CHAPTER 9: Enforcement of the Decisions on the Rights of Access and Return Orders issued by the Courts of Child's Habitual Residence Immediately before a Wrongful Removal or Retention – Articles 40-45 and 47 and Other Provisions Applicable to the Enforcement – Articles 48-52

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Contents

1. Introductory remarks

The underlying purpose of all EU legal instruments unifying the rules on the recognition and enforcement of judgments is to enhance a free 'circulation' of decisions within the EU. The same holds true for the Brussels IIbis Regulation, which must be interpreted in such a way as to facilitate the free movement of judgments[1] enhancing thereby mutual trust between the national courts of the Member States.[2] With respect to decisions on the rights of access and return orders under the so-called 'overriding mechanism' mutual trust tends to be so intense that the control is reduced to minimum standards and, as such, is comparable to the level of control exercised with respect to judgments rendered by courts in a Member State of enforcement. As stated in the literature,[3] Recital 21 of the Regulation expressly attributes to its evocation of mutual trust not only the function of justifying mutual recognition but also the function of guiding the interpretation of the key provisions implementing mutual recognition. The principle of mutual recognition continues to be a cornerstone and the complete abolition of the exequatur is the final objective of judicial cooperation in civil matters.[4]

Under the Regulation, there are different enforcement regimes, and distinct conditions for the enforcement. The recognition of judgements in matrimonial matters and the enforcement of judgements in cases of parental responsibility have already been addressed *supra* in Chapters 6, 7 and 8.

In Section 4 of Chapter III (Articles 40-45), the Regulation contains provisions relating to the enforceability of decisions on the rights of access and the return orders issued pursuant Article 11(8). These provisions predominantly concern the conditions that must be fulfilled in the Member State of origin in order to certify a judgment on the rights of access and the return of the child (Articles 40-44).

Article 45 is the only provision in Section 4 that relates to the procedure in a Member State of enforcement. It specifies which documents are to be submitted by the party seeking the enforcement. In this context, Article 47(1) of Section 6 concerning the enforcement procedure is relevant. It provides that the courts of the Member States in that respect apply the national law rules of enforcement when enforcing decisions rendered by the courts of other Member States. Additionally, Article 47(2), second sentence, determines the only reason for which these two types of judgments cannot be directly enforced.

The regime for enforcement in Sections 4 and 6 of Chapter III can be summarised as follows:

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[1] Lenaerts, *op. cit.*, p. 1302-1328, pp. 1304.

[2] See e.g. Recital 21 of the Brussels IIbis Regulation which states that 'the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required'. See also cases CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 50; and CJEU Case C-491/10 *Aguirre Zarraga v. Pelz* [2010] ECR I-14247, para 70.

[3] Weller, M., 'Mutual Trust: in search of the future of European Union private international law' (2015) Journal of Private International Law 11:1, 64-102, p. 84.

[4] Borrás, A., 'From Brussels II to Brussels IIbis and Further' in Boele-Woelki and Beilfuss, *op. cit.*, p. 7.

Provisions which are relevant for a Member State of origin (Conditions to be fulfilled and controlled in a Member State of origin):

- The emphasis is on the procedure and the conditions that must be fulfilled in the country of origin. When these conditions are fulfilled, the judge in the Member State of origin issues the relevant certificate. Conditions are provided in Article 41(2) for judgments relating to rights of access and in Article 42(2) concerning the return orders issued pursuant to Article 11(8).
- When a judgment on rights of access and orders for the return of the child given pursuant to Article 11(8) are certified as provided in Articles 41 and 42, they are directly enforceable in other Member States, without the need to obtain a declaration of enforceability in the Member State of enforcement and with no possibility of opposing the said enforcement. The conditions for certifying a judgment on rights of access and an order for the return of the child are addressed *infra* in this Chapter, under 3 '*Abolishing the exequatur under Articles 41(1) and 42(1)*' and 4 '*Enforcement scheme under Article 42*'.

Provisions which are relevant for a Member State of enforcement:

- Documents that must be submitted by the party requesting the enforcement are provided in Article 45.
- The enforcement procedure is governed by the law of the Member State where the enforcement is sought. A judgment certified in accordance with Articles 41 and 42 in one Member State is enforceable in another Member State under the same conditions as judgments rendered in the Member State of enforcement (Articles 47(1) and 47(2) first sentence).
- The irreconcilability of a judgment with a subsequent enforceable judgment is the only ground on the basis of which the enforcement may be refused (Article 47(2) second sentence).

This is the most liberal system of enforcement provided in the Regulation. It only applies to decisions on access rights and return orders issued on the basis of Article 11(8) of the Regulation. There is no requirement for obtaining *exequatur* and virtually no possibility to oppose the enforcement of these judgments, as will be explained in greater detail in the following sections.

2. Types of judgments which are enforceable under the regulatory scheme of Section 4 – Article 40

The fast track enforcement regime of Section 4 applies exclusively when the recognition or enforcement of judgments on the rights of access (Article 41) and return orders (Article 42) issued pursuant Article 11(8) is requested. No other judgments rendered on the issues under the substantive scope of application of the Regulation may be the subject of enforcement according to these provisions. The same holds true for the determination of costs incurred in these two types of proceedings under the Regulation. They are exempt from enforcement under Section

4, as this is explicitly provided in Article 49.[5] Such other judgments are enforceable in the procedure where an *exequatur* is required.

According to Article 40(2), a holder of parental responsibility is not bound to apply for the enforcement under Section 4, but may request the enforcement of a judgment in accordance with the general enforcement regime under Sections 1 and 2 which is applicable to all other types of judgments.

3. Abolishing the *exequatur* under Articles 41(1) and 42(1)

3.1 General remarks

As already mentioned, currently the Regulation has abolished the *exequatur* for two types of decisions rendered under Article 41 and 42. These are decisions on 'rights of access' in Article 41 and for return orders issued within the framework of the so-called 'second chance procedure' of Article 11(8), as provided in Article 42. The purpose of abolishing the *exequatur* is to increase efficiency in the cross-border enforcement of judgments by removing the need to obtain a declaration of enforceability in the Member State of enforcement, as well as by doing away with virtually all grounds on which enforcement may be refused.[6] In case of decisions in the 'second chance procedure' or 'the so-called 'overriding mechanism', the judgment rendered by the court of the Member State of the child's habitual residence immediately before his/her wrongful removal or retention is directly enforceable as provided in Section 4 of Chapter III. An order for the return of the child issued in a judgment pursuant to Article 11(8) and certified in the Member State where it is rendered is to be recognised and enforced in another Member State without the need to obtain a declaration of enforceability and with no possibility to oppose its recognition and enforcement.[7] The purpose of abolishing the *exequatur* is to achieve the rapid and effective enforcement of judgements relating to access rights and return orders.[8]

The only condition that must be fulfilled for the direct enforceability of these two types of judgments is that the judgment is certified in the Member State of origin by using the form provided in Annex III concerning the right of access, or the from in Annex IV concerning the return of the child. Such a certificate is issued in the EU Member State of origin. A party requesting the enforcement must submit the original certificate.[9] The court in the Member State of origin can only issue such a certificate if the conditions provided in Article 41(2) are fulfilled

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[5] See also, Magnus/Mankowski/Magnus, *op. cit.*, Article 40, note 4.
[6] See also, Hazelhorst, M., 'The ECtHR's decision in *Povse*: guidance for the future of the abolition of exequatur for civil judgments in the European Union' (2014) 1 NIPR p. 28.
[7] Article 42(1) and Recital 17 of the Brussels IIbis Regulation; See also McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?', *op. cit.*, p. 32; 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. 8: 'The CJEU also took a very strict interpretation [...] refusing the state of enforcement any room for manoeuvre even if it appeared that this enforcement would harm the child. However, this strict approach did not guarantee these orders to be enforced, 75 per cent were not'.
[8] Scott, *op. cit.*, p. 27-35, 28; See further Carpaneto, *op. cit.*, p. 249: [...] the principle of mutual trust has quickly reached the highest level with the abolition of exequatur [....]'.
[9] Magus/Mankowski/Magnus, *op. cit.*, Article 45, note 9.

in cases of rights of access or in Article 42 (2) in the case of a judgment on the return of the child.

The certificate is issued *ex officio* by the judge in the Member State of origin in cases relating to the return of the child. The same holds true for the certificate concerning the judgment on rights of access in cases which include a cross-border element at the time the judgment is rendered. In such a case, the certificate will be issued on the motion of the court of origin when the judgment becomes enforceable, even only provisionally. If a case has no international element at the moment when the judgment is rendered, but acquires an international character at a later point in time, the certificate will be issued at the request of one of the parties. Certificates for both types of judgments are completed in the language of the judgment. If a certain measure to ensure the protection of the child is taken by the court or another authority, details concerning such a measure will be stated in the certificate (Article 42(2)).

Accordingly, for the decision that may be enforced under the Regulation's regime where the *exequatur* has been abolished two alternative routes are open to the judgment creditor. He or she can choose whether to directly enforce within the framework in which the *exequatur* has been abolished or to apply for a declaration of enforceability (*exequatur*). The possibility to opt for a procedure for obtaining a declaration of enforceability follows from Article 40(2). It expressly provides that '[t]he provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter'.[10] At a first glance, leaving such a possibility may seem unnecessary. Yet the residual availability of the *exequatur* procedure may be useful where a party faces practical difficulties in obtaining a direct enforcement. Such difficulties may be encountered if national enforcement authorities are not yet imbued with the idea of directly enforcing foreign judgments.[11] It must be remembered that the actual enforcement is left to the Member States. Hence, the influence of the EU legislation ends with the rendering of a judgment and the issuing of the certificate or rather at the point where the judgment that is equivalent to a national judgment is rendered.[12]

However, the CJEU case law illustrates that the abolition of the *exequatur* does not always function smoothly.[13] Although the elimination of the *exequatur* in the second chance procedure was intended to facilitate efficiency in the return of the child, it has raised many questions in practice[14] and has frequently been criticised. The current regime of the Regulation does not pay sufficient attention to the fact that decisions regarding issues in parental responsibility are held *rebus sic stantibus*. This means that if circumstances change, the decision rendered may no longer be in the best interests of the child. Under the Regulation's current

[10] An example of this scenario is found in CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673.
[11] Kruger, 'The Disorderly Infiltration of EU Law in Civil Procedure', *op. cit.*, p. 15.
[12] Brijs, S., Nieuwe Europese uitvoerbare titels: wie ziet het bos nog door de bomen? in: Dirix, E (ed.) *Recente ontwikkelingen insolventierecht, beslagrecht en zekerheden (Themis reeks)* (Die Keure 2010), p. 59–96.
[13] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271; CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673; CJEU Case C-491/10 *Aguirre Zarraga v Pelz* [2010] ECR I-14247.
[14] Kruger and Samyn, *op.cit.*, p. 160.

scheme the recognition of the said decision may not be denied. In other cases, changes in circumstances may not be as relevant, but the possibility of making adaptations and adopting specific measures would better guarantee the protection of the interests of the child. In other words, the possibility to adopt such measures is not incompatible with the idea of denying any review as to the substance of the judgment. Therefore both issues should be considered in the Recast.[15]

In its Proposal of 2016, the Commission suggests abolishing the *exequatur* for all judgments falling under the scope of the Regulation. To this end, the Proposal introduces the uniform system of enforcement for all judgments concerning the child. To what extent the 2016 Commission's Proposal deals with this particular problem will be addressed in greater detail in the Recommendations, under 5 '*Recognition and Enforcement*'.

3.2 Conditions for issuing the certificate concerning rights of access – Article 41(2)

In order to issue the certificate by using the standard form in Annex III, the following conditions must be met:

- In the case of a default judgment, there must be proof that the document instituting the proceedings has been duly and served upon the party in good time, or the opposing party must have accepted the decision unequivocally, regardless of the fact that the service was not according to the standards provided in Article 41(2)(a).
- All parties must be given an opportunity to be heard.
- The child must be given an opportunity to be heard unless this was considered inappropriate having regard to his or her age or degree of maturity.

The responsibility to check whether these requirements have been fulfilled lies with the court in the Member State of origin. Children's right to participate in family proceedings,[16] subject to the assessment of their age and capacity, has been heavily endorsed by ECtHR jurisprudence.[17]

3.3 Difficulties in application of Article 41 – National Reports

National Reporters were invited to provide information on the difficulties encountered in practice and the solutions suggested in the literature relating to the hearing of the child in their

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[15] Carpaneto, *op. cit.*, p. 277.

[16] For more information on the child's involvement in proceedings, see Schuz, R., *The Hague Child Abduction Convention: A Critical Analysis, vol. 13* (Hart Publishing 2013), p. 114: 'Non-inclusion of the child in decisions relating to him is effectively to treat him as the passive victim of his parents' dispute [...]'.

[17] For a detailed comparative analysis of children's participation rights in family law processes, see Forder, C., 'Seven Steps to Achieving Full Participation of Children in the Divorce Process', in Willems, M.V.J., (ed.) *Developmental and Autonomy Rights of Children; Empowering Children, Caregivers and Communities* (Intersentia 2002), p. 105-140; See also Beaumont, P., Walker, L. and Holliday, J., 'Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU' [2016] 12:2 Journal of Private International Law, p. 31; See also Walker, L., and Beaumont, P., 'Shifting The Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice' [2011] 7:2 Journal of Private International Law 231, p. 236.

jurisdictions in the context of applying Article 41. It appears that there is no reported decision on the matter in Austria. Regarding an appropriate standard, the Austrian Reporter refers to Sengstschmid as follows: 'In the case of an age-typical degree of maturity of the child, only the age should be decisive. If, however, the child is more mature than a child of the same age, then the degree of maturity attained is decisive'. [18] In addition, the quoted author strives for an autonomous interpretation of Article 41(c). This would indeed eliminate barriers and uncertainty on how to tackle this notion of age and maturity. The author rightly puts forward that this reasoning can be reversed, for example, in the case of mental disability or the mere fact that the degree of maturity is more advanced. Finally, the suggestion is made that the 'age limit should be set low' with reference to several international standards.[19]

The Belgian Reporter refers to the applicable law as of 1 September 2014 in order to illustrate how the matter of the age and level of maturity of the child is dealt with. The law sets the minimum requirements, imposed on judicial and other actors, on at what age a child must be informed about his/her right to be heard and confers an implied right on those who have not attained this age.[20] The Report mentions several examples: the child who is older than 12 years is informed of his/her right to be heard. The child has the right to be heard, but may refuse to be heard. The child younger than 12 years also has a right to be heard, but is not informed of this right. He or she can ask to be heard, or this request can be made by the public prosecutor, by one of the parties or by the judge him/herself. If the request is made by the child or the public prosecutor, the court must hear the child. Nevertheless, the judge will not hear the child where the case is urgent and the certificate needs to be delivered.[21]

The Estonian Report raises the problem of filling in the certificate in which there is no possibility for the judge to reason the decision on whether or not to hear the child. In addition, there is uncertainty as to how to fill in the form when one of the parents has sole custody and the other merely has access rights. The French Reporter refers to a problem relating to the enforcement. The example is given that the hearing of the child would require more effort by the judge when enforcement is sought in Germany rather than when it is to take place in Belgium. The automatic delivery of the certificate rarely occurs and obtaining it may sometimes prove difficult. These may be considered as procedural obstacles that hamper an effective application of the provision.

The Lithuanian Reporter refers to the case where a five-year child old was heard on the basis of Article 41 because it was held that the child's degree of maturity was sufficient and the hearing would not harm the child.[22] The National Report for Malta suggests introducing stricter laws on hampering rights of access backed up by the police to enforce them and, where needed,

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[18] National Report Austria, question 42; *Sengstschmid* in Fasching/Konecny, Commentary (nt 1), 2dn edn., V/2, Article 41, note 5.
[19] National Report Austria, question 42.
[20] National Report Belgium, question 42: National law, Articles 1004/1 and 1004/2 of the Belgian Code of Civil Procedure.
[21] *Ibid.*
[22] National Report Lithuania, question 42

with the involvement of foreign authorities.[23] This is in line with the already mentioned suggestion in the Austrian National Report.[24]

According to the Polish Report, the child is to be heard outside the court. Article 72(3) of the Polish Constitution safeguards the right of the child to be heard, bearing in mind the child's 'mental development, state of health and degree of maturity.[25] The hearing of the child at the stage of the procedure before the Supreme Court ordinarily takes place in chambers and without the presence of others. This includes 'statutory or legal representatives of the child or other participants/parties', but they are 'informed about the date and statutory representatives of the child and are responsible for bringing the child to be heard'. Experience in practice proves that the hearing of the child in a courtroom may have a negative impact on the child. When the case takes place in a trial court the position of the child is attained through other competent authorities like a guardian as well as the opinion of an expert. In addition, the hearing must be on record for the purpose of conducting it as a single event only. Lastly, the Report suggests that the 'parties should submit questions or issues to be asked about, during the hearing by the court'.[26]

In Romania, the mandatory hearing of the child starts at the age of 10.[27] The Spanish reporter notes that the Spanish courts have so far not been in a position to apply Articles 41 and Article 42.[28] The welfare checklist has been used in the UK. The Report thereby refers to a note by Langdale and Robottom, stating that the welfare checklist (e.g. S. 1 (3) of the Children Act 1989) highlights factors such as 'the child's age, sex, backgrounds and any other characteristics' as being relevant for the court's decision.[29] In addition, the Report provides examples illustrating how the court takes the wishes of the child into consideration, while also focusing on what efforts can be made to make contact possible. Lastly, when the case concerns the application of the 1980 Hague Convention the courts take a more strenuous approach. In *Re W (Abduction: Child's Objections)*[30] it was held that 'a subtle shift of emphasis had come about via Article 11(2)'[31] insofar as it had enshrined a presumption in Articles 12 and 13 of the 1980 Hague Convention proceedings that 'it shall be ensured that the child is given the

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[23] National Report Malta, the complete answer to this question can be found under question 42.
[24] National Report Austria, question 42.
[25] National Report Poland, question 42: Polish Constitution Article 72(3): In the course of establishing the rights of the child, public authorities and persons responsible for the child are obliged to listen to and, if possible, to take into account the views of the child; it is also based on Article 12 of the Convention on the Rights of the Child.
[26] National Report Poland: Telenga, P., in: A. Jakubecki (ed.), Bodio, J., Demendecki, T., Marcewicz, O., Telenga, P., Wójcik, M.P., Komentarz aktualizowany do ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, LEX/el., 2016, Czerederecka, A., Psychologiczne kryteria wysłuchania dziecka w sprawach rodzinnych i opiekuńczych, Rodzina i Prawo 2010, No. 14-15, p. 22, Cieśliński, M.M., Wysłuchanie dziecka procesie cywilnym (Art. 216[1] k.p.c.), PS 2012, No. 6, p. 63-72.
[27] National Report Romania, question 42.
[28] National Report Spain, question 42.
[29] National Report the United Kingdom, the complete answer to this question can be found under question 42: Langdale, R. and Robottom, J., 'The Participation and Involvement of Children in Family Proceedings' (2012) Family Law Week (available at http://www.familylawweek.co.uk/site.aspx?i=ed96057&f=96057, accessed 25 October 2016).
[30] EWCA Civ 520, [2010] 2 FLR 1165, per Wilson LJ, para 17.
[31] *Ibid.*, stressing that 'children should be heard far more frequently in Hague Convention cases than has been the practice hitherto'.

opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.'[32] In *WF v FJ, BF & RF* [33] it was also noted that there was 'no particular age where a child is to be considered as having attained sufficient maturity for his or her views to be taken into account'.[34]

In conclusion, only a number of Member States provided an answer to this question due to the fact that no sufficient information was available either in the literature or in the case law.[35]

4. Enforcement scheme under Article 42

As already briefly explained *supra* in this Chapter, under 3.1 '*General remarks*' and 3.2 '*Conditions for issuing the certificate concerning rights of access – Article 41(2)*', return orders issued in the Member State of the child's habitual residence immediately before his/her wrongful removal or retention on the basis of Article 11(8) are directly enforceable under the enforcement scheme of Section 4. Thus, there is no need to obtain a declaration of enforceability for return orders which are certified according to Article 42 paragraph 2 in a 'country of origin'. More importantly, there is virtually no possibility to oppose the enforcement of such a judgment in another EU Member State. The only reason that may be raised against its enforcement is if there is a 'subsequent enforceable judgment' rendered in the country of origin under Article 47 paragraph 2.[36] No other ground may be relied upon to oppose the enforcement, even an objection such as a violation of fundamental rights or the best interests of the child. The ruling in the CJEU *Povse*[37] judgment is explicit in that respect:

> 'Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment'.

4.1 Difficulties in application of Article 42 – National Reports

The majority of the Member States' National Reports do not endorse the proposal that the court of one Member State could assign an authority in another Member State to enforce a

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[32] *Ibid.*
[33] *Ibid.*, '… the gateway or threshold for taking into account a child's objections is "fairly low"'.
[34] *Ibid.*
[35] National Report Austria, question 42; National Report Bulgaria, question 42; National Report Croatia, question 42; National Report the Czech Republic, question 42; National Report Finland, the complete answer to this question can be found under question 40; National Report Greece, question 42; National Report Germany, the complete answer to this question can be found under question 41; National Report Latvia, question 42; National Report Lithuania, question 42; National Report Luxembourg, question 42; National Report the Netherlands, question 42; National Report Portugal, the complete answer to this question can be found under question 42; National Report Spain, question 42; National Report Slovenia, the complete answer to this question can be found under question 42 and National Report Sweden, question 42.
[36] See, McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?', *op. cit.*, p. 32, the author calls this possibility the 'backdoor exception.'
[37] CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673.

judgment.[38] Various arguments are raised in support of this view. Whilst some refer to the fact that national law regulates such competence,[39] others invoke the principle of procedural autonomy.[40] In a number of jurisdictions there have been no issues on this matter,[41] so that the Commission's Proposal cannot be assessed due to the absence of relevant case law or other relevant information.[42] Also other barriers have been mentioned, such as those having a linguistic or cultural character.[43] Only a few Member States could see the potential for having an assigned authority stipulated by the Regulation that furthers a more expeditious enforcement of decisions.[44] Finally, an argument in favour of this idea has been perceived in 'facilitating the access of the relevant information on the Internet' and 'enhancing the use of Websites like e-Justice'.[45]

As for the issuing of the certificate referred to in Article 42, from the National Reports it does not emerge that the certificate is denied in Member States when the child or another party was not given the opportunity to be heard. Also, it is often unclear whether a 'party' in Article 42(2)(b) also includes persons other than 'holders of parental responsibility', e.g. a child's natural father. In general, from the input of the National Reports it may be concluded that there are either few problems with the application of this Article or that there is no data, case law or literature available that allows them to provide feedback from their Member States.[46] The National Reporter for Austria indicates that to her knowledge the 'issuing of the

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[38] National Report Austria, question 44; National Report Croatia, question 44; National Report the Czech Republic, question 44; National Report Estonia, question 44; National Report Finland, question 3; National Report Greece, question 44; National Report Latvia, question 44; National Report Malta, the complete answer to this question can be found under question 42; National Report the Netherlands, question 44; National Report Poland, question 44; National Report Portugal, the complete answer to this question can be found under question 43; National Report Romania, question 44; National Report Spain, question 44; National Report Slovenia, the complete answer to this question can be found under question 42 and National Report Sweden, question 44.

[39] National Report Croatia, question 44; National Report Cyprus, question 44; National Report Germany, the complete answer to this question can be found under question 43; National Report Greece, question 44; National Report Malta, the complete answer to this question can be found under question 42; National Report the Netherlands, question 44; National Report Spain, question 44 and National Report Sweden, question 44.

[40] National Report Poland, question 44.

[41] National Report Belgium, question 44; National Report Bulgaria, question 44; National Report Estonia, question 44; National Report Finland, the complete answer to this question can be found under question 42; National Report Germany, the complete answer to this question can be found under question 43; National Report Hungary, the complete answer to this question can be found under question 42; National Report Ireland, the complete answer to this question can be found under question 42 and National Report Lithuania, question 44.

[42] National Report Belgium, question 44; National Report Bulgaria, question 44; National Report Estonia, question 44; National Report Finland, the complete answer to this question can be found under question 42; National Report Germany, the complete answer to this question can be found under question 43; National Report Hungary, the complete answer to this question can be found under question 42; National Report Ireland, the complete answer to this question can be found under question 42 and National Report Lithuania, question 44.

[43] National Report Portugal, the complete answer to this question can be found under question 43.

[44] National Report France, question 44; National Report Italy, question 44; National Report Luxembourg, question 44; National Report the United Kingdom, the complete answer to this question can be found under question 42.

[45] National Report Spain, question 44.

[46] National Report Belgium, question 43; National Report Croatia, question 43; National Report Cyprus, question 43; National Report Estonia, question 43; National Report Finland, the complete answer to this question can be found under question 41; National Report Germany, the complete answer to this question can be found under question 42; National Report Hungary, the complete answer to this question can be found under question 42; National Report Ireland, the complete answer to this question can be found under question 41; National Report Lithuania, question 43; National Report Luxembourg, question 43; National Report Malta, the complete answer

certificate is refused in case of hearing impairment' and that the 'affected parties are understood only as the holders of parental responsibility'.[47] In line with the refusal of the certificate, this will also occur in the French courts.[48] Additionally, the National Report for France in connection with Article 42(2)(b) indicates the following: '[i]t is not clear if the condition that 'all parties concerned were given an opportunity to be heard' refers to the parties in the procedural meaning or refers to all the holders of parental responsibility'. The latter interpretation is favoured in the legal literature. A 'party' does not include persons other than 'holders of parental responsibility' according to the French Report.[49] In contrast, the input of the National Reporter for Greece on Article 42(2)(b) states that it 'should be construed as including others than holders of parental responsibility'. The National Reporter provides the following argument for the aforementioned stating that 'there are some concerns that the abolition of exequatur proceedings for the return of the child (Article 42) cannot be used just as an instrument to achieve at any cost the outcome which is desirable for one party to the proceedings. As was mentioned before, it is important that the abolishment of exequatur proceedings for Article 41 and 42 proves itself in practice'.[50]

In conclusion, the National Reports evidence that there are differences in the interpretation of this provision amongst the Member States, even though they do not expressly indicate that substantial difficulties have been encountered in practice.

4.2 Difficulties in application of Article 42 – CJEU case law

A number of questions on the application of the enforcement regime under Article 42 have been submitted to the CJEU. Apparently, this particularly complex procedural framework has raised many difficulties in practice.

The case of *Rinau*[51] illustrates the problems that can arise due to multiple instances of adjudication in different EU Member States. This 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 non-return strictly speaking and the second chance procedure in the Member State from which the child is removed or returned may appear unnecessary. The facts of the case are outlined *supra* in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*'.

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to this question can be found under question 41; National Report Poland, question 43; National Report Portugal, the complete answer to this question can be found under question 42 and National Report Sweden, question 43.

[47] National Report Austria, question 43.

[48] National Report France, question 43; National Report Italy, question 43; National Report Slovenia, the complete answer to this question can be found under question 41 and National Report the United Kingdom, the complete answer to this question can be found under question 42.

[49] National Report France, question 43.

[50] National Report Latvia, question 43.

[51] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271.

The applications and claims in these proceedings reached the Supreme Court of Lithuania, which referred a number of questions to the CJEU. As already indicated *supra* in Chapter 4, one question concerned the ability of a court of a Member State to certify that its decision ordering a return is enforceable even though a non-return order was overturned by a higher instance court in another Member State. In principle, a second chance decision may be rendered when a non-return order is issued in a Member State to which a child has been wrongfully removed or retained. Since no such decision was rendered at the last instance, the referring Court questioned whether the conditions for the issuance of the certificate had been met. In other words, it questioned whether it had complied with the objectives of and the procedures under the Regulation to render a return decision and to issue the certificate 'after a court of the Member State in which the child is wrongfully retained has taken a decision that the child be returned to his or her State of origin'.[52]

On this point, the CJEU concluded as follows: once a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42, that that decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has been replaced by a decision ordering return, in so far as the return of the child has not actually taken place. Since no doubt has been expressed regarding the authenticity of that certificate and since it was drawn up in accordance with the standard form set out in Annex IV to the Regulation, opposition to the recognition of the decision ordering return was not permitted. It is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child.[53]

Additionally, the Court clarified that except where the procedure concerns a decision which has been certified pursuant to Articles 11(8) and 40 to 42 any interested party can apply for the non-recognition of a judicial decision, even if no application for the recognition of the decision has been submitted beforehand.[54]

This judgment is particularly important since the Court applied, for the first time, the new urgent preliminary ruling procedure, established with effect from 1 March 2008 to allow the Court to deal with questions relating to the area of freedom, security and justice within a significantly shorter timescale. Accordingly, in this case the judgment was only rendered seven weeks after the reference to the Court, whereas the duration of a preliminary ruling procedure is currently an average of 20 months.

The CJEU's judgment in the *Zarraga* case[55] clarified that a return order issued under Article 11(8) must be enforced even if it is rendered in violation of the requirements provided in Article 42. Thus, the court in a Member State in which enforcement is sought may neither examine the correctness of the decision nor may it refuse the enforcement even if the conditions in Article 42 have been clearly disregarded or incorrectly applied. As has been elaborated *supra*

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[52] *Ibid*., para 42, question 5.
[53] *Ibid*., para 89.
[54] *Ibid*., para 97.
[55] CJEU Case C-491/10 *Aguirre Zarraga v Pelz* [2010] ECR I-14247.

in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*', the case concerned the wrongful removal of a child from Spain to Germany.

On 12 May 2008, the Court of First Instance and Preliminary Investigations of Bilbao provisionally awarded custody to the father and ruled on the mother's right to have access. In June 2008, the mother moved with the child to Germany and settled there with her new partner. On 15 October 2008, the Bilbao Court issued provisional measures which, *inter alia*, prohibited the removal of the child from Spain and suspended the earlier judgment provisionally granting the mother's right of access. In the custody proceedings the Bilbao Court held that it was required to obtain a fresh expert report and to hear the child personally. The Court fixed dates for both, but rejected the mother's application that she and her daughter be permitted to leave Spain freely after the hearing. Likewise, the Court denied the mother's request to hear the child by means of a video conference. Consequently, the mother and the child did not attend the hearing as scheduled. The Court awarded sole rights of custody to the father. The mother appealed and requested that the child be heard. The latter was rejected on the ground that, according to Spanish law, the production of evidence on appeal was only possible in expressly defined circumstances which were not fulfilled in the case at hand. Namely, the failure by a duly notified party to attend a first instance hearing voluntarily does not qualify as such a circumstance.

The father 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 in the first instance, but overturned on appeal. The latter decision was based on Article 13(2) of the 1980 Hague Convention and the child's clear objections to return to Spain.

A second set of proceedings was for the enforcement of a part of the Bilbao Court's judgment concerning the rights of custody which was certified in accordance with Article 42. The first instance Court (*Familiengericht Celle*) had held that the judgment was neither to be recognised nor enforced, on the ground that the Spanish court had not heard the child before rendering its judgment. The father appealed to the *Oberlandesgericht Celle.* The *Oberlandesgericht Celle* decided to stay the proceedings and to refer the case to the CJEU for a preliminary ruling on the following questions:

> '(1) Where the judgement to be enforced in the Member States of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power of review, pursuant to an interpretation of Article 42 of [Brussels IIbis Regulation] in conformity with the Charter of Fundamental Rights?
>
> (2) Is the court of the Member State of enforcement obliged to enforce the judgement of the court of the Member State of origin notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of [Brussels IIbis Regulation] contains a declaration which is manifestly inaccurate?'

The CJEU decision was clear in holding that the German court as the court of enforcement had no power of review and was under an obligation to enforce the judgement.[56] Instead, the court in Spain retained sole authority for such a review. In support of this holding the CJEU reasoned that mutual trust between states was sufficient to protect fundamental rights.[57]

The Court answered the questions by stating that the court in the Member State of enforcement cannot oppose the enforcement of a certified judgement ordering the return of a child on the ground that the court of the Member State of origin may have infringed Article 42 of the Regulation.[58] The assessment of whether there is such an infringement falls exclusively under the competence of the court of the Member State of origin.[59] The most important inference of this holding is that the court in a Member State of enforcement may not refuse the enforcement even when the court in a Member State of origin erroneously certifies a judgment, i.e., when the conditions provided in Article 42 have not been met. Such a conclusion follows from the fact that the CJEU did not engage in any discussion on the relevance of the correctness of the decision, i.e., whether or not the circumstances of the case at hand could be considered as giving the child 'an opportunity to be heard' within the meaning of Article 42(2)(a). The enforcement court must 'trust' that the assessment of the court in a Member State of origin in that respect is correct. Such a high standard of 'trust', virtually a 'blind trust', is not maintained in any other EU legal instrument.

The relevant facts of the CJEU *Povse*[60] judgment have already been partially explained *supra* in Chapter 4, under 2.2 '*Difficulties in application – CJEU case law*'. They can be summarised as follows. An unmarried couple Ms. Povse and Mr. Alpago lived in Italy until 2008 with their daughter Sofia, born in December 2006. They separated in January 2008 as their relationship had deteriorated. They had joint custody of their daughter. The farther initiate proceedings in Italy requesting the Venice Youth Court to award him sole custody of the child and to issue a travel ban prohibiting Ms. Povse from leaving Italy without his consent. His request was granted and a travel ban was granted on 8 February 2008. On the same day, Ms. Povse travelled to Austria with her daughter. On 23 May 2008 the Venice Youth Court revoked its earlier decision prohibiting the mother to leave and authorised the residence of the child with the mother. The Court granted preliminary joint custody to both parents. The father was ordered to share the costs of supporting his daughter. The authority to make decisions of 'day to day organisation' the Court vested with the child's mother determining thereby the conditions and details of the father's access rights. After some time, the father declared that he did not wish to continue the meetings and requested the return of his daughter to Italy. He forwarded the request for the return through the central authorities in Italy and Austria to the Leoben District Court. His claim was finally dismissed in November 2009. The Court thereby referred to the decision of the Venice Youth Court of 23 May 2008 which permitted the residence of the child with her

[56] *Ibid*., para 54.
[57] *Ibid*., para 46.
[58] *Ibid*., para 75.
[59] *Ibid*., para 51.
[60] CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673.

mother in Austria. The mother requested a preliminary sole custody, which was granted on 25 August 2009 by the Judenburg District Court.

In the meantime, there were a series of proceedings initiated in Italy. In particular, the Venice Youth Court on 10 July 2009 granted the request for the return of the child under Article 11(8) and issued a certificate of enforceability under Article 42. Upon the farther's requested for the enforcement of this return order in Austria, the Austrian Supreme Court submitted a request for a preliminary ruling to the CJEU concerning a number of Regulation's provisions. The provision of Article 42 relating to the enforcement of return orders was one of them.

The message of the CJEU is clear: the court in the Member State of the child's habitual residence immediately before the wrongful removal or retention has jurisdiction to render a final ruling on the return of a child. At the stage of the enforcement of a return order certified in the Member State under Article 42(2) no objection may be raised against the enforcement, even if the violation of a fundamental right is at stake or if there is an action that is detrimental to the best interests of the child. Yet such rights are not unprotected. Any violation of these rights must be invoked and a decision must be brought in the country of origin in the procedure of certifying the return order and obtaining the enforceability of such a judgment. However, the court in the Member State of enforcement has no discretion and may not examine whether the conditions for issuing the certificate provided in Article 42(2) have been complied with or whether the court in the Member State of origin has properly applied this provision. The court on the Member State of the enforcement must recognise and enforce the return order even if the court in a Member State of origin obviously incorrectly applied the requirements of Article 42.[61] There virtually no remedy at the enforcement stage so that such orders are unconditionally enforced in another EU Member States. Bearing this in mind, the enforcement regime under the Brussels IIbis Regulation is unsurprisingly sometimes referred to as a 'nuclear missile'.[62] As is often emphasised by the CJEU, the Regulation and its provisions on the enforcement of judgments, especially the regimes under Articles 41 and 42, are based on the principle of mutual trust amongst EU Member States.[63]

The relevant CJEU law in particular illustrates that the current procedural scheme needs to be amended so as to more appropriately accommodate the needs of the parties in child abduction cases. The appropriateness of changes in the 2016 Commission's Proposal is addressed in a greater detail in the Recommendations, under 5.2 '*Appropriateness of the*

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[61] See also, Beaumont, P., 'The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction', (2008) 335 *Recueil des cours / Académie de droit international 9-103, p. 93;* McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?', *op. cit.*, p. 32: 'This is the birth of mutual recognition, a policy that is designed to reflect the integration and, ironically, the trust that exists within the European judicial area.' For an evaluation of the mutual recognition concept, see Hess, B., 'The Integrating Effects of European Civil Procedural Law' (2002) 4 European Journal of Law Reform 3, p. 6.

[62] Muir Watt on Abolition of Exequatur and Human Rights, p. 6, available at: http://conflictoflaws.net/2013/muir-watt-on-povse/ (accessed 13 July 2015).

[63] CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673, para. 40.

Proposal and Recommendations' and 6.5 '*Appropriateness of the Proposal and Recommendations*'.

Within the context of the enforcement framework under the Regulation, the following conclusions of the CJEU are to be emphasised:

1) The enforcement may not be refused even if a certified judgment of the court in a Member State of origin, as a result of a subsequent change of circumstances, might be seriously detrimental to the best interests of the child. Such an objection must be raised before the court of the Member State of origin.

2) A judgment ordering the return of the child falls within the scope of Article 11(8) even if it is not preceded by a final judgment of the court relating to the rights of custody.

It is doubtful whether the holding under 2) serves the best interests of the child, since it implies that any decision in a Member State, even if brought outside the context of proceedings on the right of custody, is enforceable under the most favourable regime of Section 4. It is indeed inappropriate that a judgment of any court in the Member State of origin and regardless of the jurisdiction on custody would be susceptible to enforcement under the scheme of Section 4. Such a holding needs revising as it may result in multiple proceedings and may consequently hamper efficiency in child abduction cases. The 2016 Commission's Proposal attempts to remedy this shortcoming and this is addressed in the Recommendations, under 4.3 '*Commission's Proposal: 'Overriding mechanism' (Article 26 Proposal)*' and 4.4 '*Appropriateness of the Proposal and Recommendations*'.

The holding under 1) implies that the principle of mutual trust must be respected even when by doing so fundamental rights and the best interests of the child are implicated. Again, any objection based on the violation of such a right must be raised before the court in the Member State of origin. It is outside the authority of the court in a Member State of enforcement to deal with these objections as it has no option but to enforce the return order.

Since the Austrian courts in the *Povse* case had no other option but to enforce the return order with no possibility to oppose enforcement under the Regulation, the mother and the child submitted a complaint to the ECtHR.[64] The complaint argued that the Austrian courts had violated their right to respect for private and family life under Article 8 of the European Convention on Human Rights. In the applicants' view, the Austrian court had infringed this right when ordered the enforcement of the Italian court's return order without examining their argument that the child's return to Italy would constitute a serious threat to her well-being and would in effect permanently separate mother and daughter.

[64] *Povse v Austria* App no 3890/11 (ECtHR, 18 June 2013).

The ECtHR[65] reasons first of all, that the European Union protects fundamental rights to an equivalent degree and, accordingly, the presumption of compliance applies.[66] The Brussels IIbis Regulation protects fundamental rights, as it provides for the standards to be complied with by the court ordering the return of the child. The Austrian Supreme Court did comply with these standards since it requested a preliminary ruling by the CJEU, thereby making use of the most important control mechanism provided for in the European Union.[67] Since the Regulation introduces a strict division of authority between the court of origin and the court of enforcement, the Austrian courts had no discretion in deciding on the enforcement. The Court concluded that any objection to the judgment should have been raised before the Italian court as the court of the Member State of origin. It thereby referred to its earlier decision in the case of *Sneersone and Kampanella v. Italy*,[68] The Court concluded that the mechanism for the protection of Convention rights had not failed and that Austria may therefore have been considered to have acted in accordance with the Convention. Thus, one can conclude that the abolition of the *exequatur* is in principle in accordance with the ECHR if certain conditions are fulfilled, such as compliance with minimum standards or in some cases the fact that a preliminary ruling has been requested, as well as the circumstance in which the court is left with no discretion.[69]

In light of the circumstances surrounding both the decisions of the CJEU and the ECtHR it is doubtful whether the Regulation's legal framework has achieved its aim. The abolition of the *exequatur* removes any discretion for the national courts to refuse enforcement, regardless of the circumstances[70] and has therefore been criticised for its potential impact on the protection of fundamental rights.[71] The subject of major criticism in both the CJEU and ECtHR is not necessarily the legal reasoning or the application and interpretation of relevant legal instruments. It is rather the existing legal framework in the Brussels IIbis Regulation provided for in Articles 11(8) and 42 that presents a major source of the difficulty. It unnecessarily complicates the application of the 1980 Hague Convention, substantially alters the procedure provided therein[72] and prolongs the proceedings. Most importantly, the aim does not seem to be achieved since return orders appear to be seldom enforced in practice.

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[65] The Court applied the so-called *Bosphorus* test which is designed to establish whether in a case where a state claims to have simply fulfilled its obligations resulting from its membership of an international organization (such as the EU), it may be exempt from responsibility under the Convention because the relevant organization adequately protects fundamental rights. The rationale behind allowing a state to rely on a presumption of equivalent protection is to find a compromise between two conflicting objectives: the Member States' freedom to transfer sovereign power to international organizations, on the one hand, and the need to protect fundamental rights, on the other. See Peers, S., 'Bosphorus. European Court of Human Rights. Limited Responsibility of European Union Member States for Actions within the Scope of Community Law. Judgment of 30 June 2005, *Bosphorus Airways* v. *Ireland*, Application No. 45036/98', European Constitutional Law Review 2006, p. 451

[66] *Povse v Austria* App no. 3890/11 (ECtHR, 18 June 2013), para 77.

[67] *Ibid*., paras 80–81.

[68] *Sneersone and Kampanella v Italy* App no. 14737/09 (ECtHR, 12 July 2011).

[69] Hazelhorst, *op. cit.*, p. 33.

[70] Oberhammer, P., 'The Abolition of Exequatur' [2010] IPRax p. 197-203.

[71] Hazelhorst, *op. cit.*, p. 27.

[72] Lazić, '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.*, p. 179.

In any case, a revision of the scheme of the Regulation is recommended. A new regulatory framework should be drafted so as to express a more balanced approach when incorporating the principles of 'mutual trust', the best interests of the child and the fundamental right to respect for private and family life. Therefore, the Commission's initiative to revise the current procedural format in cases of child abduction is to be met with approval. Regrettably, the 2016 Commission's Proposal retains the second chance procedure. Yet it introduces a number of useful clarifications and changes in the structure of the procedural framework for the enforcement of judgements in general. This is discussed in greater detail in the Recommendations, under 5 '*Recognition and Enforcement*'.

4.3 Conditions for issuing the certificate concerning the return of the child – Article 42(2)

Article 42(2) lays down a number of conditions for issuing the certificate. Thus, the court in the country of origin shall issue the certificate for the return of the child referred to in Article 42 of the Regulation by using the standard form set out in Annex IV, provided that the following conditions have been satisfied: the child and the parties were given the opportunity to be heard and the court has taken into account the reasons for the non-return judgment issued according to Article 13 of the 1980 Hague Convention and the evidence administered in the process. Hence, certifying the return order under Articles 11(8) and 42 is conditional upon, *inter alia*, the child having been given the opportunity to be heard during the proceedings, unless the hearing of the child is inappropriate. As no standard is set within the Regulation, it is for the CJEU to provide guidance on what is 'inappropriate'. It has been rightly suggested in the literature that a broad approach should be followed so as to ensure conformity with Article 12 of the Convention on the Rights of the Child. The child's maturity is thereby to be assessed in each case, rather than imposing an arbitrary age requirement as is the case in the national laws of some EU Member States.[73]

The judgment becomes 'enforceable' at the moment of issuing the certificate for the return of the child. Article 42(1), second paragraph entitles the court to declare the judgment enforceable 'without bringing prejudice to any appeal'. Issuing the certificate for the return of the child has the following legal consequences and effects: it is no longer required to file for *exequatur* and it is not possible to oppose the enforcement of the judgment in the Member State of enforcement.[74] From the reported research results it appears that Article 42 certificates are often issued incorrectly, i.e., when the hearing of the child requirement has not been complied with. A mere statement that the child has had the opportunity to be heard is not a genuine safeguard of the child's right to be heard. Apparently, it is only in 17 percent of cases that a child has actually been heard before the return order under Article 11(8) is issued. [75]

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[73] 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. 24.

[74] For more particulars on this issue see Lupsan, 'Reflections on the Abolition of Exequatur in the Cross-border Cases Regarding the Return of the Child', *op. cit.*; see also de Boer, 'Ouderlijke verantwoordelijkheid. Kinderbescherming, kinderontvoering' in: De Boer and Ibili, *op. cit.*, p. 189.

[75] 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. 25

Therefore, the certificate should list the reasons why the child has not been heard, which opportunities to arrange for the hearing of the child were offered and, if relevant, why it was inappropriate to hear the child. In order to protect the rights of the child, minimum standards should be prescribed for hearing the child within the context of issuing both the judgment and the certificate.[76]

The certificate is issued by using the standard form set out in Annex IV. It will be completed in the language of the judgment and will include particulars of any measure for the protection of the child if such a measure has been ordered.

As already explained *supra* in this Chapter, under 2 '*Types of judgements which are enforceable under the regulatory scheme of Section 4 – Article 40*', judgments certified according to Article 42 in the country of origin may not be examined in the country of enforcement. Return orders so certified in the country of origin are enforced as a judgment rendered in the Member State of enforcement. No opposition may be raised against the enforcement of the judgement certified in accordance with Article 42(2), i.e., the judgment accompanied by the certificate issued by using the standard form in Annex IV.[77]

Most importantly, the relevant CJEU case law confirms that the enforcement must be granted even when the content of the certificate is obviously inaccurate.[78] Even when the judgment on the return of the child contains a serious infringement of fundamental rights there is no possibility for the court in the Member State of enforcement to refuse the return order issued under Article 11(8). Any objection to the effect that such a right is being infringed must be raised before and considered by the court of origin.[79] The only possible objection is envisaged in Article 47(2), as it will be explained *infra* in this Chapter, under 6 '*Enforcement of return orders and decisions on access rights – Article 47(2)*'.

Difficulties that follow from the current procedural framework under Articles 11(8) and 42 have already been discussed in great detail *supra* in this Chapter, under 4 '*Enforcement scheme under Article 42*'. Consequently, the existing scheme needs to be amended. To what extent the suggested amendments in the 2016 Commission's Proposal meet the desired standards is discussed in the Recommendations, under 5 '*Recognition and Enforcement*' and 6.4 '*Commission's Proposal: Certificates (Articles 53-54)*'.

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[76] *Ibid*., p. 31.

[77] See Recital 24 of the Brussels IIbis Regulation stating that '[t]he certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment'.

[78] CJEU Case C-491/10 *Aguirre Zarraga v Pelz* [2010] ECR I-14247 where the Spanish court issued the certificate even though it was obvious that the child had not been heard and accordingly that the condition under Art. 42(2)(a) had not been complied with. The court held in para 54, *inter alia*, that '[i]t must be held that the first subparagraph of Article 42(2) in no way empowers the court of the Member State of enforcement to review the conditions for the issue of that certificate as stated therein' and in para 56 'that, where a court of a Member State issues the certificate referred to in Article 42, the court of the Member State of enforcement is obliged to enforce the judgment which is so certified, and it has no power to oppose either the recognition or the enforceability of that judgment'.

[79] *Ibid.*, the conclusion of the Court.

5. Documents to be submitted – Article 45

The party seeking the enforcement of a judgement has to produce a copy of the judgment which satisfies the necessary conditions to establish its authenticity and the certificate referred to in Article 41(1) or Article 42(1). This certificate has to be accompanied by a translation into one of the official languages of the Member State of enforcement, or a language that that state expressly accepts, when it relates to arrangements for exercising the right of access (Article 41(1) point 12) or to arrangements for implementing the measures taken to ensure the child's return (Article 42(1) point 14). The translation must be certified by a person qualified to do so in one of the Member States.

6. Enforcement of return orders and decisions on access rights – Article 47(2)

It follows from Article 47(2) of the Regulation that any order for the return of the child and a decision on the right of access, certified in accordance with Article 42(2) and 41(2) respectively, shall be enforced in the Member State of enforcement, under the same conditions as judgments rendered in that Member State. The only reason for refusing the enforcement is if the decision is irreconcilable with a subsequent enforceable judgment.

The ruling in the *Povse* judgment clarified that 'a subsequent decision' may only be a judgment rendered in the country of origin.[80] That was one of the questions that the Austrian High Court (*Oberster Gerichtshof)* submitted to the CJEU. Amongst multiple proceedings and decisions in Austria there was an interim order issued by the *Bezirksgericht* Judenburg after the Italian court had rendered a decision to return the child. This interim order became final and enforceable under Austrian law. The Austrian court questioned whether such an order qualified as a reason, within the meaning of Article 47(2), to prevent the enforcement of the return order issued earlier in Italy as the state of origin on the basis of Article 11(8).

The CJEU concluded that the second subparagraph of Article 47(2) 'must be addressed only in relation to any judgments subsequently handed down by the courts with jurisdiction in the Member State of origin'.[81] Furthermore, the CJEU states as follows:

> 'To hold that a judgment delivered subsequently by a court in the Member State of enforcement can preclude enforcement of an earlier judgment which has been certified in the Member State of origin and which orders the return of the child would amount to circumventing the system set up by Section 4 of Chapter III of the regulation. Such an exception to the jurisdiction of the courts in the Member State of origin would deprive of practical effect Article 11(8) of the regulation, which ultimately grants the right to decide to the court with jurisdiction and which takes precedence, under Article 60 of the regulation, over the 1980 Hague Convention, and would recognise the jurisdiction, on matters of substance, of the courts in the Member State of enforcement'.[82]

[80] CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673.
[81] *Ibid.*, para 76.
[82] *Ibid.*, para 78.

Thus, it is clear that a 'subsequent enforceable judgment' is a judgment rendered in the country of origin, i.e., the court which had previously ordered a return of the child according to Article 11(8) and not the court of a Member State of enforcement.

6.1 Difficulties in application of Section 4 – National Reports

The National Reporters were asked whether there were any difficulties in practice concerning the application and interpretation of the provisions on the enforcement of judgments ordering the child's return and rights of access under Section 4 of the Regulation. According to the National Reports, these provisions do not seem to be a source of difficulty for the majority of the Member States.[83] This conclusion is based on the lack of case law and/or the absence of literature on the matter. Nonetheless, there are some Member States that have provided their input or recommendations.

Noteworthy is the remark made by the Austrian National Reporter who states that in respect of child abduction cases, the Austrian courts may be too inward-looking. In other words, once the child holds Austrian citizenship, the best interests of the child, which should ordinarily be paramount, result in the non-return of the child to the state where he/she had its habitual residence.[84] This practice presents a conflicting interest with the aim and purpose of the Regulation, as well as the 1980 Hague Convention. With respect to the rights of access, reference is made to national case law. The review of rights of access by the courts takes too long. The focus is thereby on the care provider's infringement of the other parent's right. Consequently, delays finally lead to alienation between the child and the parent whose right has been infringed. Moreover, it results in the rights of access not being enforced on the basis of the principle of the 'best interests of the child', and that the child has been placed in the care of the infringing party.

Problems have occurred concerning the enforcement of rights of access in France.[85] In Italy the question has been raised whether access rights, including contact by email or by phone, may be granted to third parties, such as the child's grandparents.[86] The Belgian Report raises another point in this context. The obligation to include the completed certificate *ex officio* of the decision concerning access rights or a return order in inter-state cases is not part of the daily practice of judges. This unawareness concerning this procedural aspect may cause further delays in actually exercising the right of access or an order for the return of the child. A general point to be raised is whether the certificate should be mentioned in the judgment and, if so, where? In that context there may be differences in practice amongst the Member States.[87] Lastly, the hearing of the child differs per state when it comes to the minimum age at which the child can be heard.

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[83] National Report Bulgaria, National Report Croatia, National Report the Czech Republic, National Report Estonia, National Report Finland, National Report Germany, National Report Greece, National Report Latvia, National Report Lithuania, National Report Malta, National Report the Netherlands, National Report Portugal and National Report Sweden.
[84] National Report Austria, question 41.
[85] National Report France, question 41.
[86] National Report Italy, question 41.
[87] National Report Belgium, question 41.

The Romanian Report points to the problem that a violation of public policy may not be raised at the enforcement stage. A violation of the requirement to hear the child contradicts the principle of public policy principles in some Member States. Yet the enforcement may not be opposed by invoking this reason.[88]

The Spanish Report refers, amongst others, to the *Zarraga* case[89] where the German court considered that the Spanish judge had not duly considered that the child had to be heard. It is noteworthy that the national legislation has been updated stating the following 'Measures for facilitating the application of Regulation no 2201/2003 in Spain', which include rules governing procedural aspects of enforcement. The certificates under Articles 41(1) and 42(1) shall be issued by the judge separately through an order (*providencia*) by completing the forms in Annexes III and IV of the Regulation'.[90] The Polish courts do not demonstrate any difficulties in applying the provisions but the National Reporter does refer to two cases on the return of the child, in line with Article 11(8).[91]

The National Reports do not generally point to substantial difficulties when applying Articles 41 and 42. Nevertheless, a number of National Reports provide some recommendations for improvement. Thus, the Austrian National Report suggests introducing the system of fining a parent who hampers the right of access: a threat of a fine after 'the first infringement' and actually imposing a fine after a second infringement'.[92] The Belgian Report points to the fact that the efficiency of Article 11(8) has been questioned in the literature.[93] Other suggestions are as follows: the certificate should be served on the party (parent) refusing to return the child, and it must be clearly worded so as to avoid the disagreements that have arisen in the case law. If the certificate is erroneous, the party contesting enforcement should have access to a court in the State of enforcement. The Slovenian reporter suggests developing 'the idea' to formulate 'minimum standards for enforcement' proceedings 'in order to facilitate a more expeditious return of the child and to secure the rights of access'.

6.2 Difficulties in application of Section 4 – CJEU case law

One further relevant issue relating to enforcement was decided upon in the case of *Bohez v Wiertz*.[94] The details of this case are outlined *supra* in Chapter 1, under 2.3 '*Difficulties in application – CJEU Case law*'. One of the questions submitted concerns the nature of a penalty payment imposed by the court of the Member State of origin that rendered a judgment on the merits regarding to rights of access, in order to ensure the effectiveness of the granted rights. The question submitted is whether such a penalty must be regarded as being part of the procedure for enforcing those rights, and as such is governed by national law as provided in Article 47(1), or as forming part of the same scheme as the rights of access that

[88] National Report Romania, question 41.
[89] CJEU Case C-491/10 *Aguirre Zarraga v Pelz* [2010] ECR I-14247.
[90] National Report Spain, question 41.
[91] National Report Poland, question 41.
[92] National Report Austria, question 41.
[93] National Report Belgium.
[94] CJEU Case C‑4/14 *Bohez v Wiertz* [2014] 1 FLR 1159, ECLI:EU:C:2015:563.

the penalty safeguards, so that the latter must, on that basis, be declared enforceable in accordance with the rules laid down by Regulation.[95]

The Court reiterated that the mutual recognition of judgments concerning rights of access has been identified as a priority within the judicial area of the European Union.[96] On the basis of that mutual trust and in accordance with Article 26 of Regulation, those judgments may not be reviewed as to their substance.[97] In the case at hand, the penalty payment whose enforcement was sought had been imposed by the court which had jurisdiction under the Regulation to deliver a judgment on the rights of access. The Court reasoned that the penalty payment at issue in the main proceedings was merely ancillary to the principal obligation which it safeguarded. In other words, it safeguards the obligation to comply with the rights of access granted by the court of the State of origin, which had jurisdiction to decide on the merits of the case.[98] This means that the enforcement of the penalty ias directly linked to the enforcement of the principal obligation and cannot not therefore be considered in isolation. Consequently, the recovery of the penalty payment therefore has to fall under the same scheme of enforcement as the rights of access which were to be safeguarded, as provided in Articles 28(1) and 41(1).[99] The Court went on to explain that if the scheme for the enforcement of penalty payments were to be separated from the scheme which is applicable to rights of access, this would amount to permitting the court of the enforcement State to verify whether there has been a breach of rights of access. Such a review would be contrary to mutual trust.

Thus, the recovery of a penalty payment – a penalty which has been imposed by the court of the Member State of origin that delivered a judgment on the merits with regard to rights of access in order to ensure the effectiveness of those rights – forms part of the same scheme of enforcement as the judgment concerning the rights of access that the penalty safeguards. As such, it must be declared enforceable in accordance with the rules laid down by the Regulation.[100]

Another question submitted was whether a foreign judgment which orders a periodic penalty payment is enforceable in the State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin. The Court held that the importance of rights of access prompted the EU legislature to provide for a specific scheme in order to facilitate the enforcement of judgments concerning rights of access. That scheme is based on the principle of mutual trust between the Member States and precludes any review of the judgment delivered by the court of the State of origin.[101] It would be contrary to the system established by the Regulation to permit an application for the

[95] *Ibid*., para 42.
[96] *Ibid*., para 43.
[97] *Ibid*., para 44.
[98] *Ibid*., para 47.
[99] *Ibid*., paras 48-50.
[100] *Ibid.*, para 53.
[101] *Ibid.*, para 58; See also the judgment in CJEU Case C-491/10 *Aguirre Zarraga v Pelz* [2010] ECR I-14247, para 70.

enforcement of a penalty payment in another Member State when the amount thereof has not been finally determined by the court of the State of origin. In this way, the court of the State of enforcement would be allowed to be involved in the determination of the final sum which would entails a review of the breaches alleged by the holder of rights of access. However, it is only the court of the Member State of origin, as the court having jurisdiction as to the substance of the matter that is entitled to make such an assessment.[102] Finally, the Court concludes that, for the purposes of application of the Regulation, a foreign judgment which orders a periodic penalty payment is only enforceable in the Member State of the enforcement if the amount of payment has been finally determined by the courts of the Member State of origin.

7. Commission's proposal

In its 2016 Proposal the Commission suggests a number of adjustments to the enforcement regime under the Regulation, including the enforcement of return orders. To what extent the suggested amendments would remedy the difficulties encountered in practice is addressed in the Recommendations, under 5 '*Recognition and Enforcement*'.

8. Other provisions in Section 6 of Chapter III

This part addresses the 'Other provisions' in Section 6 of Chapter III of the Regulation. The provision of Article 47(2) has already been discussed *supra* in this Chapter, under 6 '*Enforcement of return orders and decisions on access rights – Article 47(2)*', since it specifically concerns return orders and decision on access rights. Article 47(1) provides that decisions within the scope of the Regulation are enforced in procedure governed by the law of the Member State of enforcement. Other provisions in Section 6 deal with 'Practical arrangements for the exercise of rights of access' (Article 48) as well as with 'Costs', 'Legal aid' and 'Security, bond or deposit', as laid down in Articles 49-51 respectively. Finally, it covers 'Legalisation' of documents in Article 52. These provisions apply to the recognition and enforcement under Chapter III of the Regulation in general and not only to the return of child and right to access. Due to the fact that these provisions are not subject to much discussion, a brief coverage is considered sufficient.

8.1 Explanation of concept and the way it is currently regulated – Articles 48-51

Regulation Brussels IIbis recognises that access orders might be difficult to enforce if they lack the required level of detail and do not match the options that exist under the jurisdiction in the country where the access order has to be enforced. The level of detail might regard practical issues such as where and at what time the children will be picked up and by whom, what kind of supervised contact is possible and similar matters.[103] Therefore, Article 48 gives the court of the Member State of enforcement the authority to make practical arrangements for organising the exercise access rights, if this type of arrangements has not been included in the original judgment by the Member State with jurisdiction.

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[102] CJEU Case C‑4/14 *Bohez v Wiertz* [2014] 1 FLR 1159, ECLI:EU:C:2015:563, para 59.
[103] Magnus/Mankowski/McEleav, *op. cit.*, Article 48, note 8.

As for Article 48, it has been argued in the literature[104] that there is some uncertainty as to the extent to which this provision can be relied upon. In particular, it is questioned whether the court in the State of enforcement can revise practical arrangements on an on-going basis or whether it is only permitted to make initial clarifications. Accordingly, the same doubts have been expressed regarding the availability of legal aid in cases of subsequent clarifications of practical arrangements. In our view, the provisions of Article 48 and 50 should be interpreted so as authorising the court of the enforcement to make practical arrangements on on-going basis should they appear necessary. Thus, the systematic analysis of these provisions would suggest that a party is to be entitled to legal aid in such cases.

A (pertinent) question is which rules apply to the costs of legal proceedings under Brussels IIbis. In this respect, Article 49 clarifies that Chapter III, on recognition and enforcement, does not only apply to substantive matters, but also to costs and expenses. Not only distinct costs will be covered, but also those aspects of a matrimonial or parental responsibility judgment dealing with costs. In both scenarios, the costs must relate to proceedings taken under the Regulation, thereby excluding, for example, costs awarded under the 1980 Hague Convention.[105] Article 50 provides that legal aid entitlement will extend to certain specified procedures in the Member State of enforcement if a person has benefited from legal aid, whether complete or partial, in the Member State of origin. Legal aid will only be granted to the initial *ex parte* proceedings and not to any appeal.[106]

In the literature the practical relevance of Article 49 is put into perspective, since in many cases no costs order will be made regarding matrimonial issues and parental responsibilities.[107] When a cost order is given regarding a decision involving both divorce and matrimonial property issues, the question arises how to divide the costs. In the literature it has been argued that if it is possible to make a division, Article 49 would only apply to the costs for the topic within the substantive scope of the Regulation. Thus, the matters such as costs regarding matrimonial property issues are excluded. If it is not possible to make such a division, a broad interpretation of Article 47 could be considered, bearing in mind the rationale of promoting free movement.[108]

Pursuant to Article 50, an applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement. No problems concerning the application of this provision have been reported.

Another aspect relating to costs, is covered by Article 51 (Security, bond or deposit). This provision, drafted along the lines of the Brussels I Regulation, is aimed at 'foreigners' seeking enforcement of a court order in a Member State where he/she has not his/her habitual

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[104] Magnus/Mankowski/McEleavy, *op. cit.*, Article 48, note 9.
[105] Magnus/Mankowski/McEleavy, *op. cit*., Article 49, note 3; Article 26 of the 1980 Hague Convention.
[106] Magnus/Mankowski/McEleavy, *op. cit*., Article 50, note 7.
[107] Magnus/Mankowski/McEleavy, *op. cit*., Article 49, note 2.
[108] Althammer, *et al., op. cit.*, Article 50, note 3.

residence or nationality/domicile of that Member State. Equal treatment is the leading principle in this provision, putting all parties seeking enforcement on the same footing. To this end, Article 51 forbids a distinction in respect of security, bond or deposit regarding the legal costs, on grounds of habitual residence or nationality/domicile.

8.2 Difficulties in the application of Article 48 – National reports

Only few of the Member State's National Reports have indicated problems in the application of Article 48. The National Report of Austria mentions the situation in which the request for enforcement and the best interests of the child are not compatible, for example, when the child became alienated from the parent whose right of access is to be enforced 'precisely because the decision on the right of access has not been carried out quickly enough'[109]. The National Report for France points to the situation 'when the organisation of the practical exercise of the rights of access is not compatible with the law of the Member State of enforcement'. Additionally, it questions the scope of Article 48, in particular the limits of the prohibition to review the substance of the decision.[110]

Further contributions to this question by National Reporters are analysis of national law of a particular Member State and insights on how the application of Article 48 is dealt with in their respective jurisdictions.[111] Additionally, the authorities that are involved with the practical arrangements in applying Article 48 may differ amongst Member States.[112] Nonetheless, most National Reports indicate that this provision does not cause problems or that no feedback could be provided due to absence of relevant data and/or case law.[113]

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[109] National Report Austria, question 45.
[110] National Report France, question 45.
[111] National Report Austria, question 45; National Report Hungary, the complete answer to this question can be found under question 43; National Report Poland, question 45; National Report Romania, question 45; National Report Spain, question 45 and National Report Slovenia, the complete answer to this question can be found under question 43.
[112] National Report Cyprus, question 45: 'the welfare department'; National Report Hungary, the complete answer to this question can be found under question 43 and refers to the 'guardianship authority'; National Report Italy, question 45: the Court, Malta, the 'Agency Appogg'; National Report Poland, question 45: in case of non-consensus between the parties it will be made by the Court; National Report Slovenia, the complete answer to this question can be found under question 43 and refers to the Court; National Report Sweden, question 45.
[113] National Report Belgium, question 45; National Report Bulgaria, question 45; National Report Croatia, question 45; National Report the Czech Republic, question 45; National Report Cyprus, question 45; National Report Estonia, question 45, National Report Finland, the complete answer to this question can be found under question 43; National Report Germany, the complete answer to this question can be found under question 44; National Report Greece, question 45; National Report Hungary, the complete answer to this question can be found under question 43; National Report Latvia, question 45; National Report Lithuania, question 45; National Report Luxembourg, question 45; National Report Portugal, the complete answer to this question can be found under question 44; National Report Romania, question 45; National Report Spain, question 45 and National Report Slovenia, the complete answer to this question can be found under question 43.

8.3 Difficulties in the application of Articles 49-51 – relevant literature and CJEU case law

Little has been written about the Costs, Legal Aid and Security, bond or deposit under the Regulation. Provisions in Articles 49-51 have not led to case law or major issues of interpretation.

8.4 Commission's proposal (Articles 49-51 of the Regulation)

The 2016 Commission's Proposal suggests no changes to Article 49 regarding costs. Article 58 of the Proposal restates the current Article 50 on Legal aid indicating that the applicant shall be entitled to benefit from the most favourable legal aid in the procedures provided for in a number of other provisions (Articles 27(3), 32, 39 and 42). However, these changes merely reflect the change in the other legal aid provision.

In Article 59 on Security, bond or deposit, the 2016 Commission's Proposal rephrases the two grounds under Article 51 of the Regulation. Thereby, no change in the substance has been envisaged. Yet the last sentence seems to need some editorial attention.[114]

The Explanatory Memorandum reveals no information as to the provisions on Costs, Legal aid and Security, bond or deposit.

8.5 Explanation of concept and the way it is currently regulated – Article 52

Pursuant to Article 52 no legalisation or other similar formality is required for the documents referred to in a number of articles of Brussels IIbis, namely in Articles 37-38 and 45. This strongly contributes to efficiency and free movement of family law decisions, since ascertaining the authenticity of foreign documents can lead to complicated and time-consuming proceedings. Article 52 aims to prevent Member States from the necessity of taking measures before recognising the documents referred to in the named articles.[115]

The scope of the legalisation exemption in Article 52 is limited to the documents referred to. It includes copies of the standard track judgments which satisfy the conditions for authenticity with the relevant certificates, also when this involves documents relating to the return of the child or rights of access.[116] Moreover, documents which are necessary to establish that the defaulting party was served with the application or has accepted the judgment do not require legalisation.[117] The same goes for similar documents in cases where the required documents cannot be produced, pursuant to Article 38. Finally, documents appointing representatives *ad litem* to bring enforcement proceedings on behalf of an applicant enjoy the favourable regime of Article 52 as well.[118]

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[114] The word 'of' between 'Member State' and 'enforcement' seems to be missing and it could be considered repeating 'not' before 'habitually resident'.
[115] Magnus/Mankowski/McEleavy, *op. cit.*, Article 52, note 2.
[116] Brussels IIbis, Article 45(1) and Article 41(1) for access orders and Article 42(2) for return orders.
[117] Brussels IIbis, Article 37(2)(a).
[118] Brussels IIbis, Article 52 and Article 30(2).

8.6 Difficulties in application of Article 52 – National Reports

Given that an apostille is quite often required for certificates issued under the Regulation by the Czech courts, the question was raised by the Czech Republic in the National Report[119] how the Apostille Convention relates to Brussels IIbis and especially to its Article 52. The German Reporter observes that there are often difficulties obtaining the forms certifying foreign divorces.[120] In Romania, some courts have had difficulties in not applying the relevant domestic legislation, which are still in force, regarding the conditions for recognition and grounds for non-recognition.[121] Besides this, no distinct problems were raised in the National Reports.

Moreover, almost none of the National Reporters were aware of cases of refusal of the recognition of judgments in matrimonial cases. There are some exceptions, such as the Italian Reporter concerning judgments in cases of same-sex marriages and civil partnerships up until 2016.[122] Lithuania has refused recognition in two cases on the grounds provided for in Articles 23(a), 23(c) and 23(d).[123] In Romania, issues mostly arise concerning default judgments and the public policy exception concerning same-sex marriages, although the Reporter states that Article 22(a) should not be used as a ground for refusing the recognition of judgments in cases of same-sex marriages, since it does not involve establishing a status incompatible with the fundamental values of Romanian law.[124] As Article 52 sums up, no legalisation or other similar formality shall be required in respect of documents referred to in Articles 37, 38 and 45. It is not mentioned whether certificates indicated in Article 39 are required to be legalised. In general, the view in the legal doctrine is that documents referred to in Article 39 also fall within the scope of Article 52.[125] However, at the national Bulgarian level this matter was decided upon in a different way by the Supreme Administrative Court.[126] It ruled that a certificate attached to a foreign divorce decision of a court of a Member State in conformity with Article 39 (which is a standard form set out in Annex I of the Regulation) should bear an apostille. The Bulgarian Court ruled that the Brussels IIbis Regulation does not exempt certificates under Article 39 of the Regulation from the requirement for an apostille. Moreover, since all EU Member States are parties to the Apostille Convention,[127] the divorced parties were forced to apply for an apostille of the certificate in the Member State of origin.

In the legal literature other types of documents for which the legalisation issues are of interest are the ones mentioned in Article 11(6) regarding child abduction proceedings, which are deemed to be also exempted from the list of documents that need legalisation or other

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[119] National Report the Czech Republic, question 16.
[120] National Report Germany, question 16.
[121] National Report Romania, question 16.
[122] National Report Italy, question 16.
[123] National Report Lithuania, question17.
[124] National Report Romania, question 17.
[125] Not referred to but mentioned in Article 37 of Brussels IIbis and generally accepted, see for instance Althammer, *et. al., op. cit.,* Article 52, note 1; Rauscher, *Europäisches Zivilprozess – und Kollisionsrecht op. cit.,* Article 52, note 2.
[126] In Bulgaria, the Supreme Administrative Court (*Decision № 15903/12.12.2012, Case No 4237/2012*).
[127] Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (hereinafter – the Apostille Convention). See Impact Assessment, para 3.2.2.

formality. Since the transmission of the judgment and other documents is to be made directly between authorities in Member States, authenticity is not an issue.[128]

[128] Magnus/Mankowski/McEleavy, *op. cit.*, Article 52, note 6.

GUIDELINES – Summary

Abolishing the exequatur

According to Articles 41(1) and 42(1), no *exequatur* is required for judgments given in one Member State to be recognised and made enforceable in another Member State. The intention of this abolition was to achieve the rapid and effective enforcement of judgements relating to access and return orders.

Although this seems to be rather efficient, it does cause problems in practice. The CJEU's case law demonstrates that the abolition of the *exequatur* does not always function smoothly.

The court in a Member State of enforcement cannot oppose enforcement on the ground that the court of the Member State of origin may have infringed Article 42, since an assessment of the existence of such an infringement falls exclusively under the jurisdiction of the court of the Member State of origin (CJEU judgment in the *Zarraga*[129] case).

Enforcement may not be refused even if a certified judgment of the court in a Member State of origin, as a result of a subsequent change of circumstances, might be seriously detrimental to the best interests of the child. Such an objection must be raised before the court of the Member State of origin (CJEU judgment in the *Povse*[130] case).

A judgment ordering the return of the child falls within the scope of Article 11(8) even if it is not preceded by a final judgment of the court relating to the rights of custody (CJEU judgment in the *Povse*[131] case).

A correct interpretation of Article 47(2) is the following: 'a subsequent enforceable judgment' within the meaning of Article 42(2) is to be understood as any judgments subsequently handed down by the courts with jurisdiction in the Member State of origin and not in the State of the enforcement (CJEU judgment in the *Povse*[132] case).

A correct interpretation of Article 42 is the following: once a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant that that decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has

[129] CJEU Case C-491/10 *Aguirre Zarraga v Pelz* [2010] ECR I-14247.
[130] CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673.
[131] *Ibid*.
[132] *Ibid*.

been replaced by a decision ordering the return, in so far as the return of the child has not actually taken place (CJEU judgment in the *Rinau*[133] case*)*.

In the light of the difficulties in practice, it is doubtful whether this legal framework has achieved its aim. It is recommended that the scheme of the Regulation should be revised. A new regulatory framework should be drafted so as to express a more balanced approach when incorporating the principles of 'mutual trust', the best interests of the child and the fundamental right to respect for family life. The Brussels Ibis Regulation is a clear example of a more balanced approach when abolishing the *exequatur*. Therefore, the Commission's Proposal to revise the current procedural format in cases of child abduction is to be met with approval.

Hearing of the child

Issues relating to the interpretation of the age and degree of maturity of the child as discussed *supra* in Chapter 4, under 3 '*Jurisdiction under Article 11(1)-(5)*' also cause problems when applying Articles 11(8) and 41. An autonomous interpretation of Article 41(c) would eliminate barriers and uncertainty as to how to tackle the notion of age and maturity.

[133] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271.