommentar zu den Zivilprozessgesetze], second edition, volume V/2 (2008), Article 11 EuEheKindVO, note 14.

¹³⁴ Convention on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1)* CRC/C/GC/14, 29 May 2013.

¹³⁵ Convention on the Rights of the Child, Article 3.

This provision imposes obligations on the Member States to ensure that the principle of the best interests of the child is of paramount importance whenever the substantive rights of the child are implicated. The procedural guarantees should be in place and such interpretative considerations should be followed which ensure that the interests of the child are best served.¹³⁶ This approach is in line with the two-fold method applied by the ECtHR, imposing positive and negative obligations on States in order to ensure that guaranteed rights can be fully enjoyed.¹³⁷ The ECtHR's reasoning and clarification of the concept of the 'best interests of the child' in its case law have developed into a 'doctrine' where a balance has to be struck between the best interests of the child and the interests of the parent(s), whereby the latter carry lesser weight but cannot be neglected either.¹³⁸

The Luxembourg courts and those of Spain also follow this doctrine. The latter additionally apply 'Organic law 8/2015 that covers the best interest of the child, a list of general criteria without prejudice to more specific instruments suitable for the case that judges use for interpretation or application purposes. General Comment No. 14 and EU courts' case law may provide sufficient tools to determine (minimum EU) standards for the "best interest of the child".' In line with European values to establish harmonised rules and uniform interpretation in family matters,¹³⁹ some National Reporters consider that such standards may contribute as a corollary to govern 'adequate arrangements'.¹⁴⁰ Aside from the recommendations to concretise standards, there are several Member States that have ensured the best interests of the child in their domestic laws or codes such as in Austria, Poland, Romania, Spain and the United Kingdom.

Other ways in which the concept has been ensured is through the case law of the Supreme or Constitutional Court, by providing an interpretation¹⁴¹ of the concept, developing certain criteria¹⁴² and also developing instructions and guidelines.¹⁴³ The effect of not having a national guideline is that the courts have the necessary flexibility to determine the actual best interests of the child and to assess whether adequate arrangements have been put in place in a particular case. The National Report of Belgium has rightly raised this issue, as well as pointing

¹³⁶ Convention on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1), CRC/C/GC/14, 29 May 2013, p. 3-5.

¹³⁷ Akandji-Kombe, J-F., *Positive obligations under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights* (Human Rights Handbooks, No. 7, Council of Europe 2007), p. 1-11.

¹³⁸ National Report Spain, question 36.

¹³⁹ TFEU, Article 81(1)(3) (under Article 65 TEC).

¹⁴⁰ National Report Belgium, question 36; National Report France, question 36; National Report Ireland, the complete answer to this question can be found under question 34 (the concept is 'identifiable by national laws'); National Report Italy, question 36 and National Report Lithuania, question 36.

¹⁴¹ National Report the Czech Republic, question 36; National Report Malta, the complete answer to this question can be found under question 36; National Report Latvia, question 36 and National Report Spain, question 36.

¹⁴² National Report Greece, question 36; National Report Ireland, the complete answer to this question can be found under question 36; National Report Malta, the complete answer to this question can be found under question 36; National Report Spain, question 36.

¹⁴³ National Report Luxembourg, question 36, where the Supreme Court instructs the courts to apply the guidelines of the CJEU but, thus far, they have not yet been applied due to a lack of cases. The National Report of the United Kingdom indicates that the High Court of England and Wales offers a separate 'Welfare-centric protective remit'.

out other potential issues. One of those issues is the general consensus on what those (minimum) adequate arrangements may entail. The other point that was raised concerns the duty of the court that is seised of the matter and whether that court is under an obligation to obtain information on the respective adequate arrangements in the State where the child is to be returned. In the view of the National Reporter for the Czech Republic, there are no such concerns if the best interests of the child and adequate arrangements are ensured by proper and thorough communication between the courts and an unequivocal application of the principle of mutual recognition.

On the basis of the input by the national reporters it can be concluded that in the majority of the Member States there are sufficient indicators and criteria for assessing the best interests of the child following from national and international law and court practices.

4. Jurisdiction under Article 11(6)-(8)

Just as the provisions of Article 11(2)-(5), the provisions of Article 11(6)–(8) of the Regulation modify the 1980 Hague Child Abduction Convention. In this way, the Regulation goes further than the Convention and provides for the possibility to alter a non-return order issued the courts of the EU Member State where the child has been wrongfully removed or retained. In Article 11(6), determines how the courts in a requested Member State will proceed if an order of non-return is issued. Article 11(7) provides for the procedure for the courts in the EU Member State where the child had his/her habitual residence immediately before his/her wrongful removal or retention.

Through the procedural framework in Articles 11(6), 11(7) and 11(8) the Regulation intends to provide for a mechanism by which, in certain limited circumstances, the courts of the requesting state may nonetheless, and supposedly by way of a relatively summary procedure, determine the future state of residence of the child. The most substantial alteration in the application of the Convention is the rule provided in Article 11(8) of the Regulation. It implies that a final decision on the return of child will be rendered by the courts of the requesting Member State. In contrast, under the Convention, jurisdiction to issue a final judgment on the return of the child will be vested with the court in the requested state, i.e., with the courts of the country where the child has been removed or retained. It is likely that a return of the child will be ordered in majority of cases considering the strict conditions outlined in Article 13 of the Convention. There are no further provisions in the 1980 Hague Convention on how to proceed when the court of the country where the child has been wrongly removed or retained issues a non-return order. In contrast, Article 11(8) of the Regulation provides that '[n]otwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child'. Consequently, the application of the Convention in the EU Member States is substantially different that the application in non-EU jurisdiction.

This procedure has been referred to as ‘the overriding mechanism’, ‘the trumping provision’ and/or the ‘second bite’.¹⁴⁴ This procedural framework has received criticism in the literature for undermining mutual trust.¹⁴⁵ The availability of the second chance procedure depends on the reason for which the return was refused. If it was refused because the court considered that the child was habitually resident in its State rather than in the State to which a return is sought,¹⁴⁶ there is no second chance.¹⁴⁷ This is also the case when the return is refused because the abduction took place more than a year prior to the proceedings and the child has now settled in his/her new environment¹⁴⁸ or on the basis of fundamental rights concerns.¹⁴⁹ The second chance procedure is available if the return was based on Article 13 defences under the 1980 Hague Convention.

Just like Article 11(3) of the Regulation, Article 11(6) is intended not only to ensure the immediate return of the child, but also to enable the court in the country of origin to assess the reasons for the non-return order by the court in the Member State where the child has been wrongfully removed or retained.¹⁵⁰ Article 11(6) requires the court which has issued a non-return order to transmit a copy of the order, as well as other relevant documents, either directly or through the central authority, to the court or the central authority in the Member State of the child’s habitual residence immediately before his/her wrongful removal or retention. Both provisions express the urgency in conducting proceedings and require the court to issue the judgment within six weeks.¹⁵¹ Also, they require that the court in the Member State of the child’s habitual residence immediately before his/her removal or retention ‘shall receive all the mentioned documents within one month of the date of the non-return order’.¹⁵²

In practice, the special procedure under Articles 11(6)-(8) has demonstrated the potential to result in protracted, parallel litigation in two different Member States. It gives rise to uncertainty and damages the legal security that the Regulation aims to offer to the European Community, in those circumstances where, from the perspective of the child, certainty and security are most needed. Taking into account that the international community’s aim was for non-return orders to be the exception in child abduction cases, the special procedure seems to provide for the same cause to be litigated in a different procedural context in the Member State of origin. This results in a situation where children’s State of residence is left in limbo for a considerable period of time whilst it is disputed in the State in which the child was formerly habitually resident or alternatively in two different Member States who may engage in a lengthy legal examination of jurisdiction.¹⁵³ Additionally, it is not uncommon that a refusal is based on more than one ground and thus leads to uncertainty as to whether the second chance procedure

¹⁴⁴ Marín Pedreño, C., ‘Brussels IIbis Regulation Five Years on and Proposals for Reform’ (2010) London, IAFL European Chapter 3, p. 4 <<https://www.iafl.com/chapters/europe/index.html>> accessed on July 10, 2017.

¹⁴⁵ Kruger and Samyn, *op. cit.*, p. 158.

¹⁴⁶ The 1980 Hague Convention, Article 3.

¹⁴⁷ Kruger and Samyn, *op. cit.*, p. 158.

¹⁴⁸ The 1980 Hague Convention, Article 12.

¹⁴⁹ *Ibid.*, Article 20.

¹⁵⁰ CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 78.

¹⁵¹ Regulation Brussels IIbis, Article 11(3), second paragraph.

¹⁵² *Ibid.*, Article 11(6), second sentence.

¹⁵³ Marín Pedreño, *op. cit.*, p. 6.

is available or not.¹⁵⁴ The procedure is also stressful for the entire family and especially for the child.¹⁵⁵

Thus, the Regulation shifts jurisdiction to finally decide on a request for a return from the courts of the ‘requested Member State’¹⁵⁶ to the courts of the ‘Member State of origin’. Also, this clearly follows from Recital 17 which states that a non-return decision ‘could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention’.¹⁵⁷ Accordingly, Article 11 (8) provides ‘for an autonomous procedure under which the possible problem of conflicting judgments in the matter may be resolved’.¹⁵⁸ Indeed, in the case of ‘conflict’ prevalence is given to the decision of the Court in the Member State of the child’s habitual residence immediately before his/her wrongful removal or retention. Hence, the Member State of origin has the last word on the return.¹⁵⁹

Most importantly, the ‘procedural autonomy’ of the provisions of Articles 11(8), 40 and 42 and the priority given to the jurisdiction of the court of the requesting Member State¹⁶⁰ are maintained in the CJEU’s case law.¹⁶¹ It is to be emphasised that it is not required that a return order issued under Article 11(8) is preceded or accompanied by a final judgment on custody rights.¹⁶² This, it is not necessarily the court having jurisdiction to rule on the custody of the child in the requesting Member State. Instead, such a return order may be rendered by any court in that Member State, which is the major shortcoming of the legal reasoning in the *Povse*¹⁶³ judgment. The CJEU emphasises the importance of the allocation of jurisdiction established in Article 11(8) solely to the courts in the Member State of origin.¹⁶⁴

Moreover, a decision rendered on the basis of Article 11(8) is directly enforceable in other EU Members States as it is a ‘domestic’ judgment. If this judgment ordering the return of the child is certified in a ‘country of origin’ as provided under Article 42(2) no objections may be raised in a Member State of enforcement against return orders certified in a ‘country of origin’ as provided under Article 42(2).¹⁶⁵ This will be addressed in a greater detail *infra* in the context of the analysis of Article 42(2).

¹⁵⁴ Kruger and Samyn, *op. cit.*, p. 159.

¹⁵⁵ *Ibid.*

¹⁵⁶ According to the 1980 Hague Convention they are competent to decide upon requests for the return of the child.

¹⁵⁷ See also CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 78.

¹⁵⁸ CJEU Case C-455/15 PPU *P v Q* [2015] ECLI:EU:C:2015:763, para 49 and earlier CJEU judgments in CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 63 and CJEU Case C-211/10 PPU *Povse v Alpagó* [2010] ECR I-6673, para 56.

¹⁵⁹ Dutta and Schulz, *op. cit.*, p. 22.

¹⁶⁰ For more on this see: 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.*, p. 356.

¹⁶¹ See e.g. CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, paras 63 and 64.

¹⁶² In the *Povse* judgment, the CJEU held that a ‘judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child’.

¹⁶³ CJEU Case C-211/10 PPU *Povse v Alpagó* [2010] ECR I-6673.

¹⁶⁴ *Ibid.*

¹⁶⁵ For more on the enforceability of return orders see: Llerranz Ballesteros, *op. cit.*, pp. 343 *et seq.*, p. 358.; Lowe, ‘Some moot points on the 1980 Hague abduction convention’, *op. cit.*, p. 701.

So only when the order for the return of the child has been refused is Article 11(6)-(8) applicable, and these provisions provide for the transmission of the judgment to the court of the Member State of origin which then has to decide on one of the following measures:

- Closing the file in accordance with Article 11(7) if, within three months of notification, the parties do not release information concerning the case to the court;
- A judgment not to return the child transfers jurisdiction to decide on the merits of the case to the Member State of origin, i.e., the Member State from which the child has been unlawfully removed;
- A decision to return the child which is directly recognised and enforceable in other Member States following provision in Article 42(1).¹⁶⁶

4.1 Difficulties in application – National Reports

The so-called second chance procedure has attracted varying responses from the Member States' national reporters. Where some advocate the abolition of the procedure in Article 11(8),¹⁶⁷ others recommend a revision or clarification of the text,¹⁶⁸ whilst the majority do not thus far support the abolition of this procedure with different justifications.¹⁶⁹ Starting with the reasoning that supports its abolition, the National Reporter of Austria raises the issue that mothers are not likely to be physically present in the country where the child has his/her habitual residence due to the fact that the return of the child procedure is generally instigated against them. The context of a background of domestic violence would strengthen this unwillingness.¹⁷⁰

Likewise, this will also be the case when the situation is *vice versa*. Another supporting argument that the National Reporter puts forward is the reference to the author Miklau.¹⁷¹ Here, Article 11(8) is considered to be 'a major problem' because the personal hearing of the child was not possible, since it was not in the State where the child should have been returned.

¹⁶⁶ Lupsan, G., 'Reflections on the abolition of exequatur in the cross-border cases regarding the return of the child' (2015) 11 2 Acta Universitatis Danibus, p. 7.

¹⁶⁷ National Report Austria, question 37; National Report Belgium, question 37 and National Report Latvia, question 37; see Kruger and Samyn, *op. cit.*, p. 159: 'Our proposal is to abolish the second chance procedure and to return to the delicate balance struck by the Hague Child Abduction Convention. This will recover the same treatment of abducted children whether in or outside the EU. It will reiterate the approach of reverse subsidiarity'.

¹⁶⁸ National Report the Czech Republic, question 37; National Report Ireland, the complete answer to this question can be found under question 37; see also Kruger and Samyn, *op. cit.*, p. 159: 'if [abolishing the second chance procedure] is not possible, the procedure should be limited to where the ground for refusal of a grave risk or intolerable situation was used. It should not apply when the child has objected to return'.

¹⁶⁹ National Report France, question 37; National Report Greece, question 37; National Report Italy, question 37; National Report Luxembourg, question 37; National Report Poland, question 37: the procedure does not cause difficulties; National Report Romania, question 37; National Report Spain, question 37; National Report Sweden, question 37 and National Report the United Kingdom, the complete answer to this question can be found under question 37.

¹⁷⁰ National Report Austria, question 37.

¹⁷¹ National Report Austria, question 37 referring to: 'Miklau, 'Not without my daughter' in the middle of Europe – or the reintroduction of patria potestas through the back door ['Nicht ohne meine Tochter' mitten in Europa-oder die Wiedereinführung der väterlichen Gewalt durch die Hintertür.] iFamZ [interdisziplinäre Zeitschrift für Familienrecht] 2010, pp. 133, p. 139.

Moreover, the duration of the procedure in the context of Article 11(6) and the ‘three-stage appeal’ takes too long, up to a year or, at the second instance, up to two years.¹⁷² This is considered to be far too long, and meanwhile results the child becoming settled in his/her new environment.¹⁷³ As a concluding remark, the National Reporters propose to abolish the Article 11(8) procedure because it creates ‘duality’ and this leads to ‘more distrust than trust’.¹⁷⁴

Another firmly reasoned argument for the abolition of Article 11(8) comes from the National Reporter of Belgium.¹⁷⁵ Four points of concern are raised. The first argument concerns the grounds under Article 13 of the 1980 Hague Convention 1980 and raises the questions of, firstly, whether the court may order a non-return when an applicant has made no specific reference to Article 13 and, secondly, what is the outcome if more than one ground is applicable.

Firstly, the Report refers to the undesirable practice of the Belgian courts – due to the aim to overturn the foreign order – on the basis that there is a form of mistrust of the foreign order of non-return, by examining the non-return order to verify the ‘actual grounds’ that are specified by the foreign order.¹⁷⁶ The second concern relates to the length of the procedure.¹⁷⁷ The National Reports for Ireland and France raised this point of concern as well, where the latter mentions that the Regulation ‘rightfully prevents a too permissive approach taken in Article 13 of the 1980 Hague Child Abduction Convention.’¹⁷⁸ The third issue is that the family remains in conflict and this will most certainly not serve the well-being of the child. Lastly, the authors take a children’s rights point of view and argue the following ‘it is inconceivable why we would listen to the child only the second time he/she says something’.¹⁷⁹ If the first judge took the time to hear the parties concerned and examine the circumstances of the case, why should this decision be questioned?’.¹⁸⁰

Nevertheless, a number of the National Reports doubt that the abolition of the existing regulatory scheme of the Regulation and, instead, a reliance solely on the provisions of the 1980 Hague Convention would be the correct way to proceed. This would only rectify mistakes made by the judge.¹⁸⁰ Where its abolition has been discussed, the revision of the Article is promoted

¹⁷² See Kruger and Samyn, *op. cit.*, p. 159.

¹⁷³ National Report Greece, question 37, makes a comment which is in line with that of the national reporter of Austria concerning the length of time which the procedures take and the settlement of the child in his/her new environment.

¹⁷⁴ National Report Austria, question 37.

¹⁷⁵ National Report Belgium, question 37, referring to: Kruger and Samyn, *op. cit.*, p. 159.

¹⁷⁶ National Report Belgium, question 37: The reporter is of the opinion that the procedure should be abolished and refers to the non-functioning of the principle of ‘Mutual Trust’, however emphasizing that its position is open to discussion; See further Lazic, V., ‘Multiple Faces of Mutual Recognition: Unity and Diversity in Regulating Enforcement of Judgements in the European Union’, in Fletcher, M., Herlin-Harnell, E., Matera, C. (eds.), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2017) pp. 337-357.

¹⁷⁷ National Report Belgium, question 37: ‘[...] Since the Brussels IIa Regulation doesn’t provide a time limit in which this procedure must be completed, it is often used only to prolong the case [...] By allowing a party to stretch the case, the best interest of the child [...] is no longer guaranteed’.

¹⁷⁸ National Report France, question 37 and National Report Ireland, the complete answer to this question can be found under question 37.

¹⁷⁹ See also Kruger and Samyn, *op. cit.*, p. 159.

¹⁸⁰ National Report Belgium, question 37.

by the Czech Government and the Czech Central Authorities.¹⁸¹ Specific problems arise when, within one family, there are ‘two or more proceedings’ in a cross-border situation. The aim of the authorities is ‘to revise the ‘overriding’ mechanism to ensure swift procedures, supportive and cooperative central authorities in all Member States and respect for safeguards ensuring the best interests of the child’. The reporter expresses the personal view that ‘special return proceedings’ should be eliminated. With respect to Article 11(6) the national reporter adds that the obligatory procedure upon the rejection of the return order, henceforth to inform the Member State is often not fulfilled,¹⁸² which is a reason for concern and as such needs improvement.

Whereas the National Report of the Czech Republic suggests a revision of the existing scheme, the National Reports for Italy and Luxembourg suggest that a clarification of the mechanism may suffice.¹⁸³ The Italian National Report is of the opinion that even though the ‘machinery is complex and the relation between the two sources is not always well coordinated, the general opinion of doctrine is positive’. Moreover, a second procedure may be too great a burden, both financially and mentally, for the parent whose child has been abducted. The National Report for Luxembourg adds that the courts of Luxembourg, in the application of Articles 11(6) and 11(7), do not always mention the ‘grounds of jurisdiction’ but place emphasis on the wording of the 1980 Hague Convention.¹⁸⁴ Some National Reporters are of the opinion that the abolition of the Article 11(8) procedure would not serve the general interest for various reasons. The National Reporter of Greece reasons that the problem derives from the enforcement of a return order, hence the abolition of this procedure will not be the solution.¹⁸⁵

The National Reporter of Romania argues that even though the ‘mechanism might appear complex in practice and sustains the disputes in different countries’, its abolition would undermine its ‘abduction deterrence’ effect as opposed to the system of the 1980 Hague Convention.¹⁸⁶ The National Reporter of Spain emphasises the complementary and strengthening role of provisions 11(6)-(8) of the Regulation concerning the 1980 Hague Convention, in specific the procedural guarantees.¹⁸⁷ As a final remark in this section, the National Reporter of the UK rightly refers to the comment by Renton: ‘All statutes and regulations have unintended consequences and present problems in dovetailing with domestic rules and legislation. [The Regulation] was never going to be an exception’.¹⁸⁸

The analysis of the relevant case law of the CJEU, in particular in the *Povse*¹⁸⁹ judgment, illustrates how complicated the procedural framework of Article 11(6)-(8) in connection with Article 42 may appear in practice. Obviously, the Commission has identified

¹⁸¹ National Report the Czech Republic, question 37.

¹⁸² *Ibid.*

¹⁸³ National Report Italy, question 37 and National Report Luxembourg, question 37.

¹⁸⁴ *Ibid.*

¹⁸⁵ National Report Greece, question 37.

¹⁸⁶ National Report Romania, question 37.

¹⁸⁷ National Report Spain, question 37.

¹⁸⁸ National Report the United Kingdom, question 37; See further Wiwinius, J.-C., *Le droit international privé au Grand-Duché de Luxembourg* (3rd ed., Editions Paul Bauler 2011), p. 380.

¹⁸⁹ CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673.

the difficulties concerning the existing regulatory scheme and has suggested some substantial changes. This issue is further addressed *infra* in Chapter 9, under 4.2 ‘*Difficulties in application of Article 42 – CJEU case law*’ and 6 ‘*Enforcement of return orders and decisions on access rights – Article 47(2)*’. The 2016 Commission’s Proposal is addressed in the Recommendations, under 4 ‘*Child Abduction and Return Procedures*’.

4.2 Difficulties in application – CJEU case law

In the CJEU case of *Bradbrooke*,¹⁹⁰ the Court was asked to interpret Articles 11(7) and 11(8) of the Regulation. It was questioned whether a Member State was precluded from allocating exclusive jurisdiction to a specialised court to examine questions relating to the return or custody of a child, where proceedings on the substance of parental responsibility with respect to the child have already been brought before a particular court or tribunal.¹⁹¹

In this case, a child was born in Poland to a mother who was a Polish national and lived in Poland. The father was an English national who lived in Belgium. Subsequently, the mother and child moved to Belgium, but only the mother had parental responsibility. The child lived with its mother, while the father had regular contact with the child. The mother then took the child to Poland for a holiday, and remained there. This resulted in the father applying to a juvenile court in Brussels, seeking sole custody over the child, as well as a prohibition on the mother and child leaving Belgium. For her part, the mother challenged the international jurisdiction of the Belgian courts, seeking the application of Article 15 of the Regulation. She sought the transfer of the case to the Polish courts since the child was residing in Poland and, in the meantime, had been registered in a local nursery school. The court of first instance held that parental authority should be exercised jointly by the parents, but granted primary accommodation rights to the mother while temporarily granting secondary accommodation rights to the father on alternate weekends, it being his responsibility to travel to Poland. The father then appealed against this decision and initiated the return of the child under the procedure established by the 1980 Hague Convention. Meanwhile, a Polish court reached the conclusion that the child had been wrongfully removed and had its habitual residence in Belgium, but despite that issued a non-return decision in accordance with Article 13(b) of the 1980 Hague Convention. This Polish decision was transmitted to the Belgian authorities in accordance with Article 11(6). In accordance with Belgian law the case file was allocated to a family Court of First Instance, and after the entry into force of the new law,¹⁹² the case was reallocated to the pertinent specialised court. At that moment parallel proceedings in Belgium were taking place, as the appeal procedure was pending in the custody case initiated by the father. The Belgian Court of Appeal decided to stay its proceedings and submit the question to the CJEU to clarify whether Articles 11(7) and 11(8) was to be interpreted as precluding the law of a Member State from favoring specialised courts in cases of parental abduction over the procedure laid down in the named provisions of the Regulation, even when a court or a tribunal has already been seised of substantive proceedings relating to parental responsibility.

¹⁹⁰ CJEU Case C-498/14 PPU *David Bradbrooke v Anna Aleksandrowicz* [2015] ECLI:EU:C:2015:3.

¹⁹¹ *Ibid.*, para 40.

¹⁹² Loi de 30 juillet portant la creation d’un tribunal de la famille et de la jeunesse.

The CJEU noted that the Regulation does not seek to establish uniform substantive and procedural rules. It, therefore, held that Articles 11(7) and 11(8) must be interpreted as not precluding, as a general rule, a Member State from allocating jurisdiction to a specialised court to examine questions of return or custody with respect to a child in the context of the procedure set out in these provisions, even where proceedings on the substance of parental responsibility with respect to the child have already been separately brought before a court or tribunal.¹⁹³ However, the Court emphasised that it is vital that national rules do not impair the effectiveness of the Regulation and are compatible with the objective that procedures should be expeditious,¹⁹⁴ as well as are in line with Article 24 of the EU Charter of Fundamental Rights, which requires to ensure respect for the fundamental rights of the child.

The Advocate General and the Commission had different reasoning, namely that of commending the good practice of the concentration of jurisdiction in specialised courts in parental child abduction cases.¹⁹⁵

The case law of the CJEU is clear in illustrating that the scheme has failed to meet its purpose. In addition to *Povse*,¹⁹⁶ the *Zarraga*¹⁹⁷ case is also relevant. The proceedings in the *Zarraga* case concerned the wrongful removal of a child from Spain to Germany. A Spanish father and a German mother lived in Spain up to the end of 2007 together with their child who had been born in 2000. As the relationship between the spouses deteriorated, divorce proceedings were commenced in Spain in which both parents sought sole custody over the child. Despite not having heard the child due to the mother's failure to voluntarily attend the hearing after having been duly notified, the Bilbao court rendered its judgment and awarded sole custody rights to the father.

The father then brought two sets of proceedings in Germany. First, he petitioned for the return of his daughter to Spain on the basis of the 1980 Hague Child Abduction Convention. That application was granted at first instance, but was overturned on appeal. The latter decision was based on Article 13(2) of the 1980 Hague Convention and the child's clear objections to being returned to Spain. Secondly, the father requested the German courts to enforce part of the Bilbao Court's judgment concerning the rights of custody which was certified in accordance with Article 42. The Court of First Instance refused to recognise and enforce the Spanish court's judgment due to the child not having been heard, after which the father appealed to the *Oberlandesgericht Celle*. The latter decided to stay the proceedings and to refer the case to the CJEU for a preliminary ruling as the German court questioned whether it was obliged to enforce a judgment containing a serious infringement of fundamental rights. In this respect, the CJEU clearly confirmed that a return order issued under Article 11(8) must be enforced even if it has been rendered in violation of the requirements provided in Article 42. The reasoning of the

¹⁹³ CJEU Case C-498/14 PPU *David Bradbrooke v Anna Aleksandrowicz* [2015] ECLI:EU:C:2015:3, para 54.

¹⁹⁴ Beaumont, P., Danov, M., Trimmings, K. and Yüксеel, B. (eds), *Cross Border Litigation in Europe* (Hart Publishing 2017), p. 722.

¹⁹⁵ CJEU Case C-498/14 PPU *David Bradbrooke v Anna Aleksandrowicz* [2015] ECLI:EU:C:2015:3, para 51; Beaumont, Danov, Trimmings, and Yüксеel, *op. cit.*, p. 722.

¹⁹⁶ CJEU Case C-211/10 PPU *Povse v Alpagó* [2010] ECR I-6673.

¹⁹⁷ CJEU Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2011] ECR I-14247.

CJEU in the context of Articles 42 and 47(2) will be presented in greater detail *infra* in Chapter 9, under 4.2 ‘Difficulties in application of Article 42 – CJEU case law’ and 6 ‘Enforcement of return orders and decisions on access rights – Article 47(2)’.

The referring court in this case asked whether Article 11(8) of the Regulation must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child only falls within the scope of that provision when the basis of that order is a final judgment by the same court on the rights of custody over the child. Regrettably, the CJEU answered this question in the negative. The Court stated that such an interpretation has no basis in the wording of Article 11 and, more specifically, in the wording of Article 11(8) of the Regulation. In the view of the Court, there is nothing to suggest that the enforcement of a judgment of the court with jurisdiction ordering the return of the child was to be dependent on whether that court issued a final judgment on the right of custody. On the contrary, the Court concluded that Article 11(8) of the Regulation extends to ‘any subsequent judgment which requires the return of the child’.¹⁹⁸ It further stated that the objective of the provisions of Articles 11(8), 40 and 42 of the Regulation, namely, that proceedings be expeditious, and that priority be given to the jurisdiction of the court of origin are scarcely compatible with an interpretation according to which a judgment ordering a return must be preceded by a final judgment on rights of custody.¹⁹⁹ So Article 11(8) of the Regulation must ultimately be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody over the child.²⁰⁰ In other words, it can be any subsequent judgment which does not necessarily have to be preceded by the judgment rendered by the court which is competent to rule on the rights of custody.

Accordingly, in the present case the Austrian courts had no other option but to enforce the return order and there was no possibility to oppose enforcement under the Regulation. This part of the judgment is particularly problematic and may prove to be counterproductive in practice. It implies that such orders may be issued by any court in the Member State of the original habitual residence and may be rendered outside the proceedings concerning custody over the child. In its Proposal in 2016 the Commission has suggested corrections and adaptations specifically with respect to this point in child abduction cases.

Thus, the return order is independent under procedural law and in particular does not require any prior or simultaneous final custody judgment.²⁰¹ The CJEU permits the Member State of origin to carry out its own ‘return proceedings’ in the shape of a mere return order within pending custody proceedings in accordance with Article 11(6) and (7) without a prior or simultaneous custody judgment on the merits.²⁰²

¹⁹⁸ CJEU Case C-211/10 PPU *Povse v Alpage* [2010] ECR I-6673, para 52.

¹⁹⁹ *Ibid.*, para 62.

²⁰⁰ *Ibid.*, para 67.

²⁰¹ *Ibid.*, see further Dutta and Schulz, *op. cit.*, p. 24 *et seq.*

²⁰² Dutta and Schulz, *op. cit.*, pp. 1-40, p. 22.

In all of the above-mentioned cases, the Court has used its *urgent procedure (PPU)*,²⁰³ which enables the Court to answer questions in the area of freedom, security and justice²⁰⁴ and thus also references by Member State courts regarding the Brussels IIbis Regulation, within a much shorter time than under the general procedure for preliminary rulings.²⁰⁵ The Court has made clear that the urgent procedure is especially appropriate in cases of child abduction.²⁰⁶

The circumstances of the case of *Rinau*²⁰⁷ illustrate the problems that can arise due to multiple instances of adjudication in different EU Member States. This situation seriously hampers the efficiency of proceeding and delays the return of the child. One of the questions submitted to the CJEU in this case concerned the issue of when it is appropriate to commence a second chance procedure under Article 11(8). Namely, a first instance decision on the non-return of the child can be reversed or overturned by higher courts in the Member State to which the child has been wrongfully removed or retained. In such a case, there would be no decision on a non-return, strictly speaking, and the second chance procedure in the Member State from which the child has been removed or returned may appear unnecessary. The facts of the case are rather complex and will here be summarised.

In 2003, Mrs Rinau, a Lithuanian national, married a German national and lived with him in Germany. The couple separated in 2005 and divorce proceedings were initiated in Germany. Their daughter, Luisa, went to live with her mother. In July 2006, Mrs Rinau left Germany with Luisa to settle in Lithuania. In August 2006, the competent German court awarded provisional custody over Luisa to her father, but in December 2006 the Lithuanian court rejected the application for Luisa to be returned which Mr Rinau had submitted on the basis of the 1980 Hague Convention and the Brussels IIbis Regulation. In March 2007, that decision was overturned by a new decision on appeal ordering the return of the child to Germany. This decision was not enforced, however.

Finally, in June 2007 the competent German court granted the Rinaus' divorce, awarded permanent custody over Luisa to Mr Rinau and ordered Mrs Rinau to move Luisa back to the child's father in Germany. To this end, that court issued a certificate, pursuant to the Brussels IIbis Regulation, rendering its return decision of June 2007 enforceable and allowing for its automatic recognition in another Member State. Mrs Rinau subsequently made an application to the Lithuanian courts for the non-recognition of the return decision issued by the German court.

The applications and claims in these proceedings finally reached the Supreme Court of Lithuania, which referred a number of questions to the CJEU. One of the questions was whether the court of the Member State of origin was able to order a return when the courts of the Member

²⁰³ Introduced by the Amendment of the Rules of Procedure of the Court of 15 January 2008 [2008] OJ L 24/39; see also Council Decision of 2 December 2007 amending the Protocol on the Statute of the Court of Justice, [2008] OJ L24/42.

²⁰⁴ TFEU, Article 67 *et seq.*

²⁰⁵ Dutta and Schulz, *op. cit.*, p. 5.

²⁰⁶ E.g. CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 44.

²⁰⁷ *Ibid.*

State of refuge had initially rejected the request for a return under the 1980 Hague Convention but at higher instances had granted the request without the child in fact being returned.²⁰⁸ The CJEU found that Article 11(8) is indeed contingent on the courts of the Member State of refuge refusing a return in accordance with the 1980 Hague Convention.²⁰⁹ Furthermore, the Court concluded that it is sufficient for the special proceedings in accordance with Article 11(6)-(8) that the return was *initially* refused,²¹⁰ whereby subsequent judgments of the Member State of refuge are not material.²¹¹ The Court emphasised the duty of the courts to act expeditiously in child abduction cases. The conclusion that follows from this judgment is that the court in the Member State of origin can proceed in accordance with Article 11(7) and issue a return order in accordance with Article 11(8) as long as the request for a return was initially rejected.²¹²

The Court clearly indicated that there is no possibility to oppose the enforcement even if the conditions of Article 42 are not met. In other words, even if the national court has issued a return order by applying Article 42 incorrectly, the enforcement of the order certified may not be refused.

4.3 Relevance of the absence of the time-limit within which Central Authorities are to act – National Reports

The National Reporters were asked to provide information on whether the absence of a time frame in the Regulation is an impediment to securing the return of the child when the Central Authorities are involved in child abduction cases. The National Reports offer a divided view on this matter, but the majority report that there is no or limited information available.²¹³ A number of National Reports express the view that it would be desirable to determine a time frame within which the Central Authorities can operate in order to ensure the expedient return of the child.²¹⁴ On the other hand, some state that the absence of a time frame within which the Central Authorities are to act is not an impediment.²¹⁵ The French National Reporter notes that in the ‘current situation, the introduction of a time frame would probably be inefficient and useless because of the limited powers of the French Central Authority and its dependence on intermediaries placed between the CA and the judge’.²¹⁶

²⁰⁸ Dutta and Schulz, *op. cit.*, p. 25.

²⁰⁹ CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, paras 59-60.

²¹⁰ *Ibid.*, paras 75-81.

²¹¹ *Ibid.*, para 80.

²¹² Dutta and Schulz, *op. cit.*, p. 25-26.

²¹³ National Report Austria, question 39; National Report Belgium, question 39; National Report Bulgaria, question 39; National Report Croatia, question 39; National Report Cyprus, question 39; National Report Estonia, question 39; National Report Finland, the complete answer to this question can be found under question 39.

²¹⁴ National Report the Czech Republic, question 39; National Report France, question 39; National Report Poland, question 39; National Report Spain, question 39; National Report Slovenia, the complete answer to this question can be found under question 37 and National Report Sweden, question 39.

²¹⁵ National Report Austria, questions 39 and 40; National Report Cyprus, questions 39 and 40; National Report Estonia, questions 39 and 40; National Report Hungary, questions 39 and 40; National Report Ireland, questions 39 and 40; National Report Latvia, questions 39 and 40.

²¹⁶ National Report France, question 39.

From other National Reports it can be derived that time frames already function relatively well in their national legal system. They argue that providing a time frame for the Central Authorities would not be necessary.²¹⁷ Other Reporters express the opposite view suggesting that a time frame for the Central Authorities regarding their own activities could be desirable, as delays favour the abductor and impair the best interests of the child.²¹⁸ In some cases many Reports mention considerable delays by the Central Authorities of other Member States.²¹⁹ Most of the Reports link the desirability of a time frame in particular to child abduction cases where the Central Authorities have such a crucial task. The relevant part of the Spanish Report reads as follows: ‘In fact, we believe that the absence of time frames in general is always negative, above all in matters related to minors, where rapidity in resolution is imperative for the sake of the best interests of the child’.²²⁰ The UK Report points to a change in the habitual residence of the child, pending enforcement or an appeal.²²¹ Jurisdiction can be ineffective when time changes the habitual residence of a child. Appeals should be subject to similarly expeditious procedures, although this would require extra financial support and means, both human and material. The lack of financial means has been raised by a substantial number of Reporters.²²² A shortage of the necessary financial resources and good and qualified administrative staff are the main problems for many Central Authorities. The Slovenian Central Authority is run by one person, for instance.

In the light of these critical remarks, the new Article 61²²³ of the 2016 Commission’s Proposal contains a new provision regarding financial resources. This obliges Member States to ensure that Central Authorities have adequate financial and human resources to enable them to carry out the obligations assigned to them under Brussels IIbis.

Even though they consider that a time frame could be beneficial, some National Reports point to potential drawbacks. Thus, the Polish National Report puts forward that the introduction of a specific time limit without making exceptions for very complex cases might have a negative impact. Imposing an unrealistic time frame which most likely cannot be met by the courts may prove counterproductive. The same holds true if exceptions to the duty to comply with the time frame requirement will be permitted.²²⁴ The same objection has been raised by

²¹⁷ National Report Spain, questions 39 and 40; National Report Latvia, questions 39 and 40; National Report the Netherlands, questions 39 and 40; National Report Romania, questions 39 and 40; National Report Croatia, questions 39 and 40 (referring to the existing time frame under the 1980 Hague Convention).

²¹⁸ National Report Spain, questions 39 and 40; National Report France, questions 39 and 40; National Report Italy, questions 39 and 40; National Report Luxembourg, questions 39 and 40; National Report Malta, questions 39 and 40; National Report Sweden, questions 39 and 40.

²¹⁹ National Report Luxembourg, question 39 indicating that this question can only be answered on a case by case basis.

²²⁰ National Report Spain, question 39.

²²¹ National Report the United Kingdom, question 40.

²²² National Report Croatia, question 47; National Report Estonia, question 47; National Report Cyprus, question 47; National Report Spain, question 47; National Report Greece, question 47; National Report Slovenia, question 47.

²²³ See the Impact Assessment, pp. 207-208: ‘The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs’.

²²⁴ National Report Poland, question 39.

the Slovenian report,²²⁵ which states, *inter alia*, that the ‘determination of an acceptable time frame...could lead to the extension of the proceedings on the return of the child’.²²⁶

The Greek Report suggests that a European Central Authority should be introduced which would deal with some of the issues being dealt with by the Central Authorities in each Member State. This independent authority could take into consideration the difficulties in relation to possible delays and could directly inform the other authorities. It could also act as an impartial body not intervening on behalf of its citizens.²²⁷ An independent authority supervising return orders in the context of the Regulation could eventually minimise the risks of issuing non-return orders or at least take notice of the hurdles encountered in abduction cases. Such an authority might be extremely useful in the aftermath of new artificial reproductive technologies and the institution of new forms of parentage, such as the double maternal link which is already recognised in the UK, Sweden, Spain, Belgium etc., that are not necessarily recognised in all the countries of the European Union. Furthermore, it is advisable to reinforce the role of the European mediator in child abduction cases. Such a reinforcement might necessitate hiring mediators who are experienced in handling such cases so as to enhance the possibilities for reaching compromises between the parents.²²⁸

In general, there is no or limited information available on this point in the majority of the Members States.²²⁹ The National Reports for a number of Member States express the view that it would be desirable to determine a time frame wherein the Central Authorities can operate in order to secure the expedient return of the child.²³⁰ Even though they consider that that a time frame could be beneficial, some National Reports point to potential drawbacks and raise counterarguments, as has already been explained (see the examples of the French, Polish and Slovenian Reports).

The National Report for Romania indicates that there are ‘no time limits that should be respected by the Central Authority when deciding to refer it to a lawyer’.²³¹ The remark from

²²⁵ National Report Slovenia, question 40.

²²⁶ National Report Slovenia, the complete answer to this question can be found under question 37.

²²⁷ National Report Greece, question 40.

²²⁸ Georgouleas, N., ‘International Abduction of Children’ in Chrysapho, T. (ed.) *International Family Law* (Nomiki Vivliothiki 2016), p. 330. See also: <http://www.europarl.europa.eu/atyourservice/en/20150201PVL00040/Child-abduction-mediator>.

²²⁹ National Report Austria, question 39; National Report Belgium, question 39; National Report Bulgaria, question 39; National Report Croatia, question 39; National Report Cyprus, question 39; National Report Estonia, question 39; National Report Finland, the complete answer to this question can be found under question 39; National Report Germany, the complete answer to this question can be found under question 38; National Report Greece, question 39; National Report Hungary, the complete answer to this question can be found under question 37; National Report Ireland, the complete answer to this question can be found under question 37; National Report Latvia, question 39; National Report Lithuania, question 39; National Report Malta, question 37 and National Report Portugal, the complete answer to this question can be found under question 38.

²³⁰ National Report the Czech Republic, question 39; National Report France, question 39; National Report Poland, question 39; National Report Spain, question 39; National Report Slovenia, the complete answer to this question can be found under question 37 and National Report Sweden, question 39.

²³¹ National Report Romania, question 39.

the Spanish National Report is that ‘the establishment of deadlines is useless without financial support and means, both human and material, to accomplish their task’.²³²

The National Report for Luxembourg refers to a case where the Dutch Central Authorities ‘took seven months to notify the Luxembourg authorities about a wrongful removal of three children that were taken to Luxembourg’. However, in the case at hand, ‘the left-behind parent only contacted the Dutch Central Authority one year after the wrongful removal’. Evidently, considering the time that had lapsed, the Luxembourg court could do nothing more than to issue a decision on the non-return of the children. In this context the National Reporter states that the ‘absence of that time frame could be considered as an obstacle’.²³³

²³² National Report Spain, question 39.

²³³ National Report Luxembourg, question 39.

GUIDELINES – Summary

Article 10 – Jurisdiction on issues pertaining to parental responsibility in cases of child abduction

The idea incorporated in Article 10 is that the courts of the Member State where the child was habitually resident immediately before his/her wrongful removal or retention, in principle retain jurisdiction to decide on the custody of a child.

The jurisdictional rules under Article 10 apply in cases where an action is filed on any issue pertaining to the substance of parental responsibility.

Thus, this provision is not relevant for determining jurisdiction in proceedings for the return of a child. A request for the return of the child is to be submitted to the Member State in which the child has been wrongfully removed or returned. The courts of a Member State to which the child has been wrongfully removed or returned may only decide on the return of the child, but not on the merits of a right pertaining to parental responsibility, such as the right of custody or the right of access.

Only where the conditions provided in Article 10 are met will the courts in the Member State to which the child has been wrongfully removed or retained have jurisdiction for both return orders and for the substance of parental responsibility. Conversely, the courts in a Member State where the child had his or her habitual residence immediately before his/her wrongful removal or retention are competent to hear any claim relating to the substance of parental responsibility, but they have no jurisdiction to decide on a request for the return of the child.

How to apply Article 10

Step 1: Establish where the child has his/her habitual residence

- The CJEU has defined this concept in relevant case law as explained in connection with the application of Article 8. These considerations are relevant and fully applicable in the context of Article 10.
- The concept of ‘habitual residence’ ...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 in 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 courts to establish the habitual residence of the child, taking account of all the circumstances which are specific to each individual case (the case of A).²³⁴

- To the factors to consider habitual residence in the case A, in the *Mercredi*²³⁵ case the CJEU added further factors as follows: ‘...such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. [...] the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that 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.*

- If there is no habitual residence of the child in the Member State to which he/she has been wrongfully removed or retained in, jurisdiction remains with the courts of the Member State of origin.
- If the child has acquired a habitual residence in the second Member State, move to step 2.

Step 2: has each person, institution or other body having rights of custody acquiesced in the removal or retention of the child?

- If the answer is yes, jurisdiction will be transferred from the Member State of origin to the second Member State, where the child has his/her habitual residence.
- If the answer is no, move to step 3.

Step 3: Establish whether the child has:

- a) resided in that other Member State for a period of **at least one year**;
- b) after the person, institution or other body having rights of custody has had or should have had **knowledge** of the whereabouts of the child; and
- c) the child has **settled** in his or her new environment; and
- d) at least one of the following conditions is met:
 - within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for a return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained
 - a request for a return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

²³⁴ CJEU Case C-523/07 A. [2009] ECR I-2805, para 44.

²³⁵ CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.

- a case before the court in the Member State where the child was habitually resident immediately before his/her wrongful removal or retention has been closed pursuant to Article 11(7);
- a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before his/her wrongful removal or retention. (Article 10(b)(iv) must be interpreted as meaning that a provisional measure does not constitute a ‘judgment on custody that does not entail the return of the child’ and thus cannot be the basis of the transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed (the case of *Povse*²³⁶).

If conditions a), b), c) and d) are met, jurisdiction will be transferred to the courts of the Member State of the new habitual residence.

Main difficulties in the application of Article 10

Habitual residence

Different National Reporters claim that the temporal and substantive conditions and the determination of the child’s habitual residence after he/she has moved for a period of time make it more complex to decide on which court has jurisdiction. Habitual residence ‘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. [...] the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that 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 *Mercredi*²³⁷).

Relationship with the 1980 Hague Convention

The problems that are sometimes encountered in practice, concerning the scope of application between the Regulation and the Convention, illustrate the need to clarify this issue. There is no ‘overlap’ between the two instruments as far as Article 10 is concerned. Only in cases where the return of the child is the main issue in the proceedings as regulated in Article 11 is there an ‘overlap’ between the Regulation and the Convention. When there is an overlap, the Regulation always prevails over the Convention, following Art. 11(1) and 60 of the

²³⁶ CJEU Case C-211/10 PPU *Povse v Alpage* [2010] ECR I-6673.

²³⁷ CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.

Regulation. Regarding other matters of parental responsibility, there is no overlap and, accordingly, there are no difficulties in defining the scope of application.

Provisional measures

A provisional measure does not constitute a ‘judgment on custody that does not entail the return of the child’ within the meaning of Article 10(b)(iv) and accordingly does not present a basis for the transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed (the CJEU in the *Povse* case²³⁸).

Article 11 – scope

When a competent authority in an EU Member State has to proceed on the basis of the 1980 Hague Convention, it will do so by applying the provisions of Article 11(2)–11(8) of the Regulation. These provisions prevail over and modify the corresponding 1980 Hague Child Abduction Convention. Also, Article 60 of the Regulation, which provides for the precedence of this EU instrument over listed international agreements, confers supremacy on the Regulation over the Convention in matters regulated in both legal instruments.

No other provisions of the Convention are affected by the Regulation.

Provisions prevailing over or modifying the 1980 Hague Convention

Article 11(3) 6-week time frame

This deadline is often not met in practice, mostly because it is unclear whether these 6 weeks apply to each instance or instead include appellate procedures or even the enforcement of a return decision. In reality, proceedings take 165 days on average, which is more than 23 weeks. Not only is there a need for a clarification of this deadline, but the Member States themselves have had to modify their national laws in order to be able to comply with the deadline.

Article 11(4) ‘adequate arrangements’

It is questionable whether the strict six-week return deadline leaves sufficient time to put sufficient checks and appropriate protective safeguards in place. It is also not clear what standard should be followed to assess the appropriateness of these arrangements. Perhaps the mutual trust between the courts in respecting that each other’s state measures meet their own standards may facilitate to shorten the time within which the child is returned. The National Reporters have expressed the need for a guideline to assess the ‘best interests of the child’ when deciding on whether ‘adequate arrangements have been made to secure the protection

²³⁸ CJEU Case C-211/10 PPU *Povse v Alpage* [2010] ECR I-6673.

of the child after his or her return'. Here it would be desirable to follow the Convention on the Rights of the Child, General Comment No. 14 and the two-fold method applied by the ECtHR, imposing positive and negative obligations on States, as well as its established doctrine on the best interests of the child.

Article 11(5) the opportunity to be heard

From the National Reports it follows that the notion of 'the opportunity to be heard' in respect of child abduction cases does not seem to have the same understanding and application in the EU Member States. Evidently the respective national laws vary as to how this notion is to be safeguarded, applied and enforced in matters concerning the return of the child. The difficulties identified do not only relate to the notion itself, but must be seen together with the meaning of the concept of the 'degree of maturity' or the weight that should be attached to the opinion of a 'child'. Here the National Reports clearly express the need for more guidance on how to apply this paragraph regarding the age of the child, possibly a minimum standard, the weight that should be attached to the view of the child, as well as a clearer standard of the degree of maturity.

Special procedure, Article 11(6)-(8)

In practice the special procedure under Article 11(6) – (8) has shown the potential to cause protracted, parallel litigation in two different Member States. This leads to uncertainty and affects legal security. Problems regarding this procedure include:

- The personal hearing of the child is often impossible due to him/her not being present in the Member State where he/she should be returned,
- The length of the procedure, and
- Sometimes even the three-instance proceeding so that the child has settled in his/her new environment and with family relations which most certainly does not serve either the best interests of the child, or the whole scheme undermines the principle of mutual trust between the Member States.