

Recommendations

To Improve the Rules on Jurisdiction and on the Enforcement of Decisions in Matrimonial Matters and Matters of Parental Responsibility in the European Union

As part of the final output from the project ‘Cross-Border Proceedings in Family Law Matters before National Courts and CJEU’, funded by the European Commission’s Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722).



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Introduction¹

These Recommendations are based on the results of research presented in the ‘Guide for Application of the Regulation Brussels IIbis’ (hereinafter: Guide for Application or Guide). Thus, they are to be read within the context of the Guide, as they provide suggestions to overcome difficulties in the application identified therein. Indeed, the problems signalled by the Commission in its Proposal,² as well as its suggestions for improvement, are discussed in great detail.

The Recommendations are presented in two separate Parts. Part I (‘Parental Responsibility’) addresses the Proposal and thereby follows its sequence and structure. This part has been co-written by Vesna Lazić, Lisette Frohn, Richard Blauwhoff, Wendy Schrama and Jaqueline Gray. Part II (‘Matrimonial Matters’) contains suggestions for changes with respect to matrimonial matters, i.e. issues with respect to which the Commission proposes no substantive changes. It has been written by Pablo Quinzá Redondo, Valerie De Ruyck and Jinske Verhellen.

These Recommendations are part of the final output from the project ‘Cross-Border Proceedings in Family Law Matters before National Courts and CJEU’, funded by the European Commission’s Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722).

¹ For more details on the Project and all of its final outputs, their structure and authorship, see the Preface to the Guide for Application of the Brussels IIbis.

² Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final (hereinafter: 2016 Commission’s Proposal or Proposal). The text is preceded by the Explanatory Memorandum, pp. 2-17 (hereinafter: Explanatory Memorandum).

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PART I: Parental Responsibility

**Recommendations to Improve the Rules on Jurisdiction and Enforcement of Decisions
in Matters of Parental Responsibility**

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1. Scope and Definitions

1.1 The Commission's Proposal

The Commission makes no suggestions for revising Article 1 which defines the substantive scope of the Regulation's application. The 2016 Commission's Proposal contains only a few minor adjustments in the wording, such as replacing the 'court or tribunal' with 'judicial or administrative authority' or 'shall' with 'does'. These terminological alterations have no bearing on the substance of the provision.

As for the scope of application *ratione personae* of the rules on jurisdiction in matrimonial matters, this will be addressed within the context of Article 6 of the Proposal on residual jurisdiction, contained in Part II.

The majority of the alterations suggested in Article 2 have no substantial consequences or implications, but most likely aim at achieving greater consistency in the use of terminology or enhancing a general readability of the text. For example, the term 'judgment' is replaced with a wider expression – 'decision' – throughout the text of the Regulation, including the definition for the term 'decision' in Article 2(4). It should be noted that the Brussels Ibis Regulation still employs the term 'judgement'. Presumably, the Commission believes that the expression 'decision' is more appropriate considering the substantive scope of the Brussels Ibis, as well as the fact that different authorities may be involved which do not necessarily render a 'judgment'. Yet, it is generally recommendable to use specific terms in a uniform manner throughout various instruments, with the purpose of achieving a greater degree of consistency in regulating PIL on the EU level.

In a similar vein, a definition of the 'right of custody' is adjusted so that the reference to joint custody in the context of 'wrongful removal or retention' has become redundant.

The only alteration as to the substance is a new definition under point 7 of Article 2, defining the 'child' as a 'person below the age of 18 years'. The interpretation of the legal concept of the 'child' has hitherto been left to the discretion of legal practice. The findings of the National Reports support the view that there is a common understanding, however, that for the purposes of the Regulation a 'child' refers to a person younger than 18 years. There are different approaches in international instruments regarding the concept of a 'child' (e.g., under 16 years in the 1980 Hague Abduction Convention and under 18 years in the 1996 Hague Child Protection Convention). This may give rise to legal uncertainty not only for legal practitioners but also for parents and children. Article 2 (7) of the Proposal which sets an age limit of 18 years is therefore to be welcomed.¹

In Recital 12, the Proposal contains useful explanations on the relevance of this new provision for the application of the 1996 Hague Convention and avoids an overlap with the 2000 Hague Convention on the International Protection of Adults which applies from the age of 18 years onwards. Also, it confirms that the new definition does not apply in the context of the 1980 Hague Child Abduction Convention and Chapter III of the Regulation, as they continue to apply to children up to the age of 16.

¹ An analogy may be drawn with Article 2(1) of the Hague Convention of 13 January 2000 on the International Protection of Adults which defines adults as persons who have reached the age of eighteen years old.

1.2 Recommendations

1.2.1 General remarks

As a general remark, it is appropriate to provide guidelines in the Recitals summarising or otherwise reflecting the conclusions that follow from the relevant CJEU case law. This is not to suggest that findings and legal interpretations in all CJEU judgments should be ‘summarised’ in the Recitals. However, such guidelines on the application and interpretation of certain basic concepts which are not defined in the Regulation, such as ‘habitual residence’, would prove useful for the judiciary and, more generally, for legal practitioners. The same holds true with respect to the scope of application of the rules on jurisdiction, both substantive and *ratione personae*. It would be most beneficial for practitioners to have some general guidelines in the Regulation itself on whether a subject-matter, which involves questions that are excluded from its scope, does or does not qualify as one of the subject-matters falling within the Regulation’s scope. The EU legislators have followed this approach in the context of revising the Brussels I Regulation. The Brussels Ibis Regulation incidentally incorporates and further clarifies relevant CJEU case law on defining the substantive scope of application in the Recitals.² This will certainly prove to be a useful tool in interpreting the Regulation. Besides, if such an approach would generally be followed when revising the relevant legislation at the EU level, it would enhance consistency in EU law making in the area of private international law.

Regrettably, the 2016 Commission’s Proposal does not contain similar guidelines or clarifications on how to approach the problem of delineating the substantive scope of application between various EU PIL instruments in cases of ‘overlapping’ matters. Consequently, the judiciary and legal practitioners will have to rely on other sources, especially CJEU case law, when applying and interpreting the provisions of the Regulation.

When defining a ‘decision’ in Article 2(4), the Proposal does not mention decisions on provisional measures that are enforceable under the Regulation, even though there are such decisions that do fall under the enforcement scheme of the Regulation. This approach differs from the definition under Article 2(a) of the Brussels Ibis Regulation which specifies that a ‘judgment’ includes decisions granting provisional measures brought by the court of a Member State having jurisdiction on the merits of the case. The framework for the enforceability of provisional measures is similar under the Proposal as it follows from the new Article 48, which is a welcome improvement. This provision clearly states that the enforcement regime under the Proposal applies to provisional measures. Yet, there is a necessary difference between the two instruments: under the 2016 Commission’s Proposal all provisional measures would be enforceable under the Regulation as revised, but shall cease to apply as soon as they are replaced by measures granted by the court having jurisdiction on the merits. In contrast, under the Brussels Ibis Regulation only measures granted by the court which is competent as to the substance of the case would be enforceable in other EU Member States. Such a distinction is necessary and appropriate as it reflects a difference in the substantive scope of application of the two legal instruments. Another difference which may also be justified by the same reason is that provisional measures issued in *ex parte* proceedings are not enforceable under the

² See e.g., Recital 12 on clarifying the extent of the so-called ‘arbitration exception’ under the Regulation.

Proposal (Article 48(2)),³ whereas such measures may be enforceable in other Member States under the Brussels Ibis Regulation subject to the conditions specified in Article 2(a).

The CJEU case law has clarified a number of issues when interpreting both Regulations. Yet these decisions have usually triggered debates in the literature which have resulted in substantial controversies in the interpretation. Therefore, the fact that this issue would now be regulated in a rather coherent manner in both legal instruments is to be met with approval. However, the ways of incorporating comparable or similar ideas differ amongst the two Regulations.

This is not to suggest that the approach followed in Article 2(a) of the Brussels Ibis Regulation is free from criticism. Particularly inconvenient is the lack of a cross-reference to Article 2(a) in Article 35 relating to provisional measures and *vice versa*. Yet, for the sake of enhancing consistency in EU legal regulation, it would be more appropriate to also define in Article 2 that provisional measures issued by courts having jurisdiction under Chapter II are decisions which are enforceable under the Regulation.

It should be mentioned that in the literature an opposite view has been expressed, arguing that ‘it is highly desirable that [the approach under the Brussels Ibis Regulation] is not based on the notion of a decision, as in Regulation No. 1215/2012, but on an *ad hoc* rule dedicated to provisional measures’.⁴ The reasons for such a view are not obvious, especially considering that creating such an *ad hoc* rule is not necessarily incompatible with the definition of a ‘decision’ which would encompass those on provisional measures that may be enforceable under the Regulation. On the contrary, it would ease the application and contribute to consistency in legal regulation. Indeed, addressing the issue *only* in the definitions under Article 2 would not be appropriate and would be susceptible to the same criticism as the method followed under Brussels Ibis.

1.2.2 Definition of marriage for the purposes of its application

It is unclear whether a marriage, for the purposes of the Regulation, is to be autonomously defined on an EU level rather than according to national law.⁵ In any case, no coherent interpretation of marriage for these purposes can be identified between the Member States⁶, and neither the CJEU nor the accompanying documentation of the Regulation have given a concrete indication of a stance in this regard.

In light of this present situation, it would be useful for a future recast to include guidance, in the Regulation itself or in the accompanying documentation, regarding the treatment of, in particular, same-sex marriage in the Member States. Even if the advice provided merely serves to endorse the present status quo of delegating decision making on this issue to

³ According to Article 48(2), the provisions of Chapter IV relating to the recognition and enforcement ‘shall not apply to provisional, including protective, measures ordered by an authority without the respondent being summoned to appear.’

⁴ Mellone, M., ‘Provisional Measures and the Brussels Ibis Regulation: an assessment of the *status quo* in view of future legislative amendments’, 1 NIPR(2015), p. 25, n. 38.

⁵ The National Reports, as discussed in the Guide for Application, show no consensus in this regard.

⁶ The National Reports in the Guide for Application indicate that if a Member State allows same-sex marriage in their national law, it will tend towards including same-sex marriage in the scope of the Brussels Ibis Regulation. Conversely, where same-sex marriage is not allowed under national rules, it will tend to be excluded from the definition of a marriage for the purposes of the Regulation.

national law, the establishment of a certain stance would allow judges to act with greater certainty. In this context, providing clarity is of increasing importance, since the number of EU Member States which allow same-sex couples to marry is growing. Until May 2018, same-sex marriage is allowed in 14 Member States and as of 1 January 2019 it will be permitted in Austria, as well.

One solution would be to introduce a provision similar to that of Article 13 of Rome III, according to which a Member State court that does not deem a marriage in question to be valid for the purposes of divorce proceedings is not obliged to pronounce a divorce under that Regulation. The same holds true for Article 9 of Regulation 2016/1103 on matrimonial property regimes. It provides that if a court holds that under its private international law the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction. This would offer a degree of concrete guidance for national courts, and to some extent increase predictability for those in same-sex relationships.⁷ The European Economic and Social Committee⁸ suggests to add in a recital of the Regulation a reference to Article 21 of the Charter of Fundamental Rights of the EU on non-discrimination, thereby ensuring a better compliance of the Member States with the named provision, even if the concept of marriage is to be defined according to national laws of the Member States. Other experts went further by proposing to insert in the Regulation the definition of ‘spouses’ which would determine the types of unions covered (such as same-sex marriages or civil partnerships).⁹

1.2.3 Provision of guidance on specific issues relating to marriage annulment

Marriage annulment, for the purposes of the Regulation’s application, has not yet been comprehensively defined. This gives rise to a number of grey areas. Firstly, there is the issue of whether *ipso iure* annulment proceedings (declaratory judgments) would be included within the scope of the Regulation (since arguably no process of annulment is required in these instances).¹⁰ Secondly, there is the question of whether posthumous annulment proceedings either by a spouse or a third party fall within the scope of this instrument. In contrast to the previous stance of the Borrás report,¹¹ the CJEU has recently ruled that an action for marriage

⁷ Of course, this provision would not oblige Member State courts which do not recognise same-sex marriage in their own domestic laws to refuse to pronounce a divorce for a same-sex couple in a private international law context.

⁸ Opinion of the European Economic and Social Committee on the ‘Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)’ [2017] OJ C 125/06, n. 1.13.

⁹ European Parliament’s Briefing: Main Recommendations from External Experts to the European Parliament on ‘Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)’, p. 2 (the recommendation of Borg-Barthet, J.) (available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571366/IPOL_BRI\(2016\)571366_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571366/IPOL_BRI(2016)571366_EN.pdf)).

¹⁰ European Commission, *Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment: Final report* (hereinafter Impact Assessment), p. 7.

¹¹ Borrás Rodríguez, A., ‘Explanatory report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters’, para 27; See also Ní Shúilleabháin, M., *Cross-border divorce law: Brussels IIbis* (OUP 2010) p. 122, para 3.58.

annulment instigated by a third party after the death of one of the spouses does fall within the scope of the Regulation.¹² The reasoning of the aforementioned CJEU judgment also might imply that third party instigated proceedings during the lifetime of the spouses fall under the scope of the Regulation.¹³

It would be useful if the revised Regulation or its accompanying documentation were to provide concrete guidance on the boundaries of marriage annulment for the purposes of its application. In particular, it is recommended that formal guidance is given concerning the open possibility of annulment proceedings instigated by a third party during the lifetime of the spouses following the steps taken by the CJEU to expand the definition of annulment to proceedings instigated by third parties after the death of one of the spouses. When doing so, it is recommended to define the substantive scope as to include annulment proceedings initiated by a third party during the lifetime of the spouses.

1.2.4 Commission's Proposal: Maintain the change from a 'court or tribunal' to a 'judicial or administrative authority'

Article 1(1) states that the Regulation applies in cases involving the subject-matter discussed above 'whatever the nature of the court or tribunal'. Proceedings conducted by both judicial and non-judicial authorities fall within the scope of this Regulation, with administrative proceedings held to be included, provided they are officially recognised in the Member State.¹⁴ Nevertheless, a number of the National Reporters mentioned that they perceive there is a lack of clarity as to whether certain administrative proceedings fall within the scope of the Regulation. The commentators cited the inclusion of administrative divorce¹⁵ and decision making by social work bodies¹⁶ as potential points of interpretational difficulty within their jurisdictions.

In line with the changes to Article 1(1) in the 2016 Commission's Proposal (from 'court or tribunal' to 'judicial or administrative authority'), it is suggested that the new Regulation should adopt wording that emphasises the expansive interpretation to be assigned to the body which conducts proceedings in this setting.

¹² CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2016] ECLI:EU:C:2016:772.

¹³ The CJEU pointed out in this case on posthumous annulment that a third party could only rely on the grounds of jurisdiction that were designed to ensure a genuine link with the spouses, therefore excluding Article 3(1) fifth and sixth indents for these purposes. This step appears to defuse the previously mentioned argument against the possibility of Brussels IIbis applying to nullity proceedings undertaken by a third party during the lifetime of the spouses. In this regard, see: Ní Shúilleabháin, *op. cit.*, p. 122, para 3.58.

¹⁴ See the clear inclusion established by the Explanatory Memorandum accompanying the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children (Regulation 1347/2000, i.e. Brussels II Regulation), COM(1999) 220 final, at p. 11, para 4.3: 'Administrative procedures officially recognised in a Member State are therefore included'. See also Ní Shúilleabháin, *op. cit.*, pp.123-124, paras 3.61-3.62 and Magnus/Mankowski/Pintens, *Brussels IIbis Regulation* (Sellier European Law Publishers 2012), Article 1, note 4.

¹⁵ National Report Spain, question 3.

¹⁶ National Report Slovenia, question 3.

1.2.5 Clarification of the position on decisions by religious or private authorities

In delineating a ‘court or tribunal’ for the purposes of the Regulation, there is a clear lack of clarity as to the inclusion of religious or private authorities in this setting. Whilst proceedings undertaken by such bodies were expressly excluded from the Brussels II Regulation, their position in Brussels IIbis has not been enunciated. A degree of contradiction is evident between the Member States over the inclusion of private or religious authorities within the remit of this instrument: for instance, whilst the French authorities will view a divorce pronounced by a religious authority as falling within the scope of Brussels IIbis for the purposes of recognition if the body in question had jurisdiction in the other Member State to make such a decision,¹⁷ in Ireland such decisions are completely excluded.¹⁸

This status quo has an impact on legal certainty for EU citizens, since it has been reported that even where religious decisions have been verified and given civil effect by a Member State court, recognition has nevertheless been refused in another EU jurisdiction.¹⁹

It is recommended here that the recast and/or the accompanying documentation should further elaborate upon the nuances of the approach to be taken by the national courts in this regard. In pursuit of maximising predictability for couples across borders, it is further suggested that a more expansive approach be taken in defining a ‘court or tribunal’, whereby state-verified decisions by religious or private authorities are generally recognised, subject to the public policy exception that already exists in Article 22(a) of the Regulation. However, within the view of the recent case law of the CJEU, it is unlikely that this recommendation can be followed.²⁰

¹⁷ National Report France, question 15.

¹⁸ National Report Ireland, question 13.

¹⁹ *Ibid.*, pp. 55-56, paras 12-13. See the example cited here of a German court refusing to recognise a divorce decision which was originally pronounced by a *mufti* under *sharia* law, but which was subsequently approved and given civil effect by a Greek court. It stated that this was not a judgment within the scope of the Regulation because it deemed that the Greek civil court was not exercising control over the mufti’s decision (OLG Frankfurt, 16 January 2006, FamRBint, 2006, 77).

²⁰ CJEU Case C-372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI:EU:C:2017:988, where the Court followed the Opinion of the Advocate General Saugmandsgaard Øe that Rome III does not cover divorces which are declared without a constitutive decision of a court/other public authority, such as a divorce resulting from the unilateral declaration of a spouse which is registered by a religious court. As this conclusion of the Court *inter alia* stems from the interpretation of the Brussels IIbis Regulation and considering that synergy of these two instruments is required (as stressed by the Court), divorces pronounced without the involvement of a national court or a public authority are presumably not covered by the Brussels IIbis Regulation.

2. Jurisdiction in Parental Responsibility

All provisions on jurisdiction for both matrimonial matters and for parental responsibility are consolidated in Chapter II of the Proposal. Such a merged regulation of provisions on jurisdiction consolidation may prove useful from a practical point of view. Since no changes to the rules of jurisdiction concerning matrimonial matters are suggested in the Proposal, the Recommendations regarding this issue are provided separately in Part II.

2.1 General Jurisdiction - Article 7 Proposal (Article 8 Regulation)

2.1.1 Commission's Proposal

The general rule of Article 8(1) of the Regulation attributes primary responsibility to the authorities of the Member State where the child has his/her 'habitual residence.' No definition of habitual residence is provided which is justifiable given the variety of factors which may determine its meaning. In determining a child's habitual residence, the case law of the CJEU provides guidance. Thus, the family and social relationships with a particular state must be determined taking into account, *inter alia*, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and all other circumstances relating to the case at hand.

As may be expected, the Proposal does not introduce a definition of the concept of 'habitual residence.' It is understandable given the variety of factors that may be considered when defining this term. Yet, it would be useful if the guidelines following from the CJEU case law in that respect would be summarised in the Recital(s), as it has already been suggested as a general remark, *supra* under 1.2.1, 'General remarks'.

According to Article 8 of the Regulation, once a competent court is seised, in principle the court will retain jurisdiction even if the child acquires habitual residence in another Member State during the course of the court proceedings, which is in line with the principle of '*perpetuatio fori*'.

The proposed Article 7 departs from this approach. It expressly allows a court of the Member State in which the child has acquired his/her new habitual residence to accept jurisdiction. In other words, it could be said that jurisdiction follows the concrete factual circumstances surrounding the child, thereby giving less weight to legal certainty. Hence, the principle of '*perpetuatio fori*' is no longer maintained in the proposed Article 7. The same follows from Recital 15 of the Proposal. It states that, where the child's habitual residence changes following a lawful relocation, jurisdiction should follow the child in order to maintain the proximity. The Recital goes on to add that this should not only apply where proceedings are not yet initiated, but also in pending procedures.

Such reasoning is justifiable given that the court of the new habitual residence may – generally, but not invariably – be in a better position to make an in-depth assessment of the child's interests. For reasons of proximity, it may be expected that it will be easier to hear the child and to obtain information regarding his/her well-being. Moreover, this approach is in line with the 1996 Hague Convention for the Protection of Children, in particular Article 5(1)

thereof. However, the Proposal may give rise to other questions regarding ‘habitual residence’, in the sense that it could still cause interpretative problems in assessing the relevant facts illustrating that a child has indeed acquired a *new* habitual residence. Moreover, the gathering of information with regard to the child’s situation may nowadays be less difficult than it was in the past because of improved access to information concerning the child (partly due to digitalisation). As a result, the principle of proximity may also have acquired a different meaning and weight.

In its Proposal in Article 7(1), the Commission has removed the clause ‘*at the time the court is seised,*’ thereby proposing to abandon *perpetuatio fori*. In addition, it inserts a new sentence: ‘*Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the authorities of the Member State of the new habitual residence shall have jurisdiction.*’²¹ Subsequently, the European Parliament’s Committee on Legal Affairs (Rapporteur Tadeusz Zwiefka)²² published a Report on the Commission’s Proposal for the Recast of EC Regulation 2201/2003 (Brussels IIbis). In this report, the second sentence incorporating a time clause has been omitted. Presumably, it has been deleted due to it being redundant: it is sufficient to delete the wording ‘at the time the court is seised’ in order to do away with the *perpetuatio fori*.

2.1.2 Appropriateness of the Proposal and Recommendations

Accordingly, it is recommended that *perpetuatio fori* will not be upheld for the reasons stated above. Rather, *only* the child’s habitual residence should be decisive in determining that court’s jurisdiction on the basis of the general jurisdictional rule of the Regulation.

2.2 Continuing Jurisdiction in Relation to Access Rights – *Perpetuatio fori* (Article 8 Proposal; Article 9 Regulation)

The Proposal leaves the Regulation virtually unchanged in respect of Article 9. This Article concerns the continued jurisdiction during a period of three months for modifying a decision on the right of access when a child moves lawfully from one Member State to another. The National Reports do not suggest that this provision gives rise to problems or that there is any particular need to adapt this provision. Accordingly, no particular amendment is required.

²¹ 2016 Commission’s Proposal.

²² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0388+0+DOC+PDF+V0//EN>.

2.3 Jurisdiction in Cases of Child Abduction

2.3.1 Commission's Proposal (Article 9 Proposal; Article 10 Regulation)

No substantial changes are suggested with regard to the current Article 10 of the Regulation. It has been renumbered as Article 9 in the Proposal. A number of minimal changes in the wording concern the replacement of the 'court' with the 'authority', the 'judgment' by a 'decision' and 'paragraph (i)' by 'point (i)'. These alterations have no bearing on the substance.

A new paragraph has been added under (iii) resulting in the former paragraphs 10(b)(iii) and 10(b)(iv) having been renumbered as Article 9(b)(iv) and 9(b)(v) respectively. The new text added under (iii) reads as follows:

'(iii) a request for return lodged by the holder of rights of custody was refused on grounds other than Article 13 of the 1980 Hague Convention;'

Thus, the proposed amendment offers an additional possibility for the courts of the child's new habitual residence to attain jurisdiction under Article 10(b).

2.3.2 Appropriateness of the Proposal and Recommendations

The new ground under (iii) of Article 9(b) of the Proposal appears to be a consequential amendment of the clarifications in the scheme concerning the 'overriding mechanism'. Namely, the Proposal, in Article 26(4), now clearly specifies that an order for the return of the child is to be made within the context of a decision on the question of custody, as will be addressed in greater detail *infra*, under 4.3. *Commission's Proposal – 'Overriding mechanism' (Article 26 of the Proposal)*. Thus, it is not the case that any court in any proceedings initiated in the Member State of the child's habitual residence immediately before the abduction can overrule a non-return order rendered by a court in a Member State to which the child has been wrongfully removed or retained. Instead, it is the court which has jurisdiction over the question of custody that can issue an order for the return of the child (see *infra*, under 4.3).

It is a well-established practice and a common understanding that the 'second chance' procedure is only available if the decision on non-return is rendered on the grounds under Article 13 of the 1980 Hague Convention, but not if the non-return order is issued for any other reason. Consequently, a non-return order by the Court of a Member State where the child has been removed or retained is a final decision on the matter if the non-return order is based on any other ground and not on Article 13 of the 1980 Convention. In other words, such decisions are not susceptible to the 'second chance' examination in the Member State of the child's habitual residence immediately before his/her abduction and a non-return order will be a final decision on the matter.

It is self-explanatory that the court(s) of the Member State of the child's new habitual residence should be vested with jurisdiction to decide on custody matters when a request for the return of the child was refused on any ground other than those mentioned in Article 13 of the 1980 Hague Convention. After all, it seems that the line of reasoning of the Proposal is to 'concentrate' the competence to finally decide on the return of the child with the courts of the

Member State having jurisdiction over the question of custody. Since a decision on non-return rendered by the court in a Member State of the child's new habitual residence in such a case would be a final one, it is appropriate that the same court has competence to decide on the rights to custody.

In conclusion, if this amendment is intended to align the jurisdiction to finally decide on the return of child with the jurisdiction on custody, it is to be met with approval.

2.4 Choice of Court for ancillary and autonomous proceedings (Article 10 Proposal; Article 12 Regulation)

2.4.1 Commission's Proposal

The Proposal modifies current Article 12 of the Regulation (Art. 10 of the Proposal). It adds that the jurisdiction of the courts should be accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the latest at the time the court is seised or, *where the law of that Member State so provides, during those proceedings*. Establishing whether the prorogation has been accepted by the parties, may, in some Member States, require national implementing legislation.

According to Article 10(4) of the Proposal, the jurisdiction conferred to courts outside divorce proceedings in accordance with paragraph (3) will cease as soon as the proceedings have led to a final decision. This amendment merely incorporates the case law of the CJEU. The Proposal adds that where all the parties to the proceedings in relation to parental responsibility accept the jurisdiction referred to in paragraph 1 (within divorce proceedings) or 3 (outside divorce proceedings), the agreement of the parties shall be recorded in court in accordance with the law of the Member State of that court. Indeed it is appropriate that this agreement should be in a written form. Yet some may question the appropriateness of the requirement that such agreement should be 'recorded in court in accordance with the law of the Member State of the court' as Article 10(5) of the Proposal suggests.²³ In this context, formulating a uniform European legal standard may be considered.

2.4.2 Appropriateness of the Proposal and Recommendations

The additional clauses in the Proposal make sense from the perspective that prorogation should remain an exception to the principle of proximity embodied in the jurisdiction of the Member State of the child's habitual residence. As such they should therefore cease at the latest as soon as a decision in those proceedings on parental responsibility matters has become final. This is in order to respect the requirement of proximity for any new proceedings in the future (see Recital 16 of the 2016 Commission's Proposal). The Proposal does not give any further guidelines as regards the interpretation of the notion of 'best interests of the child'. This omission is partially understandable because the interpretation of the best interests of the child may vary from case to case. However, it is submitted that the best interests of the child should in general be interpreted having regard, inasmuch as such outcomes may be predicted on the

²³ See e.g., National Report the Czech Republic.

basis of the facts and circumstances of the case, to the child's long-term interests in having a stable family environment.

In that respect, it is recommended that the child should be heard if he/she is capable of forming and expressing his or her own views, but the prorogued court should also make its own assessment of the child's interests. This latter point will require close and expedient communication between national courts and may, for example, require interviews with video-conferencing and the support of a court interpreter.

2.5 Jurisdiction based on the child's presence

Article 13 of the Proposal (Article 14 of the Regulation) is a residual jurisdictional ground. Although it has so far been rarely used it may become more useful especially with regard to refugee children and those children who have been internationally displaced because of disturbances occurring in their home countries.²⁴ The child's presence in a Member State should, however, be considered only in cases in which a mere presence rather than habitual residence in a Member State can be established on the basis of the facts and circumstances of the case. The Proposal does not contain any substantial changes in respect of this jurisdictional ground. No amendments or alterations to this jurisdictional ground appear needed or recommended.

2.6 Provisional, Including Protective, Measures (Article 12 Proposal; Article 20 Regulation)

Relevant provisions on provisional measures both under the Brussels I and Brussels II enforcement regimes have frequently caused difficulties for national courts when applying them. In its judgments, the CJEU has shed light on a number of aspects, thereby however, frequently leaving a leeway for distinct understanding and interpretations. It is therefore a positive initiative to use the opportunity, when revising the Regulations, to offer answers and solutions to the difficulties encountered in the application. Thus, the Brussels Ibis Regulation in Article 2(a) has expressly addressed the enforceability of decisions relating to provisional measures. In its 2016 Proposal, the Commission suggests a number of clarifications surrounding provisional measures. As already briefly addressed *supra*, under 1.2.1 'General remarks', both Regulations aim at achieving similar or at least comparable 'results' on the legal nature and relevance of provisional measures, but the 'methods' thereby employed are not consistent.

Problems encountered in connection with the application of Article 20 of the Regulation can be summarised as follows: 1) There has been uncertainty regarding the presence, interpretation and reach of the wording 'persons or assets' before the courts in the Member State where a measure has been requested. The CJEU has held that 'persons' include not only the child but also the parents.²⁵ Within that context, the scope of Article 20 has not been clearly

²⁴ See also Corneloup, S., *et. al.*, 'Private international law in a context of increasing international mobility: challenges and potential', Study for the JURI committee, Directorate General for Internal Policies of the Union Policy Department for Citizens' Rights and Constitutional Affairs PE 583.157- June 2017, pp. 13-16.

²⁵ CJEU Case C-403/09 PPU *Detiček v Sgueglia* [2009] ECLI:EU:C:2009:810, paras 50–52.

defined. 2) Besides, the issue of parallel proceedings has been raised before the national courts. On this point, the CJEU has ruled that there is no *lis pendens* when the case in one court concerns the substance of the dispute and the case in another Member State concerns provisional measures.²⁶ 3) Most importantly, there is the issue of the cross-border enforceability of provisional measures. The CJEU has found that provisional measures granted by national courts that do not have jurisdiction as to the substance of the dispute do not qualify for cross-border enforceability under the Regulation. If the matter is urgent, a court other than the court with jurisdiction over the dispute can take measures, but these measures only have a territorial reach under the Regulation.²⁷

2.6.1 Commission's Proposal

In its Proposal, the Commission introduces amendments which would incorporate, but also modify and further clarify relevant CJEU case law. Amendments are contained in scattered provisions of Article 12 (currently Article 20 of the Regulation) and the new Article 48 which are accompanied by Recital 17 (amended Recital 16 of the Regulation) and a new Recital 40. For an easier understanding of the suggested amendments to the current text of Article 20 of the Regulation, the provision of Article 12 is reproduced, reading as follows:

Article 20 12

Provisional, including protective, measures

1. In urgent cases, ~~the provisions of this Regulation shall not prevent the courts~~ **authorities of a Member State where the child or property belonging to the child is present shall have jurisdiction to take** ~~from taking such~~ provisional, including protective, measures in respect of ~~persons~~ **that child** or assets ~~property in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.~~

In so far as the protection of the best interests of the child so requires, the authority having taken the protective measures shall inform the authority of the Member State having jurisdiction under this Regulation as to the substance of the matter, either directly or through the Central Authority designated pursuant to Article 60.

2. [...]

Application of the provision only to parental responsibility

The suggested text implies some important clarifications and alterations in the legal regulation on the provisional measures. Firstly, it is clear that this provision relates only to cases of parental responsibility and not to matrimonial matters. Such a conclusion may clearly be drawn from the fact that the provision expressly refers to the 'child' instead of 'persons'. Besides, Article 12 on provisions, including protective measures, has been removed from Section 3 entitled

²⁶ CJEU Case C-296/10 *Purrucker v Vallés Pérez* II [2010] ECLI:EU:C:2010:665.

²⁷ *Ibid.*, para 92.

‘Common Provisions’ and is now placed in Section 2 entitled ‘Parental Responsibility’. Additionally, the wording ‘authorities of a Member State where the child or property belonging to the child is present’ clearly indicates that such measures may only be issued in a Member State where the child or his/her property is present.

Under the new sentence in the Proposal (Article 12(1)), the court ordering the measure is to inform the authority in a Member State having jurisdiction on the merits under the rules of the Regulation about the measure taken, if this is in the best interests of the child. However, a failure to inform in itself does not present a reason to refuse the enforcement of the measure.²⁸

Paragraph 2 of Article 12 of the Proposal has been taken over from Article 20(2) of the Regulation. It has remained virtually unchanged except for minor alterations in the wording: the measure issued shall cease to apply as soon as the authority in a Member State having jurisdiction over the merits has taken the measures it considers appropriate.

Free circulation of decisions on provisional measures within the EU

Article 48

Provisional, including protective, measures

The provisions of this Chapter applicable to decisions shall apply to provisional, including protective, measures ordered by an authority having jurisdiction under Chapter II. They shall not apply to provisional, including protective, measures ordered by an authority without the respondent being summoned to appear.

It follows from Article 48 of the 2016 Commission’s Proposal that the relevant provisions on enforcement apply to provisional, including protective, measures rendered by the courts ‘having jurisdiction under Chapter II’. Thus, provisional measures issued by the court having jurisdiction in cases of parental responsibility under the rules of the Regulation are enforceable in all EU Member States. Since the Proposal in Article 12 provides for a uniform rule on jurisdiction in cases involving measures to protect the child or his/her property, the decisions issued by the court of a Member State where the child or his/her property is present will also be enforceable in other Member States. They will apply until the court having jurisdiction on the substance of the matter has taken measures which it considers appropriate. However, provisional, including protective, measures which were ordered without the respondent being summoned to appear should not be recognised and enforced under this Regulation.

²⁸ 2016 Commission’s Proposal, Recital 17, last sentence.

This is confirmed and further explained in Recitals 17²⁹ and 40³⁰. As has been mentioned before, provisional, including protective, measures which were ordered without the respondent being summoned to appear should not be recognised and enforced under this Regulation.

2.6.2 Appropriateness of the Proposal and Recommendations

According to the Proposal, it is clear that the possibility to order provisional measures is limited to proceedings on parental responsibility. In other words, provisional measures in connection with matrimonial matters are not to be covered by the Regulation. From a practical point of view, this presents no change, considering that the substantive scope of application of the Regulation is narrowly defined. It includes only ‘divorce, legal separation or marriage annulment’. Bearing this in mind, it is indeed difficult to imagine circumstances in which a provisional measure could possibly fall within such a narrowly defined substantive scope of application. It is most likely that provisional measures would be needed in the context of the personal or matrimonial property aspects of divorce, separation or the annulment of a marriage. However, such controversies are outside the Regulation’s scope, even though they may and usually are raised in proceedings concerning divorce, legal separation or marriage annulment. Consequently, a measure that may be issued in connection with a matrimonial matter within the Regulation’s scope, would have to be issued either on the basis of national law, the Regulations on matrimonial/partnership property regimes³¹ or, to the extent that it is applicable, the Regulation on protection measures applicable since January 2015.³² Although it may be obvious

²⁹ Recital 17 (adjusted Recital 16) of the 2016 Commission’s Proposal, reads as follows: ‘This Regulation should not prevent the ~~courts~~ **authorities** of a Member State **not having jurisdiction over the substance of the matter** from taking provisional, including protective measures, in urgent cases, with regard to the persons or property **of a child situated present** in that Member State. **Those measures should be recognised and enforced in all other Member States including the Member States having jurisdiction under this Regulation until a competent authority of such a Member State has taken the measures it considers appropriate. Measures taken by a court in one Member State should however only be amended or replaced by measures also taken by a court in the Member State having jurisdiction over the substance of the matter. An authority only having jurisdiction for provisional, including protective measures should, if seised with an application concerning the substance of the matter, declare of its own motion that it has no jurisdiction. Insofar as the protection of the best interests of the child so requires, the authority should inform, directly or through the Central Authority, the authority of the Member State having jurisdiction over the substance of the matter under this Regulation about the measures taken. The failure to inform the authority of another Member State should however not as such be a ground for the non-recognition of the measure.**’

³⁰ Recital 40 of the 2016 Commission’s Proposal reads as follows: ‘Where provisional, including protective, measures are ordered by an authority having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. The same applies to provisional, including protective, measures ordered in urgent cases on the basis of Article 12 of this Regulation by an authority of a Member State not having jurisdiction as to the substance of the matter. Those measures should apply until a competent authority of a Member State having jurisdiction over the substance of the matter under this Regulation has taken the measures it considers appropriate.

However, provisional, including protective, measures which were ordered without the respondent being summoned to appear should not be recognised and enforced under this Regulation.’

³¹ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, Article 19.

³² Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters (applicable as of 15 January 2015).

for private international law specialists, it may prove useful for legal practitioners in EU Member States to include a reference on this point in the Recital.

A reference to the ‘child’ presumably alters the CJEU case law in so far as it contravenes the amendment. It seems that the wording ‘authorities of a Member State where the child or property belonging to the child is present’ implicates the presence of the child or his/her property in this Member State as a condition to have competence for issuing the provisional measure.³³ It seems that the most important consequence of the revised text is to formulate an autonomous rule on jurisdiction in the Regulation for issuing provisional measures, since there is no longer a reference to the measures ‘as may be available under the law of that Member State’. Thus, a unification of the rule on jurisdiction to issue a provisional measure justifies the free circulation of such measures.

Introducing the possibility of the extraterritorial effect of protective measures will have important consequences within the context of the return of the child procedure. Namely, the court before which the return procedure is pending could order urgent protective measures when the child could be at a grave risk of harm or could otherwise be put in an intolerable situation if he/she is returned to the Member State of his/her habitual residence. Such a protective measure can also ‘travel with the child’ to the State of habitual residence where a final decision on the substance has to be taken.³⁴ It will have effects by operation of law in the Member State of the child’s habitual residence immediately before his/her abduction until the courts in that State have issued a final decision on the matter. Provisionally granting the rights of access to one parent by the court in the Member State of refuge until the court in the Member State of the child’s habitual residence immediately before his/her abduction finally decides on the access rights, may serve as an example.³⁵ This can certainly be perceived as an improvement, considering that it would be most appropriate that the authority in the Member State where the child is present orders such protective measures. However, the lack of a clear indication as to what types of measures can be granted is likely to cause difficulties in practice, consequently resulting in multiple proceedings in different Member States.

What remains unclear is whether or not it is possible for authorities in Member States to issue provisional measures that may be available under their own law regarding other ‘persons’. When interpreting Article 20, the CJEU has held that ‘persons’ include not only the child but also the parents.³⁶ In relevant literature, the view has been expressed that this is the case because the measures influence their exercise of parental responsibility³⁷ and that the strict interpretation of ‘persons’ obviates the very purpose of the rule, namely to protect children in urgent situations.³⁸ Since the reference to ‘persons’ has been deleted, the CJEU case law in this respect is presumably no longer relevant. As there is no reference in the Proposal to a possibility

³³ CJEU Case C-256/09 *Purrucker v Vallés Pérez* I [2010] ECLI:EU:C:2010:296, para 147. Advocate General Sharpston has in an Opinion expressed the view that it was erroneous to interpret that the child and the persons exercising parental responsibility had to be present in the State granting the provisional measures.

³⁴ Explanatory Memorandum, p. 13.

³⁵ *Ibid.*

³⁶ CJEU Case C-403/09 PPU *Detiček v Sgueglia* [2009] ECLI:EU:C:2009:810, paras 50–52.

³⁷ Kruger, T and Samyn, L, ‘Brussels IIbis: successes and suggested improvements’ (2016) 12:1 *Journal of Private International Law*, pp. 132-168 p. 149.

³⁸ *Ibid.*; See also, Iterson, van D., *Ouderlijke verantwoordelijkheid en kindbescherming* (Maklu, 2011) pp. 127–128; Magnus/Mankowski/Pertegas Sender, *op. cit.*, Article 20, note 26.

of issuing provisional measures other than in the circumstances regulated therein, a possible conclusion is that authorities in EU Member States would not be permitted to issue provisional measures by relying on their national laws. Another possible interpretation could be that authorities in Member States may issue measures available under their national laws with respect to other ‘persons’ and/or the ‘child’, but such orders would only be effective on the territory of that Member State. In order to clarify this point a short explanation in the Recital would be useful. Provisional measures which were issued without the respondent being summoned to appear are not to be recognised and enforced under the Regulation. This merely confirms what has been the established view in the relevant CJEU case law. To some extent it has been reflected in Article 2(a) of the Brussels Ibis Regulation. Yet this provision does provide for the possibility to include *ex parte* provisional measures within the scope of the Brussels Ibis Regulation. Namely, it provides that the Regulation does not apply to ‘a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement’. Indeed, the difference in legal regulations is justified by the distinct nature and character of the legal relationships falling in the substantive scope of application of the two Regulations. To the extent that the Proposal purports the same or similar line of reasoning in both legal instruments, the suggested amendment enhances consistency in EU law making.

2.7 Residual Jurisdiction (Article 13 Proposal; Article 14 Regulation) and the Transfer of jurisdiction (Article 14 Proposal; Article 15 Regulation)

There are no suggestions in Article 13 of the Proposal concerning residual jurisdiction, except for replacing the ‘court’ with the ‘authority’ and adjustments in the cross-references.

As for the transfer of jurisdiction, the Regulation in Article 15 provides an exceptional jurisdictional rule which allows a court which is seised of a case, and has jurisdiction on the substance, to transfer the case to a court of another Member State if the latter is ‘better placed’ to hear that case (pursuant to Article 15 of the Regulation). This provision remains virtually unchanged under Article 14 of the Proposal. The only addition is a specific reference to the European Judicial Network in civil and commercial matters.

2.7.1 Commission’s Proposal

Under the current framework of Article 15 of the Regulation, there are three cumulative conditions to initiate the transfer process: 1) another court is ‘*better placed*’ to hear the case; 2) such a transfer would be in ‘*the best interests of the child*’ and 3) that the child has a ‘*particular connection*’ with another Member State. The provision presupposes close co-operation between the courts (in the Proposal: the authorities) of the Member States. As the only addition to the current legal framework, the Proposal has expressly attributed a role to the European Judicial Network in civil and commercial matters.

It is true that the first two conditions are rather abstract, but it is difficult to see how they may be formulated more precisely. So much is clear that all three conditions require the authorities involved to communicate openly with each other and to assess whether, in the

specific case, the requirements for a transfer have been fulfilled. This, in particular, includes the assessment of whether the transfer of the case would indeed be in the best interests of the child. The insertion of a clause which requires the referring court to provide a specification of and reasoning for the interests of the child may be commendable, given the specific nature of this jurisdictional ground. This may require an analysis of the impact that the transfer of jurisdiction might have on the child's future. Courts are considered to be sufficiently well equipped and informed to decide on such matters more expediently.

Furthermore, it may be better, in that regard, to draw a distinction between situations in which the case is transferred from the court seised to a court in another country – Article 8 of the 1996 Hague Child Protection Convention – and the reverse situation (Article 9). Article 14 of the Proposal does not change this, but it may be better to distinguish between 'inbound' and 'outbound' requests in separate provisions in a similar way.

At present, the division of tasks between the competent courts and the parties is not very clear. The wording of Article 15(2) of the Regulation seems to indicate that one of the parties may request a court of another Member State to assert its jurisdiction without being certain which court will be the competent court. However, if this jurisdiction is not asserted, parties no longer have a say in any such jurisdictional issue.³⁹ The competent court may allow the parties to have a certain period of time within which they may request the transfer or the court may itself contact the court in the other Member State through the intervention of the Central Authority.

2.7.2 Appropriateness of the Proposal and Recommendations

In that connection, it could also be commendable, to restrict the right of the parties to have a say in issues regarding transfer, as provided for in Article 15(2). Particularly the requirement that the transfer proposed by a court should necessarily be accepted by at least one of the parties should be abolished, for reasons of procedural efficiency and in accordance with the principle of mutual confidence in the judiciary of the Member States.⁴⁰

³⁹ De Boer, Th. M. in: De Boer, Th. M. and Ibili, F. (eds.) *Nederlands internationaal personen-en familierecht* (Wolters Kluwer Nederland 2017) p. 176.

⁴⁰ See also: De Boer, Th. M., *op.cit.*, p. 18.

3. Common Provisions - Section 3 of Chapter II Proposal

The changes suggested in the Proposal predominantly relate to minor adjustments to the wording. The most important amendments are new provisions on incidental questions and the right of the child to express his or her views.

3.1 Forum shopping - rush to the court; seising of the court

As outlined in the Guide for Application (Chapter 5, under 1, '*Seising of a Court – Article 16*'), in its Impact Assessment the Commission identified the problems of forum shopping and a rush to the court. It expressed the following view:

'In view of differences in national substantive laws, there might be clear advantages or disadvantages for the spouses depending on which court was first seised. The expectation of such differences can lead to forum shopping and rush to court by the parties (in view of maximising their perceived personal advantages by seizing a specific court).'⁴¹

There is no reliable information to assess how frequently this problem occurs and whether this problem is real or potential. Yet, if a rush to the court is a real problem which is frequently encountered in practice, the abolishment of alternative grounds of jurisdiction would be the most appropriate manner to deal with this. In conclusion, such a substantial departure from the existing rules approach in regulating jurisdiction rules in divorce matters would only be justified if the problem is signaled in a number of Member States. In general, the suggestions concerning matrimonial matters are contained in Part II of the Recommendations.

The changes in this part (Articles 15, 17 – 19 of the Proposal, relating to the seising of the court, an examination as to jurisdiction and as to admissibility, as well as to *lis pendens* and related actions), predominantly concern minor adjustments in the wording and the reference to the revised Service Regulation in the context of the provision on the examination as to admissibility in Article 18 of the Proposal. The changes suggested in the new provisions on incidental questions (Article 16 of the Proposal) and on the right of the child to express his or her views (Article 20 of the Proposal), are the most important ones. These will be addressed in the following part.

3.2 Incidental questions

In its new provision, added to the Proposal in Article 16 and accompanying the relevant Recital 22, the Commission suggests the following amendments:

⁴¹ Impact Assessment, p. 42.

Article 16

Incidental questions

If the outcome of proceedings before an authority of a Member State depends on the determination of an incidental question falling within the scope of this Regulation, that authority may determine that question.

The purpose and aim of this provision is explained in Recital 22 of the Proposal. It reads as follows:

‘If the outcome of proceedings before an authority of a Member State not having jurisdiction under this Regulation depends on the determination of an incidental question falling within the scope of this Regulation, that authority should not be prevented by this Regulation from determining that question. Therefore, if the object of the proceedings is, for instance, a succession dispute in which the child is involved and a guardian *ad litem* needs to be appointed to represent the child in those proceedings, the authority having jurisdiction for the succession dispute should be allowed to appoint the guardian for the proceedings pending before it, regardless of whether it has jurisdiction for parental responsibility matters under the Regulation. Any such determination of an incidental question should only produce effects in the proceedings in question.’

Presumably, the idea is to enhance the efficiency of proceedings pending before the court of a Member State other than the Member State of the child’s habitual residence where the child or his/her interests are present. As such it is a useful addition to the current framework.

3.3 Right of the child to express his or her views

According to Recital 19 of the Regulation, the hearing of the child plays an important role in the application of the Regulation, although the Regulation does not intend to modify national procedures.⁴² The Court stressed that a child must be given a genuine and effective opportunity to make his/her views known, whilst having regard to the age or degree of maturity of the child and taking account of his/her best interests.⁴³ The right of the child to have his/her view be given due weight, in accordance with the age and maturity of the child, is emphasised in the literature. It is further suggested that the Regulation should place more emphasis on children’s rights.⁴⁴ Also, the view has been expressed that the hearing of the child is one of the shortcomings in the Regulation due to the difference in rules which are applicable in the Member States, such as the different age requirements. These differences have, on multiple occasions, led to a decision of one Member State not being recognised in another Member State.⁴⁵

⁴² Brussels IIbis Regulation, Recital 19.

⁴³ CJEU Case C-491/10 PPU *Aguirre Zarraga* [2010] ECLI:EU:C:2010:828, paras 63-68.

⁴⁴ Kruger and Samyn, *op. cit.*, p. 156.

⁴⁵ De Boer, Th. M., ‘De herschikking van de Verordening Brussel II-bis: een eerste indruk’ FJR 2016/68 p. 2. See also: Impact Assessment, p. 57.

The issues of the interpretation of the age and the degree of maturity of the child also cause problems when applying Articles 11(8) and 41. In the Impact Assessment, it is stated that an autonomous interpretation of Article 41(c) would eliminate barriers and uncertainty on how to tackle this notion of age and maturity. Additionally, the weight that should be attached to the opinion of the child varies among the Member States. Uniform rules at the European level would give support to better the legitimacy of the rules on automatic enforcement. Also, the term ‘hearing’ seems to have different meanings in the various legal systems, ranging from ‘having been given an opportunity to express himself or herself’ (which could take place outside the court) to a formal hearing of the child before a court.⁴⁶

In this connection, difficulties arise due to the fact that Member States have diverging rules governing the hearing of the child.⁴⁷ The introduction of common minimum procedural standards could enhance mutual trust between Member States and thus, the application of the provisions concerning recognition and enforceability. If a decision is given without having heard the child, there is a danger that the decision may not take the best interests of the child into account to a sufficient extent.⁴⁸

The solution suggested by the Commission in its 2016 Proposal is the adoption of common minimum standards concerning the hearing of the child.⁴⁹ This could involve, for example, a specification of the age at which children should be heard and an age at which they may be heard depending on the maturity of the individual child. Minimum standards could apply to the manner in which children’s views are heard.⁵⁰

3.4 Commission’s Proposal

In its Proposal, the Commission introduces the new provision of Article 20, which reads:

Right of the child to express his or her views

‘When exercising their jurisdiction under Section 2 of this Chapter, the authorities of the Member States shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings.

The authority shall give due weight to the child's views in accordance with his or her age and maturity and document its considerations in the decision.

Recital 23 states that the hearing of the child should be done in accordance with Article 24(1) of the Charter of Fundamental Rights of the European Union and Article 12 of the United Nations Convention on the Rights of the Child. Furthermore, the Commission adds that the Regulation is not intended to set out how to hear the child, for instance, whether the child is heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child is heard in the courtroom or in another place.⁵¹

⁴⁶ Impact Assessment, p. 57.

⁴⁷ *Ibid.*

⁴⁸ Explanatory Memorandum, p. 4.

⁴⁹ Explanatory Memorandum, p. 14.

⁵⁰ Scott, A., ‘A question of trust? Recognition and enforcement of judgments’ (2015) 1 NIPR, pp. 31-32.

⁵¹ *Ibid.*

3.5 Appropriateness of the Proposal and Recommendations

The Proposal leaves Member States' rules and practices on how to hear a child untouched, but requires mutual recognition between the legal systems. For a parent seeking the recognition of a decision in another Member State, this means that a court in that country will not refuse to recognise it merely because a hearing of the child in another country was done differently compared to the standards applied by that court.⁵² The Proposal does not contain any indications as to how the child should be heard, minimum age requirements or whether this should happen in a courtroom.

In the Impact Assessment, three sub-options were proposed regarding the hearing of the child:

- Inclusion of a reference to Article 12 of the UN Convention on the Rights of the Child in the Regulation;
- Introduction of common minimum standards regarding the question from what age a child must be given the opportunity to be heard;
- Introduction of an explicit obligation to give the child an opportunity to express his/her views, where the national rules as to how the child will be heard will be left untouched, but mutual recognition between the differing systems is required.⁵³

The last option was put forward as the most preferred option, as it would require Member States to mutually respect their national rules while obliging them to give the child the opportunity to express his/her views and to take due account of them. This choice is guided by the principle of proportionality. It respects national laws but at the same time avoids that mere differences between the Member States serve as a ground for non-recognition.⁵⁴

It seems that the Commission has mostly copied this option. However, no clear indication has been given in the Proposal as to *when* (i.e. at what age) the child should be given the opportunity to express his/her own views, and how much *weight* should be given to the child's views. Both were requested by the Member States in their National Reports, as well as by the Working Group in its Impact assessment.⁵⁵

⁵² Explanatory Memorandum, p. 15.

⁵³ Impact Assessment, p. 62.

⁵⁴ *Ibid.*, p. 67.

⁵⁵ *Ibid.*, p. 62.

4. Child Abduction and Return Procedures

In the Explanatory Memorandum of the 2016 Proposal, the Commission identifies a number of shortcomings of the Regulation concerning parental responsibility matters, the inefficiency of the child return procedure being one of them.⁵⁶ Several reasons for its ineffectiveness are mentioned. Thus, the time limit of six weeks to issue a return order gave rise to uncertainties in practice, especially in relation to whether or not the time limit refers to decisions brought at each instance in the adjudication. Providing for procedures in multiple instances, as is the case in some Member States, and the lack of specialised courts dealing with return applications, cause delays in handling cases.

Similar objections are often raised in the literature, especially regarding the inefficiency of return procedures. Article 11(3) of the Regulation requires the court to act expeditiously and provides for a deadline of 6 weeks to decide on a return order.⁵⁷ This deadline is often not met in practice⁵⁸, mostly because it is unclear whether these 6 weeks apply per instance, include appeals or even the enforcement of a return decision.⁵⁹ In reality, the proceedings take 165 days on average.⁶⁰

As is detailed in Chapter 4 (under 4 ‘*Jurisdiction under Article 11(6)-(8)*’) of the ‘Guide for Application’, the current system of the ‘overriding mechanism’ or ‘second chance’ procedure is laid down in the current Article 11 of the Regulation. The Explanatory Memorandum notes that difficulties are encountered due to the fact that custody proceedings take place in the jurisdiction where the child is not present. Additionally, the abducting parent is often not cooperative and it is usually difficult to hear the child.

The current system of the ‘overriding mechanism’ or ‘second chance’ procedure is often criticised in the literature and has proven to be inefficient in practice. In particular, it appears that it unnecessarily prolongs the judicial proceedings in child abduction cases and that the return orders rendered in the ‘second chance’ procedure are hardly ever actually enforced. As such, they have proven to be ineffective and even counterproductive, as they operate against those whose rights were intended to be protected by the current framework (e.g., the CJEU cases of *Zarraga*⁶¹ and *Povse*⁶²). Therefore, it would be most appropriate to do away with the scheme under Article 11 in connection with Articles 42 and 47.

However, the 2016 Commission’s Proposal suggests retaining the idea of the courts in the Member State of the child’s habitual residence before his/her abduction being able to render a final decision on the return of the child. The procedural scheme has however been substantially revised as is detailed *infra*, under 4.3, ‘*Commission’s Proposal: ‘Overriding mechanism’ (Article 26 Proposal)*’.

⁵⁶ Explanatory Memorandum, p. 3.

⁵⁷ Weller. M.P., ‘Die Reform der EuEheVO’ (2017) 3 IPRax 37, p. 225; Article 11(3) Brussels IIbis Regulation.

⁵⁸ CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271, para 76.

⁵⁹ Explanatory Memorandum, p. 3.

⁶⁰ Statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Part II — Regional Report, Prel. Doc. No 8 B — update of November 2011 for the attention of the Special Commission of June 2011, p. 10-12, available at <https://assets.hech.net/upload/wop/abduct2011pd08be.pdf>.

⁶¹ CJEU Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2010] ECR I-14247.

⁶² CJEU Case C-211/10 PPU *Povse v Alpage* [2010] ECR I-6673.

In order to deal with the difficulties encountered, the Proposal introduces a number of significant changes. The current Article 11 of the Regulation is contained in a separate part, namely, Chapter III entitled ‘Child Abduction’, in Articles 21-26. It is thereby suggested that the provisions of Article 11(1)-(5) should be revised in accordance with Articles 21-25 of the Proposal, as is explained *infra*, under 4.1, ‘*Commission’s Proposal (Article 21-25)*’. It is also suggested that the so-called ‘overriding mechanism’ provided in Article 11(6)-(8) should be revised in Article 26 of the Proposal, as detailed *infra*, under 4.3, ‘*Commission’s Proposal: ‘Overriding mechanism’ (Article 26 Proposal)*’.

4.1 Commission’s Proposal (Articles 21-25)

The Proposal suggests some important changes to improve the efficiency of the procedure for the return of the child. The provisions of Articles 21-25 contain adjustments of Article 11(1)-(5) of the Regulation. Important additions are the provisions contained in Articles 22 and 23 and paragraphs 1, 3, 4, and 5 of Article 25. Thus, the Proposal suggests that the appellate proceedings against the decision brought upon the request to return the child would be permitted in only one instance (i.e., no recourse in cassation) in Article 25 paragraph 4. Thereby, it introduces a maximum period of 18 weeks for all possible stages, a 6+6+6 deadline.⁶³ Further, it provides for a concentration of local jurisdiction in Article 22 and introduces the possibility of mediation in Article 23(2). According to Article 21(1)(b), it is possible for the court deciding on the return to order urgent protective measures within the meaning of Article 12 if they are necessary to enable a safe return. The measures ordered are enforceable in the Member State of habitual residence. They should be recognised and enforced in all other EU Member States and apply until a court having jurisdiction over the merits of the case has taken the measures it considers appropriate.⁶⁴

The requirement that the person requesting the return of the child must be given the opportunity to be heard has remained virtually unchanged, despite some minor changes in the wording. It has been taken over in paragraph 2 of Article 25.

Important improvement is the possibility that the court ordering the return of the child declares this decision as provisionally enforceable according to Article 25(3).⁶⁵ Regardless of whether or not an appeal may be permitted, the court may order such provisional enforceability even if the national law of that Member State does not provide for such a possibility. An important tool has thereby been created which would operate independently as an autonomous concept with no need to be supported by the national procedural law of the court seised of the matter.

The provision in paragraph 5 of Article 25 contains an express reference to the enforcement of the return decisions under the 1980 Hague Convention. There is a number of substantial changes relating to the system of recognition and enforcement of judgment in the

⁶³ See Explanatory Memorandum, p. 3.

⁶⁴ Recital 29 of the 2016 Commission’s Proposal.

⁶⁵ Similar views were expressed during the conference on ‘Enhancing the Efficiency of the Brussels IIbis Regulation’ of 10 November, 2017, where it was mentioned that despite Member States recognising all decisions on parental responsibility given by another Member State by operation of law, proceedings to obtain a declaratory order on ‘preventive’ recognition or non-recognition cannot be done away with.

Proposal. As to the provisions on the enforcement an important addition is contained in Article 32 relating to the competent courts and the enforcement procedure.

One of the aspects that will have pivotal effects is the provision of a time limit of six weeks for the enforcement of judgements, in paragraph 4 of Article 32. This provision is explicitly referred to in the new provision of Article 25(5). Thus, if the decision is not enforced within the said time limit, the court of the Member State of enforcement shall inform the Central Authority in the Member State in which the child had his/her former habitual residence, or the person that requested the return of the child without assistance of the Central Authority. The court will state the reasons for its failure to comply with the time limit when enforcing the decision. The idea is obviously to enhance the effectiveness of the enforcement proceedings brought before the Member States in cases involving decisions of parental responsibility.⁶⁶

Finally, Article 25(1)(a) requires cooperation to take place between the authorities of the Member State of refuge and the Member State of the child's habitual residence, either directly, by the assistance of the Central Authorities or through the European Judicial Network.

4.2 Appropriateness of the Proposal and Recommendations

The efforts to this end are to be met with approval. However, it may be expected that Article 25(3) on the provisional enforceability of the decisions may appear difficult to be accommodated in all Member States. It is rather likely that in a number of Member States additional legislative measures will be necessary in order to incorporate the suggested change.

The hearing of the child when applying Articles 12 and 13 of the 1980 Hague Child Abduction Convention, currently dealt with in Article 11(2) of the Regulation, has been modified in Article 24 of the Proposal entitled 'Hearing of the child in return proceedings under the 1980 Hague Convention'. Thus, the Proposal replaces the obligation of ensuring that the child is given the opportunity to be heard by requiring that the child is given the opportunity to 'express his or her views in accordance with' the new provision of Article 20. Additionally, the wording 'unless this appears inappropriate having regard to his or her age or degree of maturity' has been deleted. Under the new Article 20, the age and the degree of maturity of the child are considered when assessing the weight which is to be attributed to the child's view, as has already been addressed *supra* under 3.4, '*Commission's Proposal*'.

4.3 Commission's Proposal: 'Overriding mechanism' (Article 26 Proposal)

The Commission suggests the revision of current provisions of Article 11(6)-(8) in Article 26 of the 2016 Commission's Proposal. First, there is a new provision in paragraph 1 of Article 26 requiring the court to expressly indicate the provision(s) of the Hague Convention on Child Abduction of 1980, on which the refusal is based. The Proposal contains a rather substantial revision regarding the refusal to return a child, in particular with respect to paragraph 8 of Article 11 of the Regulation contained in the Proposal in Article 26(4).

The current provision of paragraph 6 of Article 11 is to a large extent taken over in paragraph 2 of Article 26. However, the reference is made to the European Judicial Network

⁶⁶ Explanatory Memorandum, p. 4 and 5.

next to the Central Authority, as an intermediary through which a decision of non-return can be transmitted to the court or Central Authority in the Member State of the child's former habitual residence. Additionally, there is no longer any reference to national law in the context of the documents accompanying the decision and a transcript of the hearings before the court. Instead, it refers to the requirements concerning translation in accordance with Article 69 of the Proposal.

In particular, Article 69 of the Proposal is a new provision entitled 'Translations'. This provision presents a useful addition providing for a uniform determination of all requirements concerning a translation or transliteration of the documents, across all Member States. Article 26(2) refers to the possibility of translating such documents into one of the official languages of the Member State, as well as it being possible to translate into another language that the Member State expressly accepts.

Article 11(7) of the Regulation has remained substantially unchanged, despite some minor adjustments in the wording. It is virtually taken over in Article 26(3) of the 2016 Commission's Proposal.

In contrast, it is suggested to more thoroughly amend Article 11(8) of the Regulation. The suggested amendments are contained in paragraph 4 of Article 26 of the Proposal. First of all, a provision has been added imposing an obligation upon the courts of the Member States of the previous habitual residence of the child to consider the reasons for refusing the return of the child in the decision brought by a court of a Member State. Such an obligation would exist where custody proceedings were already pending, or in the proceedings following the submissions filed after the non-return orders. In addition to the reasons given by the court of another Member State, the court deciding on the custody will make its decision, taking into consideration the best interests of the child.

There is a substantial difference in comparison to provisions of paragraph 8 of Article 11 of the Regulation. Presently, the order for return under Article 11(8) of the Regulation is procedurally independent of a decision on custody. Namely, it refers to 'any subsequent judgment which requires the return of the child' which is not necessarily a decision on custody. In contrast, the Proposal refers to the 'decision on the question of custody' and not to 'any subsequent judgement which requires the return of the child'. This implies that the decision on the return of the child must be given in the context of the decision concerning the custody.

4.4 Appropriateness of the Proposal and Recommendations

The problematic lack of clarity as regards the regulatory environment, which results from a large number of legal acts and the differences between cases concerning third-country nationals (Hague Convention) and EU nationals (Brussels IIbis which adds to the Hague Convention), would generally be improved by bundling the essential regulations regarding child abduction into the new Chapter III, following Article 21 of the Proposal. Additionally, Article 74 of the Proposal makes clear that the provisions of the 1980 Hague Convention shall be applied in accordance with Chapter III of this Regulation. This systematic concentration and formulation of the relationship between the Regulation and the Hague Convention is most welcome.⁶⁷

⁶⁷ See also Weller, *op. cit.*, p. 223.

Particularly useful is the clarification in Article 26(4) that the decision overturning a non-return order must be given in the context of a final decision on custody. It presents a significant improvement and would overrule the judgment of the CJEU in the *Povse* case. The latter implies that *any decision* brought in the Member State of the child's habitual residence immediately before the wrongful removal or retention may overturn a decision refusing to return the child rendered pursuant to Article 13 of the 1980 Hague Convention. The Proposal clarifies that it is a 'decision on the question of custody... which requires the return of the child' that falls within the Regulation's enforcement scheme.

Yet, to do away with the 'overriding mechanism' altogether would be a better solution. Even though the Proposal may bring about a slight improvement, the problem of prolonging the decision-making on the return of the child will remain. This also holds true with respect to another argument that is often raised against the 'second chance' procedure. This concerns its ineffectiveness in practice due to the lack of the actual enforcement of a decision on the return of the child.

5. Recognition and Enforcement

The Proposal consolidates all aspects of recognition and enforcement for all types of decisions in one part – Chapter IV, as follows: Recognition (Section 1), Enforcement (Section 2), Refusal of Recognition (Section 3), Common Provisions (Section 4), Authentic Instruments and Agreements (Section 5) and Other Provisions (Section 6). Considering that Sections 5 and 6 do not provide substantial alterations they will not be further addressed. Changes in Sections 1-4 are outlined in the subsequent parts.

5.1 Commission’s Proposal: Abolishing the Exequatur Procedure

In recent years the declaration of enforceability (*exequatur*) has been abolished in a number of EU PIL instruments unifying the rules on the recognition and enforcement of judgments (e.g., Maintenance Regulation, European Enforcement and European Payment Order, Regulation on Small Claims Procedure). The same holds true for the Brussels Ibis Regulation (Art. 39). According to this provision, from the moment a person receives an enforceable judgment in the court of origin, he/she is able to ‘proceed to any protective measures which exist under the law of the Member State’ where the enforcement of the judgment is sought (Article 40).

However, the procedure and the grounds for refusing enforcement in these legal sources are not necessarily identical.⁶⁸ This abolition of *exequatur* in European instruments reflects an important EU policy which promotes the free circulation of decisions. One of the main objections to preserving *exequatur* is that it may lead to complex, lengthy and costly procedures. Moreover, the two different approaches to *exequatur* under the current Regulation can create inconsistencies between access and custody rights.⁶⁹

The Commission has also acknowledged that the procedure for declaring a decision given in another Member State enforceable (*exequatur*) remains an obstacle to the broader policy objective of achieving a free circulation of decisions throughout the Member States. It also entails ‘unnecessary costs and delays’ for parents and their children involved in cross-border proceedings.⁷⁰ Moreover, the time for obtaining *exequatur* differs per Member State. Depending on the jurisdiction and the complexity of the case, this varies between a few days to several months. The time indicated does not take into account the time required for collecting the documents necessary for the application and, if needed, translations of these documents. Appellate proceedings cause further delay in the enforcement and the duration of such procedure differ amongst Member States.⁷¹

⁶⁸ Also, during the conference on ‘Enhancing the efficiency of the Brussels Ibis Regulation’ of 10 November 2017, a remark was raised that *exequatur* has not been abolished in a number of recently enacted PIL instruments, e.g. the Regulation on matrimonial property regimes and the Regulation concerning succession. Additionally, the objection has been put forward that statistical data do not provide a reliable basis for the abolition of *exequatur*.

⁶⁹ Scott, *op. cit.*, p. 28.

⁷⁰ 2016 Commission’s Proposal.

⁷¹ During the conference, it was suggested that these appeals could be avoided which would reduce costs and enhance the expedience of the enforcement. In order to do so, the provisions concerning recognition and enforcement should require that both parties are to be involved in the proceedings at first instance and that it is up to the party against whom enforcement is sought to raise grounds of non-recognition or non-enforcement. The enforcement court should then work towards a possible settlement or at least towards the acceptance of enforcement. In relation to appeals, time limits should be set and the number of appeals to be brought should be

In general, the 2016 Commission's Proposal aims at abolishing *exequatur* in all enforcement proceedings, for all decisions covered under the scope of the Regulation. With the aim of making cross-border litigation concerning children more efficient, the Proposal suggests the abolition of *exequatur* and seeks to provide for a simple procedure in all decisions in matters of parental responsibility.⁷² The decision given by the authorities in one Member State will be enforceable in all Member States as if it were rendered there.⁷³

The manner in which *exequatur* is abolished in the Proposal resembles the procedure under the Brussels Ibis Regulation. Thus, there is no need to obtain a declaration of enforceability before enforcing the decision. The 2016 Commission's Proposal provides for the abolition of the declaration of enforceability (*exequatur*) in Articles 27(1) and 27(2) (recognition) and 30(1) (enforcement). However, a person opposing the enforcement or more generally any interested party, may apply for the procedure to refuse the recognition or enforcement of the decision. Also, it is possible to declare a decision on the rights of access to be provisionally enforceable, even though national law does not provide for such provisional enforceability (Article 30(2) of the Proposal).

5.1.1 Jurisdiction of local courts and the procedure for enforcement

Under the 2016 Commission's Proposal, the current regime regarding the enforcement of decisions will change. The application for enforcement would, pursuant to Article 32(1), be submitted to the competent court of the Member State of enforcement. This court then takes all necessary steps to ensure the enforcement of the decision, including the concrete measures to be applied, the adaptation of the decision in accordance with Article 33 (if necessary), and the instruction of the enforcement officer (Article 32(2)). No grounds for the refusal of recognition or enforcement may be examined at this stage according to Article 32(3), unless a procedure for the refusal of recognition is filed pursuant to Articles 39 and 41. Finally, if the decision is not enforced within six weeks after the enforcement proceedings were initiated, the court of the Member State of enforcement is obliged to inform the requesting Central Authority in the Member State of origin, or in the case where the proceedings were instituted without the assistance of the Central Authority, the applicant, of the delay and the reasons therefor.

If this Proposal is accepted, some Member States will need to enact legislation in order to implement this new enforcement regime, as Recital 35 of the Proposal suggests.

Article 29 of the Proposal modifies Article 27 of the Regulation. It deals with the competence of the court where a decision is invoked to stay proceedings for the recognition of a decision. In a similar vein, a new provision on the stay of enforcement proceedings is suggested in Article 36 of the Proposal. In Article 29 of the 2016 Commission's Proposal, the wording has been adjusted so as to incorporate the criticism expressed in the legal doctrine that the wording 'ordinary appeal' is unclear. According to the rephrased provision of Article 29(1) of the Proposal, the court may stay proceedings concerning recognition if the decision which is invoked is challenged in the Member State of origin.

limited, preferably to only one instance. Additionally, it is the court of enforcement which should order any provisional measures of protection until the enforcement would be obtained.

⁷² Recital 33 of the 2016 Commission's Proposal.

⁷³ *Ibid.*

Furthermore, the Commission's Proposal adds two new grounds for staying the proceedings in paragraphs (b)-(c) of Article 29. It states that a court can stay proceedings in the case of:

(b) an application having been submitted for a decision that there are no grounds for the refusal of recognition referred to in Articles 37 and 38 or for a decision that the recognition is to be refused on the basis of one of those grounds; or

(c) where a decision on parental responsibility, proceedings to modify the decision or for a new decision on the same subject-matter are pending in the Member State having jurisdiction over the substance of the matter under this Regulation.

This covers situations in which there is no appeal against a decision in the Member State of origin, but an application for (non-)refusal has been lodged in the Member State of the recognition invoking one of the grounds for the non-recognition of marriage-related decisions (Article 37 of the Proposal; Article 22 of the Regulation) and decisions relating to parental responsibilities (Article 38 of the Proposal; Article 23 of the Regulation). The wording 'may stay the proceedings' implies that the decision on a stay is discretionary. This is in contrast to the stay of enforcement under the new Article 36 of the Proposal. Under this provision, the stay is mandatory in the following cases:

- Where the enforceability of the decision is suspended in the Member State of origin,
- Where the grounds for the refusal of the enforcement under Article 40 are invoked, and
- Where 'due to temporary circumstances such as serious illness of the child, enforcement would put the best interests of the child at grave risks'. The enforcement may be resumed 'as soon as the obstacle ceases to exist' (Article 36 (2)).

Whereas Article 29 of the Proposal refers to 'the authority', Article 36 states that the court shall stay the proceedings upon an application of the party.

As to other aspects of the procedure, a new provision has been included in Article 33(1) and (3) of the Proposal on the adaptation of the decision. The provisions concerning the documents to be submitted for recognition (Article 28 of the Proposal; Article 37 of the Regulation) and those required for the application for enforcement (Article 34 of the Proposal; Article 45 of the Regulation) have also been adjusted.

5.1.2 Refusal of recognition and enforcement - Grounds for non-recognition/non-enforcement

The grounds for the refusal of recognition under the Regulation have largely been retained in the Proposal. Thus, the reasons for not recognising decisions in matrimonial matters are provided in Article 37 of the Proposal. They are identical to the grounds currently mentioned in Article 22 of the Regulation with some insignificant changes in the wording.

As to the grounds for non-recognition in matters of parental responsibility, a failure to provide for the opportunity for the child to be heard has been omitted, as already explained. Article 20 of the Proposal expressly provides for the opportunity for the child to express his/her views. The reason mentioned in Article 23(g) of the Regulation is also suggested to be removed from the list of grounds for non-recognition. It relates to the failure to comply with the procedure for the placement of a child in another Member State as a ground to refuse recognition.

Grounds for the refusal of recognition and enforcement are contained in Articles 37 relating to decisions in matrimonial matters, 38 and 40 of the 2016 Commission's Proposal. The latter two relate to grounds for non-recognition (Art. 38) and ground for refusal of enforcement of decisions in matters of parental responsibility (Art. 40). A party opposing the enforcement under Article 40 may invoke all grounds for non-recognition indicated in Article 38. However, only certain grounds in Article 38 may be invoked against the enforcement of a decision granting the rights of access and entailing the return of child rendered within the framework of the 'overriding mechanism' under Article 24(6). In addition to grounds listed in Article 38, there are two new grounds introduced in Article 40(2), as it will be detailed *infra*.

Except for the grounds relating to the 'hearing of the child' and non-compliance with the provisions on the placement of the child having been deleted, all other grounds currently provided in Articles 22 and 23 of the Regulation have been retained in Article 38 of the 2016 Proposal. Thus, the reason of the foreign judgment being 'manifestly' contrary to the public policy of the Member State of enforcement has been retained. The public policy exception as a ground for non-recognition should be invoked cautiously and restrictively, paying due regard to the connection with the forum State. It is to be expected that the public policy exception will not become more uniform from a European perspective, let alone be defined in any future Recast, as this has not been done either in any previous European instrument.

In the 2016 Commission's Proposal, the lack of the child being heard is no longer included as a separate ground for non-recognition. Instead, the right of the child to express his/her own view 'during the proceedings' has been included as a general rule in Article 20, as has already been explained, *supra*, under 3.4, '*Commission's Proposal*'. Given the discrepancies in the interpretation of the grounds for the non-recognition of decisions in the Member States, in particular in relation to the issue of the hearing of the child, it is understandable that no particular minimum age from which the child should be heard during the proceedings, has been suggested in the Proposal.

In view of these different approaches amongst Member States, it cannot be excluded that a failure to hear a child could be considered to amount to a serious violation of a basic procedural principle in the Member States where the decision is to be recognised. This is especially so when the child has reached a certain age and/or in a particular Member State can be considered to be sufficiently emotionally mature to express his/her views during the proceedings. It cannot be said with certainty whether or not such a violation may amount to invoking the exception of public policy to justify withholding the recognition of that decision in that Member State. A possible interpretation is that a violation of a fundamental principle as such is sufficient to qualify for the public policy exception.⁷⁴ The exclusion of the ground 'hearing of the child' could then be understood as preventing unjustifiable refusals of recognition or enforcement by easily relying on this reason. Accordingly, as a corollary, it cannot be excluded that if a child is not heard, this omission may fall under the (more) general public policy exception which has been preserved in the Proposal. However, it is unlikely that such an interpretation is reconcilable with a general requirement that the public policy exception

⁷⁴ The need to maintain the public policy exception was particularly stressed during the conference on 'Enhancing the Efficiency of the Brussels IIbis Regulation'. Since human rights are at play here, the best interests of the child need to be taken into account.

should be narrowly construed and that the list of grounds is exclusive. This is especially so considering that this ground – a failure to hear a child – is obviously omitted from the list of grounds to refuse the enforcement. In any case, the ‘hearing of the child’ would be a precondition for relying on the newly introduced ground in Article 40(2)(a) of the Proposal. The insertion in the Proposal of Article 20(1) that ‘the authorities of the Member States shall ensure that a child who is capable of forming his or her own views’ should be given an opportunity to express his/her own view is to be welcomed. This is an improvement because it also considers the capability and maturity of the child to express his/her own views, and may, in view of the foregoing, therefore be considered to be a sufficient procedural safeguard. A number of grounds may not be invoked as reasons for the *non-recognition* of a decision granting rights of access or entailing the return of the child. These are the following grounds: a violation of public policy, non-compliance with the requirement of ‘due process’ and a failure to give an opportunity to be heard to a person claiming an infringement of his/her parental responsibility rights (Art. 40(1) of the Proposal). Consequently, the only grounds on which the recognition of return of child decisions can be opposed under Article 38 are the ones mentioned under Article 38(d) and 38(e) of the 2016 Commission’s Proposal. These reasons are: the existence of an irreconcilable later decision given in the Member State of enforcement, or a decision given later in another Member State, or in the Member State of the habitual residence of the child, if such decisions fulfil the conditions for the recognition in the enforcement state.

As for the grounds and procedure for *refusing the enforcement* of decisions in matters of parental responsibility, they are contained in subsection 2 of Section 3 of the Proposal (Articles 40 to 47). As to the grounds, Article 40(1) refers to the reasons for non-recognition provided in Article 38(1) of the Proposal. Here again the grounds mentioned in points (a) to (c) of Article 38(1) may not be relied upon against a decision granting rights of access or entailing the return of the child. Accordingly, irreconcilable later judgements remain the reason under Article 38 on the basis of which the enforcement in these two cases may be refused.

Paragraphs 2 and 3 of Article 40 refer to the best interests of the child. As already briefly outlined *supra*, paragraph 2 provides for additional grounds for the refusal of recognition or enforcement, besides those set out in Article 38. Thus, a person against whom enforcement is sought may apply for non-enforcement where by virtue of a change of circumstances since the decision was given, the enforcement would be manifestly contrary to the public policy of the Member State of enforcement because one of the following grounds exists:

- (a) the child being of sufficient age and maturity now objects to such an extent that the enforcement would be manifestly incompatible with the best interests of the child;
- (b) other circumstances have changed to such an extent since the decision was given that its enforcement would now be manifestly incompatible with the best interests of the child.’

It follows that the two additional grounds (an objection by the child and changed circumstances) may be invoked only if the objection or the changed circumstances is so extensive that would render the enforcement of the decision manifestly incompatible with the best interest of the child to such extent that it would amount to a violation of public policy.

The wording of Article 40(3) may, at first glance, appear unclear. It states that in the case where the child objects to the enforcement according to point (a) of paragraph 2, ‘**before refusing enforcement** the competent authorities in the Member State of enforcement shall take the necessary steps to obtain the child's cooperation and **ensure enforcement** in accordance

with the best interests of the child' (*emphasis added*). For this reason, the explanation in Recital 37 is useful. It seems to imply that the enforcement should not be refused without a considerable effort to enforce the decision by taking 'all appropriate steps to prepare the child for the enforcement and obtain his or her cooperation'. The enforcement may be refused only when it would be incompatible with his/her best interests, due to strong objections of the child, or because of another change of circumstances which occurs after the decision was given. In other words, the competent authority will have to obtain the child's cooperation and carry out the enforcement whenever this is in the best interests of the child. The list of the grounds is exclusive.

5.1.3 Enforcement of decisions on the return of the child

The provision concerning jurisdiction and the procedure for the refusal of recognition is the same as the procedure for the refusal of enforcement in Articles 41 to 47 of the Proposal. When appropriate, common provisions of Sections 4 and 6, and Chapter VI apply analogously in proceedings for the refusal of recognition (Article 39). The same holds true with respect to the suggested unified scheme for the recognition and enforcement of decisions in Chapter IV.

In addition to the fact that a decision on the return of the child can be brought only within the context of the proceedings on the custody of the child, the enforcement of the decision on the return of the child has been suggested to be substantially revised in comparison to the enforcement regime under the current Regulation. Most importantly, the enforcement regime provided under the current Articles 41 and 42 of the Regulation is proposed to undergo considerable changes. In Section 4, the 2016 Commission's Proposal suggests a number of new common provisions, in particular on provisional measures including protective measures in Article 48, and return decisions given under the 1980 Hague Convention in Article 49.

Several provisions have remained virtually unchanged (Articles 24 to 26, and Article 29 of the current text, now contained in Articles 50 to 53). The provision in Article 38 on the absence of documents is suggested to be deleted.

The most important change relates to the enforcement of decisions on rights of access in Article 41 of the Regulation and to decisions on the return of the child in Article 42 of the Regulation. The method of enforcement without any possibility of opposing the recognition of judgements certified in accordance with the current provisions of Articles 41 and 42 has been abandoned. These provisions have caused many difficulties in the application and prove to be counterproductive as may also be deduced from relevant CJEU case law (*Zarraga*⁷⁵ and *Povse*⁷⁶).

Under the 2016 Commission's Proposal, return decisions are to be enforceable in the same manner as other decisions on parental responsibility. However, there are some notable exceptions with regard to the return orders issued within the 'overriding mechanism'. In particular, some of the grounds for non-recognition will not apply to the decision on the return of the child, as has been explained *supra*, under 5.1.2 *Refusal of recognition and enforcement – Grounds for non-recognition/non-enforcement*.

⁷⁵ CJEU Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2010] ECR I-14247.

⁷⁶ CJEU Case C-211/10 PPU *Povse v Alpage* [2010] ECR I-6673.

There is no exclusion of the applicability of these two grounds as reasons to oppose the enforcement of decisions granting rights of access or entailing the return of the child rendered within the overriding mechanism of Article 26(4) of the Proposal. As already explained, certain grounds – those contained in points (a)-(c) of Article 38(1) – are expressly excluded in second subparagraph of Article 40(1). Since the new grounds contained in Article 40(2) are not excluded, it follows that they may be relied upon to oppose the enforcement of all types of decisions in matters of parental responsibility, including those on to the access rights and on the return of the child. In order to avoid any doubts in that respect and to prevent possible distinct understanding, interpretation and application it is desirable to clarify this issue in the Recitals.

5.2 Appropriateness of the Proposal and Recommendations

It is to be met with approval that the Proposal does away with divided enforcement frameworks. Within that scheme, under the common provisions in Section 4, it specifies which decisions on provisional measures are governed by the enforcement regime (Article 48 of the Proposal) and specifies further that return decisions brought under the 1980 Hague Convention are also to be enforced in accordance with the consolidated system of enforcement (Article 49 of the Proposal). Such an approach of consolidating provisions on enforcement for all types of decisions in one common part (Chapter IV) is likely to enhance the understanding and applicability of the Regulation in practice. Thus, such a better structured scheme is appropriate. The same holds true for new provisions aimed at improving the efficiency of the enforcement of decisions, especially Article 32(4) of the Proposal (informing the applicant and/or other interested persons in case a decision has not been enforced within six weeks) and Article 33 on adaptations of a decision in the Member State of enforcement.

Exequatur is abolished, but the Proposal provides sufficient safeguards that the grounds for non-enforcement may be raised in the same procedure. Particularly important is a clarification that the grounds for refusal are to be raised and decided upon in one and the same procedure. The same holds true with respect to provisions on the stay of proceedings in Articles 29 and 36 of the Proposal. The grounds for the refusal of recognition and enforcement are predominantly the same or substantially similar to those in the Regulation. In that sense, the manner in which the *exequatur* is abolished is consistent with the Brussels Ibis Regulation, providing for sufficient safeguards and a balanced approach in protecting the interests of all parties.

On balance, there seem to be more compelling reasons pertaining to procedural efficiency, overall consistency with other European Regulations which concern the enforcement of judicial decisions, and pertaining to the interests of the child, which justify the abolition of *exequatur* rather than preserving it. If a party wishes to have judicial review of the enforcement take place, this will still be possible pursuant to Article 39 and 41 of the Proposal, thereby providing a judicial remedy.

However, neither the abolition of *exequatur* nor the provision of an *ex parte* procedural remedy pursuant to Article 39 and 41 will be sufficient to achieve a European judicial culture based on mutual trust which requires the development of procedural safeguards. It has been suggested that this can only be achieved by extensive training and meeting opportunities offered to members of national judiciaries. A common European judicial culture built on trust is created

not only by judicial dialogue but equally importantly by opportunities for meeting peers and being trained together.⁷⁷

Regrettably, the ‘overriding mechanism’ has not been abolished. As far as the grounds for refusal of enforcement are concerned, it seems likely that the reason mentioned in Article 38(1)(d) will result in multiple proceedings in different Member States. The grounds for the refusal of return orders have been expanded, provided that the two newly introduced grounds under Article 40(2) apply also to a decision granting rights of access or entailing the return of the child in within the ‘overriding mechanism’ of Article 26(4) of the 2016 Commission’s Proposal. As already explained, it is recommended to clarify this issue in the Recitals, for the sake of achieving a greater uniformity in understanding and applying a revised Regulation.

⁷⁷ Postulski, W. ‘Developing training and meeting opportunities for national judicial authorities’ Recasting the Brussels IIa Regulation Workshop 8 November 2016, p. 88. See: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU\(2016\)571383_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf).

6. Common Provisions

6.1 Commission’s Proposal - Provisional, including protective, measures (Article 48) and Decisions on the Return of the Child given under the 1980 Hague Convention (Article 49)

Article 48 of the Proposal relating to provisional measures has already been addressed and recommendations have been given, *supra*, under 2.6, ‘*Provisional, Including Protective, Measures (Article 12 Proposal; Article 20 Regulation)*’.

In addition to expressly providing that the enforcement includes decisions on provisional measures, the Proposal states that decisions on the return of the child under the 1980 Hague Convention are also to be enforced under the Regulation. Article 35 relating to the service of the certificate and the decision and Article 38(2) relating to a limitation of the grounds for refusing to enforce return orders rendered under the ‘overriding mechanism’ are thereby excluded. It reads as follows:

Article 49

Return decisions given under the 1980 Hague Convention

The provisions of this Chapter relating to decisions on matters of parental responsibility, with the exception of Article 35 and Article 38(2), shall apply accordingly to decisions given in a Member State and ordering the return of a child to another Member State pursuant to the 1980 Hague Convention which have to be enforced in a Member State other than the Member State where they were given.

6.2 Appropriateness of the Proposal and Recommendations

Both provisions are useful additions in clarifying the types of decisions falling within the enforcement scheme of the Regulation which are likely to further facilitate and improve the interpretation and application of the Regulation.

6.3 Preservation of the prohibition on reviewing the jurisdiction of the court of origin (Article 50 Proposal); Differences in the applicable law (Article 51); and a non-review as to substance (Article 52)

The Commission’s Proposal in Articles 50-52 shows no substantive changes as to the current provisions of Articles 24-52 of the Regulation. Cross-references have been adjusted to the new numbering, a ‘court’ has been changed to an ‘authority’ and a ‘judgment’ into a ‘decision’. The Explanatory Memorandum of the 2016 Commission’s Proposal demonstrates nothing new in respect of Article 24, except for the change of ‘court’ to ‘authority’ and references to the numbering of the provisions. In our view, there is no valid reason to change this important rule either. No suggestions have been made in legal doctrine relating to the prohibition on reviewing the jurisdiction of the court of origin as laid down in Article 24 of the Regulation, nor do the National Reports demonstrate much enthusiasm for change. It is clear that provisions like these need to be included in the Regulation, if in the context of judicial cooperation the aim is to facilitate the efficient resolution of family law matters for citizens in Europe. The Impact

Assessment notes that decisions relating to parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement.⁷⁸ However, this is a problem which is not related to provisions being unclear, which leave little room for reviewing. The reason rather lies in the different application of these provisions by courts in the Member States.

Considering that new paragraphs are introduced in Articles 28(2) (Article 37 of the Regulation) and 34(2) and (3) (Article 45 of the Regulation) relating to, *inter alia*, the possibility to require translations in the Member State of enforcement, Article 38 of the Regulation has become redundant. Consequently, the Proposal suggests deleting it.

6.4 Commission's Proposal: Certificates (Articles 53-54)

The conditions for issuing certificates in all cases falling within the substantive scope of application are suggested to be regulated in a consolidated provision of Article 53 of the Proposal:

- certificates concerning decisions in matrimonial matters in paragraph 1 (Annex I);
- certificates concerning decisions in matters of parental responsibility in paragraph 2 (Annex II);

Paragraphs 3, 4 and 7 contain common provisions on the conditions and other requirements for issuing a certificate in both types of cases (matrimonial matters and parental responsibility). Paragraph 3 includes a new provision stating that the certificate shall contain relevant information under recoverable costs of proceedings and the calculation of interest.

Provisions specific to parental responsibility are contained in paragraphs 5 and 6. The former provision revises the requirement of hearing the child as a condition for issuing certificates under the current Articles 41 and 42 of the Regulation. Following the Proposal, the certificate, in a case of parental responsibility, shall be issued 'only if also the child was given a *genuine and effective* opportunity to express his views in accordance with Article 20' (emphasis added). Accordingly, the same criteria in that respect (hearing the child) will have to be applied in all cases of parental responsibility, so that there will be no specific provisions that are applicable in cases of access rights and child abduction. The conditions provided in paragraph 4 differ to a certain extent from the grounds mentioned in Articles 41 and 42 of the Regulation. The requirement that the child was given an opportunity to be heard in Articles 41(2)(c) and 42(2)(a) has been rephrased in a separate paragraph 5 in the Proposal, as has just been explained. Thus, as to the conditions to issue certificates on the return of the child and access rights, the requirement that the child is to be heard and that the parties are given an opportunity to be heard, are suggested to be deleted. The reference is thereby made to Article 20, a separate provision on the right of the child to express his/her views.

The other two conditions have been retained, thus it is necessary that all parties are given an opportunity to be heard and that 'due process' requirements are met. As to the latter, the certificate concerning a decision given in default may be given if the person was served with the document instituting the proceedings in sufficient time and in such a manner so as to

⁷⁸ Impact Assessment, p. 30.

be in a position to arrange for his/her defence. This requirement does not have to be complied with if it is established that a person accepted a decision unequivocally.

Paragraph 6 specifically applies to issuing certificates in the so-called ‘overriding mechanism’ procedure. It revises Article 42 of the Regulation so as to incorporate the changes suggested in paragraphs 2-5 of Article 53 of the Proposal. In fact, the conditions mentioned in Article 42 of the Regulation have been reduced to the requirement that the judge is to take into consideration the reasons for and evidence underlying a previous decision on non-return. Thus, the condition that the judge needs to take the reasons for and evidence underlying the previous decision on non-return into consideration has been retained with minor adjustments in the wording.

As for the provisions on the language of the certificate, as well as the provisions of Article 31 paragraph 3 of the Regulation, the Proposal suggests that these be deleted. According to this latter provision, the certificate is to be issued *ex officio* when the judgement becomes enforceable and the rights of access involve a cross-border situation at the time of the delivery of the judgement. In case the situation acquires a cross-border character at a later point, the certificate is to be issued at the request of one of the parties.⁷⁹

6.4.1 *Rectification and withdrawal of the certificate*

In its Proposal, the Commission added the following text to the new Article 54:

1. *The authority of origin shall, upon application, rectify the certificate where, due to a material error, there is a discrepancy between the decision and the certificate.*
2. *The authority of origin shall, upon application, withdraw the certificate where it was clearly wrongly granted, having regard to the requirements laid down in this Regulation.*⁸⁰

Recital 39 was amended by adding the following text: *[the certificate] should be withdrawn where it was clearly wrongly granted, having regard to the requirements laid down in this Regulation.*⁸¹

Thirdly, the Commission added a new Article 56 with the following text:

1. *The competent authority of the Member State of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex III. The certificate shall contain a summary of the enforceable obligation recorded in the authentic instrument or contained in the agreement between the parties.*

⁷⁹ See Explanatory Memorandum, p. 15: ‘As it is already the case under the current Regulation, the proposal also contains a series of standard certificates which aim at facilitating the recognition or enforcement of the foreign decision in the absence of the *exequatur* procedure. These certificates will facilitate the enforcement of the decision by the competent authorities and reduce the need for a translation of the decision.’

⁸⁰ 2016 Commission’s Proposal, Article 54.

⁸¹ *Ibid.*, Recital 39.

2. *The certificate shall be completed in the language of the authentic instrument or agreement.*
3. *Article 54 shall apply accordingly to the rectification and withdrawal of the certificate.*⁸²

6.5 Appropriateness of the Proposal and Recommendations

Even though the suggested changes may appear extensive, Articles 53 and 54 merely incorporate amendments consequential to the abolishing of the exequatur and dealing with all aspects of recognition and enforcement in one consolidated part. Considering that there will not be a ‘dual’ system of enforcement – one with and another without exequatur – it is both necessary and, from a practical point of view, convenient to consolidate provisions on the certificates to be issued in a Member State of origin. These provisions represent substantially revised and adapted Articles 41 and 42 of the Regulation.

⁸² *Ibid.*, Article 56.

7. Cooperation between Central Authorities

7.1 Designation of Central Authorities

7.1.1 Commission's proposal (Article 60) and Recommendations

The Commission suggests no alteration to the current Article 53 of the Regulation. Yet, it would be advisable to adjust this provision in order to ensure the synergy in the sphere of cooperation between the Regulation and the Hague Conventions – the 1980 Child Abduction Convention and the 1996 Convention. Currently a number of Member States have designated different bodies for the role of a Central Authority under the Regulation and the said Conventions. Considering the overlapping substantive scope of application of these legal instruments and mutual coordination of their provisions, the designation of the same institutions as Central Authorities in all of them would ensure the better functioning of the system as a whole⁸³.

7.2 Cooperation between Central Authorities in cases relating to parental responsibility

Even though the Impact Assessment reports that the involvement of the Central Authorities was considered 'to have contributed to a smoother handling of cases related to matters of parental responsibility',⁸⁴ criticism has been voiced on a number of issues. The cooperation between Central Authorities in matters of parental responsibility has been the subject of many suggestions for improvement. Common to these ideas is that the Regulation does not give sufficient guidance as to what is to be expected from the Central Authorities. Generally, the provisions in Chapter IV are drafted in very broad terms and have not been sufficiently effective. Notably, they are less detailed than the cooperation provisions of the 1996 Hague Convention. The Convention's provisions are replaced by those of the Regulation for children having their habitual residence in a EU Member State,⁸⁵ whilst remaining applicable to children whose habitual residence is in a non-EU Contracting State.

Particular concerns have been expressed regarding, *inter alia*, the interpretation of Article 55, especially to the failure to handle the applications for information in a timely manner, as well as to the issue of translation of the information exchanged. Moreover, significant differences exist between Member States with regard to the assistance provided by Central Authorities to holders of parental responsibility who are seeking the enforcement of judgments on the access rights.⁸⁶

⁸³ This amendment was kindly proposed by one of the speakers at the conference on 'Enhancing the Efficiency of the Brussels IIbis Regulation' of 10 November, 2017.

⁸⁴ Impact Assessment, p. 41.

⁸⁵ Corneloup, S., *et al.*, 'Children On the Move: A Private International Law Perspective', Study for the JURI committee', Directorate General for Internal Policies of the Union Policy Department for Citizens' Rights and Constitutional Affairs PE 583.158- June 2017, p. 29; Art. 61.

⁸⁶ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Brussels, 15.4.2014 COM(2014) 225 final, p. 11; Župan, M., 'Chapter 10 Cooperation of Central Authorities', in Honorati, C. (ed.) *Jurisdiction in matrimonial matters, parental*

The involvement of Central Authorities in fostering mediation also seems to be insufficient under the Regulation. Currently only Article 55 mentions mediation, which is insufficient legal framework to increase the use of this dispute settlement mechanism.⁸⁷ Finally, the Central Authorities seemingly lack involvement in the facilitation of the safe return of the child.

The Commission notes that the efficiency of the provisions on cooperation could be improved by drawing inspiration from other family law instruments, in particular the Maintenance Regulation.⁸⁸ Another suggested way of improving the efficiency of the Regulation's provisions is by developing guidelines for good practices in line with the European Judicial Network guide for cases of child abduction.⁸⁹ Moreover, the Commission will further contribute to building trust among Member States by requiring child protection bodies to enhance understanding of the cross-border context and improve the acceptance of decisions taken in another Member State.

7.2.1 Commission's proposal (Article 63)

The Proposal suggests some important changes which are aimed at expanding the duties of the Central Authorities and enhancing the efficiency of cooperation process.

The Commission states in the Proposal:

'[t]he cooperation between Central Authorities in specific cases on parental responsibility, contained in Article 55, is essential to support effectively parents and children involved in cross-border proceedings relating to child matters. A problem observed by all stakeholders, including Member States, is the unclear drafting of the article setting out the assistance to be provided by Central Authorities in specific cases on parental responsibility. This has led to delays which were detrimental to children's best interests. According to the results of the consultation, the article does not constitute a sufficient legal basis for national authorities in some Member States to take action because their national law would require a more explicit autonomous legal basis in the Regulation'.⁹⁰

The newly proposed Article 63 reads as follows:

responsibility and abduction proceedings. A Handbook on the Application of Brussels IIa Regulation in National Courts (1st edn, Giappichelli and Peter Lang 2017).

⁸⁷ Carpaneto, L. 'On the Recast of the Brussels II-bis Regulation regime on Parental Responsibility: few Proposals de jure condendo' in: Queirolo, I., and Heiderhoff, B., *Party Autonomy in European Private (and) International Law- Tome I* (Aracne 2015) p. 278.

⁸⁸ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

⁸⁹ European Judicial Network Guide to best practices and common minimum standards.

⁹⁰ 2016 Commission's Proposal.

Article 63 of the 2016 Commission's Proposal (Art. 55 of the Regulation))

Cooperation on in specific cases relating to parental responsibility

1. The Central Authorities shall, upon request from a Central Authority of another Member State or from an authority, cooperate in specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps to:

(a) provide, on the request of the Central Authority of another Member State, assistance in discovering the whereabouts of a child where it appears that the child may be present within the territory of the requested Member State and the determination of the whereabouts of the child is necessary for carrying out a request under this Regulation;

(b) collect and exchange information under Article 64;

(c) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions in their territory, in particular concerning rights of access and the return of the child;

(d) facilitate communications between authorities, in particular for the application of Article 14, Article 25(1)(a), Article 26(2) and the second subparagraph of Article 26(4);

(e) provide such information and assistance as is needed by authorities to apply Article 65; and

(f) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end; and

(g) ensure that where they initiate or facilitate the institution of court proceedings for the return of children under the 1980 Hague Convention, the file prepared in view of such proceedings, save where exceptional circumstances make this impossible, is complete within six weeks.

2. Requests pursuant to points (c) and (f) of paragraph 1 may also be made by holders of parental responsibility.

3. The Central Authorities shall, within their Member State, transmit the information referred to in Articles 63 and 64 to the competent authorities, including the authorities competent for service of documents and for enforcement of a decision, as the case may be. Any authority to which information has been transmitted pursuant to Articles 63 and 64 may use it for the purposes of this Regulation.

4. Notification of the data subject of the transmission of all or part of the information collected shall take place in accordance with the national law of the requested Member State. Where there is a risk that it may prejudice the effective carrying out of the request under this Regulation for which the information was transmitted, such notification may be deferred until the request has been carried out.

The new Article 63 (current Article 55 of the Regulation) illustrates that the authorities have a new obligation to take all appropriate steps to provide assistance in discovering the whereabouts of a child. Such assistance will be provided when it appears that the child may be present within

the territory of the requested Member State and the determination of the whereabouts of the child is necessary for carrying out a request under the Regulation.

The introduction of a time frame, included in an added paragraph (g) is new in Article 63. According to this addition, Central Authorities are to provide assistance with initiating or facilitating the institution of court proceedings for the return of children under the 1980 Hague Convention. Thus, they should ensure that the file prepared with a view to such proceedings is completed within six weeks, save where exceptional circumstances make this impossible. This time frame is in line with the practice of those Member States which are the most expeditious in dealing with return cases under the 1980 Hague Convention.

The Regulation permits holders of parental responsibility to submit a request to Central Authorities under Article 55 on basically any matter which falls within the competence of the Central Authorities. In the Proposal the wording ‘holders of parental responsibility’ are crossed out in the very first sentence of this provision. Thus, the 2016 Commission’s Proposal now limits such request to only particular cases which are indicated in new Article 63(1)(c) and (1)(f). This is so stated in Article 63(2) of the Proposal. Consequently, it implies that only Central Authorities can directly submit requests to Central Authorities in another Member States on all matters, whereas holders of parental responsibility are limited to specific cases only.

7.2.2 Appropriateness of the Proposal and Recommendations

The suggested improvements are to be welcomed as they at least to some extent meet the concerns expressed as to the efficacy of current provisions of the Regulation. This provision is more specific than the more general formulated tasks of the Central Authorities under the Regulation.

The addition of a new time frame along with time limits set for the proceedings before the first instance court (6 weeks) and the appeal stage (6 weeks) helps to better achieve the goals of the 1980 Convention on Child Abduction. On the one hand, it is leaving less room for differences between Central Authorities by creating this obligation for the Central Authorities, which on the other hand, might possibly be difficult to enforce.⁹¹ However, it has been questioned how to interpret the new time frame paragraph. Especially unclear is when the time limit starts to run and which moment determines the completion of the obligation. In a similar vein, it is unclear what is to be understood by ‘file prepared’. Kruger’s suggestion to add the wording ‘and submitted to the court’ in paragraph (g)⁹² would add some clarity to the proposed provision.

Also, we concur with the Kruger’s suggestion to add two new subparagraphs in paragraph 1 of Article 63 (Art. 55 of the Regulation) in order to expand the scope of cooperation of the Central Authorities in this regard as follows: ‘...provide assistance, either through Regulation 1206/2001 or through other means, to ensure that the child has a real opportunity to be heard when the child resides in a Member State other than the Member State in which the

⁹¹ Kruger T., ‘Enhancing Cross-Border Cooperation’, Recasting the Brussels IIa Regulation Workshop 8 November 2016, p. 37.

⁹² *Ibid.*, p. 43.

proceedings are conducted’ and ‘gather information on child protection authorities in its Member State and make such information available’.⁹³ It could further be suggested to expand the involvement of the Central Authorities in facilitating the safe return of the child. This could be reflected in the amended Article 11(4) or Article 55 of the Regulation. Namely, specific obligations between Central Authorities such as taking responsibility for safe accommodation for the returning parent and child or the removal of criminal sanctions against the returning parent could be introduced.⁹⁴

Although the obligations of the Central Authorities are already expanded in the Proposal and therefore it might be difficult to meet them due to the lack of staff and/or financial resources, this now seems to be resolved by a newly proposed Article 61 which sets an obligation to the Member States to ensure that the Central Authorities have adequate financial and human resources. Yet, the enforcement of such obligation might turn to be troublesome. This is a main issue and it remains to be seen what impact this obligation will have on the actual funding and staff.

As for the newly imposed limitation of possible requests from holders of parental responsibility to the Central Authorities, it could be advisable to expand the list of these specific cases by adding cases regarding the location of the child (point (a) of paragraph 1 of the Article 63 of the 2016 Commission’s Proposal (Art. 55 of the Regulation).

Also, the Proposal does not clarify the involvement of the Central Authorities in the promotion of mediation, although that is desirable. There is a specific body within the EU which deals with mediation in Child Abduction cases, namely the European Parliament Mediator for International Parental Child Abduction.⁹⁵ In order to have recourse to the European Mediator, specific reference to it should be made within the new version of the Regulation. This would be especially welcome since the scope of Directive 2008/52 does not cover matters of parental responsibility.⁹⁶ A sensible idea was raised that the current Article 11(3) of the Regulation could also provide a reference to mediation.⁹⁷

Finally, what has not been specified in the Commission’s Proposal is that judges have a duty to cooperate with Central Authorities through the European Judicial Network in order to enhance the efficient application of the Regulation. It would be useful to make clear in the revised Regulation, presumably in a Recital, that judges are under the obligation to cooperate with the Central Authorities with the purpose of achieving this aim.

⁹³ *Ibid.*, p. 44.

⁹⁴ Carpaneto, On the Recast of the Brussels II-bis Regulation regime on Parental Responsibility: few Proposals de jure condendo, *op. cit.*, p. 285.

⁹⁵ Established in 1987 by the EU Parliament, for more information see:

<http://www.europarl.europa.eu/aboutparliament/en/000c205a13/Child-abduction-mediator.html>.

⁹⁶ Carpaneto, On the Recast of the Brussels II-bis Regulation regime on Parental Responsibility: few Proposals de jure condendo, *op. cit.*, p. 278.

⁹⁷ On this issue, see Lowe, N., Overall, M., Nicholls, M., *The New Brussels II Regulation, A supplement to International Movement of Children* (London 2005) p. 46 ‘it is a pity that this Article [11(3)], laudable as it is, makes no provision for the inevitable delay in those cases in which the parties might be able to resolve their differences by mediation. It may be that the courts will, where there is a real hope that discussion or mediation will be better for the children, decide that the circumstances are ‘exceptional’.’

7.3 Cooperation when collecting and exchanging information

7.3.1 Commission's proposal (Article 64)

The suggested newly added Article 64 of the 2016 Commission's Proposal sets out rules for sufficient cooperation when Central Authorities fulfil their task, laid down in Article 63(b) of the Proposal, to collect and exchange. The Regulation currently only briefly states the very general formulated obligation of the Central Authorities to collect and exchange information on the named aspects in its Article 55(a).

It follows from Recital 45 that where a request with supporting reasons for a report on the situation of the child, on any ongoing procedures or on decisions taken concerning the child is made, the competent authorities of the requested Member State should carry out such a request without applying any further requirements which may exist under their national law. The request should contain in particular a description of the proceedings for which the information is needed and the factual situation that gave rise to those proceedings.

Although Article 64 of the Proposal does not extend the scope of information which can be provided in a requested report, as currently listed in Article 55(a), Recital 46 of the Proposal clarifies that courts and authorities can also request social reports on a parent or siblings of the child if these are of relevance in child-related proceedings. As the Commission's Proposal states, the new Article 64 imposes an autonomous obligation created by the Regulation to provide a social report, when a social report is requested.

Article 64(b) of the Proposal also attributes Central Authorities with the option of requesting the competent authority of its Member State to consider the need to take measures for the protection of the person or property of the child.

Furthermore, the new paragraph 5 of Article 64 of the Proposal indicates that the authorities of a Member State where the child is not habitually resident shall gather information or evidence at the request of a person residing in that Member State who is seeking to obtain or to maintain access to the child, or at the request of a Central Authority of another Member State. According to the new, rather difficult to read, Recital 47 of the Proposal this person can also be a person having *de facto* family ties with the child, when this person is residing in one Member State and wants to commence access proceedings in another Member State where the child is habitually resident. This option follows from the case law of the European Court of Human Rights relating to Article 8 of the European Convention on Human Rights.

Paragraph 6 of the new Article 64 of the Proposal sets an obligation to transmit the requested information to the Central Authority no later than two months following the receipt of the request, except where exceptional circumstances make this impossible.

Another amendment to current provisions is rather technical, yet practically essential. The suggested Article 64(4) of the 2016 Commission's Proposal stipulates that the request is to be accompanied by a translation into the language of the requested State or one of the official languages of the requested Member State or any other language that the requested Member State expressly accepts. The provision of Article 81(1)(c) of the Proposal sets an obligation to the Member States to inform the Commission about the languages accepted for such translations.

7.3.2 Appropriateness of the Proposal and Recommendations

The efforts to regulate the procedure of collection and exchange of information are to be welcomed as currently no guidelines are provided as to the practical implementation of Article 55(a) of the Regulation. Article 64 of the Proposal provides much more detail of what is expected in this respect from the Central Authorities. Subsequently, it provides more clarity than the current Article 55, whereas the lack of clarity has been identified in the literature as one of the major current problems. The new rule on 64(4) of the Proposal regarding translations adds a welcome clarification that the requests referred to in paragraphs 1 to 3 of Article 64 are to be accompanied by translations to one of the languages the requested Member State accepts. Together with Article 81(1)(c) of the Proposal these provisions may well enhance efficiency in terms of time whenever the Member States will inform the Commission on languages in which they accept the documents. As French or English can be expected to be accepted in most of the Member States, this may facilitate the cooperation and reduce its costs. Even though the general obligation regarding communication to the Central Authorities already existed under the Regulation, extension of the obligation in Article 81(1)(c) of the Proposal is an improvement. It is expected that the Member States will comply with this obligation.

However, some further amendments to Article 64 of the Proposal can also be suggested. First of all, the new Article 64 of the 2016 Commission's Proposal does not impose an obligation. It merely stipulates that upon a request the Central Authority 'may' provide a report. It would be recommendable to replace the word 'may' with 'shall' in order to ensure that there can be no refusals of requests for cooperation due to the impression that the provision of information is at the discretion of the requested authority.

As regards the newly set time frame of two months, the moment when this period starts running should be clarified⁹⁸. As in practice many incomplete applications are submitted, it should therefore be specified whether the time starts running after the first application is submitted or only after a complete request has been filed. Although the latter would be more sensible, it can also cause considerable delays.

Moreover, according to Article 64(6) of the Proposal the set time frame can be deviated from in exceptional circumstances. It is rather unclear what is to be understood under these exceptional circumstances. This may well lead to distinct interpretations amongst the Central Authorities in EU Member States. In cases when human resources or time are lacking, they may feel the urge to give 'exceptional circumstances' a broader meaning than the Commission might have expected. Presumably, CJEU case law will have to bring some clarity as to what is the scope of these exceptional circumstances.

On the other hand, in some cases, two months can be too long to ensure the protection of the best interests of the child. Kruger suggests adding to Article 64(6) of the Proposal the possibility of a requesting authority to intimate that the case is urgent and the obligation of the requested authority to respect such a request.⁹⁹ Alternatively, a different (shorter) time frame could be set for urgent cases, though this could make the whole system too complex. However,

⁹⁸ This amendment was kindly proposed by one of the speakers at the conference on 'Enhancing the Efficiency of the Brussels IIbis Regulation' of 10 November, 2017.

⁹⁹ Kruger, *op. cit.*, p. 44.

there is no clear criteria on when a case is ‘urgent’. To this end, if a provision on urgent cases would be imposed, there would also be a need to indicate circumstances which would be relevant in determining the meaning of urgent cases.

7.4 Placement of a child in another Member State

7.4.1 Commission’s proposal (Article 65)

The new Article 65 of the Proposal (Art. 56 of the Regulation) clarifies the procedure for placing a child with a foster family or in an institution abroad and aims to ensure that such requests are dealt with quickly. It states:

‘Central Authorities which have an obligation to assist courts and authorities in arranging cross-border placements have regularly reported that sometimes it takes several months until it is established whether consent is required in a particular case. If consent is required, the consultation procedure as such has to follow and is reported to be equally lengthy as there is no deadline for requested authorities to reply. As a result, in practice many requesting authorities order the placement and send the child to the receiving State while the consultation procedure is still pending or even at the moment when is initiated because they consider the placement to be urgent and are aware of the length of the proceedings. Receiving States have therefore complained that children have often already been placed before consent has been given, leaving the children in a situation of legal uncertainty.’¹⁰⁰

What has been proposed is a general and autonomous ‘consent’ procedure which should replace the current ‘consultation’ process. It is seemingly deemed to impose a stricter obligation, as the wording suggests. It is also stipulated under paragraph 1 of Article 65 of the Proposal that the consent should include a report on the child, together with the reasons for the proposed placement or provision of care.

Other amendments are related to the time frame set and to the translations required. As in 64, paragraph 4 of Article 65 (Article 56 of the Regulation) sets an obligation to transmit the decision granting or refusing consent to the requesting Central Authority no later than two months following the receipt of the request, except where exceptional circumstances make this impossible. As regards translations, the rule in paragraph 2 of Article 65 also reflects the above-mentioned wording of Article 64(4) of the Proposal.

7.4.2 Appropriateness of the Proposal and Recommendations

First of all, the very term ‘placement of a child’ and ‘foster family or institution’ has not been defined in the new Article 65 of the Proposal (Art. 56 of the Regulation). The Report on the Study on the assessment of the Regulation showed that concerns were expressed about the lack of a clear definition of the ‘placement of a child’, which accordingly affects the clarity of the

¹⁰⁰ *Ibid.*, p. 4.

scope of Article 56 of the Regulation.¹⁰¹ It has been suggested to substitute the term ‘placement of a child’ with a more comprehensive ‘alternative care’ – i.e. an alternative to parental care which can be ordered by an administrative or judicial authority. This would include a foster home, a residential home or other types of arrangements to provide a child with support and care.¹⁰²

As one of the goals is to specify who can ask what assistance and under which conditions, the proposed wording of Article 65 does not make it clear enough as to who the requesting state is and who should ask who for consent.¹⁰³ It is unclear in which cases the receiving State needs to give its consent, and which documents have to be submitted.¹⁰⁴ It is, however, very welcomed that the content of the request for consent is specified in paragraph 1 of the Article in question, which indicates a need to include a report on the child and the reasons for the proposed placement or provision of care.

The newly introduced time frame of two months to provide with a decision on whether the consent is given is to be welcomed as it may enhance the effectiveness of this procedure in terms of time.¹⁰⁵ The deadline for the communication of the consent indeed brings some clarity for the requesting subjects, yet it is not specified when such period starts running. It could be clarified that the period of 8 weeks starts running after the submission of a request with all the accompanying documents (i.e. a complete request).

On the other hand, two months might be too long to wait, as, what practice showed, some placements of children are already ordered at the very time of initiation of the consultation procedure as it is simply too lengthy. It could therefore be suggested to shorten the time frame of two months, even if in some cases it would not be possible to ensure that the deadline is met. Moreover, as with Article 64, the meaning of exceptional circumstances stipulated in paragraph 4 of Article 65 is also too vague and may be subjected to different interpretations.

From a children’s rights perspective, Recital 51 is to be supported, which states that any long-term placement of a child abroad should be in accordance with Article 24(3) of the Charter of Fundamental Rights of the EU and with the United Nations Convention on the Rights of the Child. In particular, Member States (including Central Authorities) should pay due regard to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background. This is an important recognition of the importance of children’s rights.¹⁰⁶

As noted above (under 5.1.2 *Refusal of recognition and enforcement – Grounds for non-recognition/non-enforcement*), the non-observance of the procedure laid down in Article 65 of the Proposal (Art. 56 of the Regulation) currently under the Regulation amounts to a ground for the non-recognition of the judgment concerning the placement of a child in institutional care or

¹⁰¹ Impact Assessment, p. 98; see also Carpaneto, L., ‘Cross-border placement of children in the European Union’ (Directorate General for Internal Policies Policy Department C: Citizens’ Rights And Constitutional Affairs, European Union, 2016) available at: <http://www.europarl.europa.eu/supporting-analyses>, p. 26.

¹⁰² Miranda, F., ‘Revision with respect to the cross-border placement of children’, (2015) 1 NIPR, p. 42.

¹⁰³ Fridrich, L., ‘The experience of a National Central Authority’, Recasting the Brussels IIa Regulation Workshop 8 November 2016, p 50.

¹⁰⁴ http://ec.europa.eu/justice/civil/files/family-matters/brussels2_factsheet_en.pdf, p. 7.

¹⁰⁵ Lamont, R., ‘Care proceedings with a European dimension under Brussels IIa: jurisdiction, mutual trust and the best interest of the child’ (2016) 28 1 Child and Family Law Quarterly, p. 81.

¹⁰⁶ Miranda, F., *op. cit.*, p. 40.

with a foster family and where such placement is to take place in another Member State. However, the Proposal omits the latter ground for the non-recognition in Article 38. As Article 65(3) of the Proposal indicates that the decision on placement referred to in paragraph 1 may be given in the requesting State only if the competent authority of the requested Member State has consented to the placement (as Article 65 requires), the consequences of the failure to comply with this provision are no longer clear under the Proposal. Most likely is the EU legislator motivated by the endeavour to enhance mutual trust amongst the Member State and further endorse the principle of mutual recognition, but this is by no means certain and the reason of deleting the said ground for the non-recognition is therefore unclear.

7.5 Working method relating to the placement of a child in another Member State

7.5.1 Commission's proposal (Article 66 Proposal; Article 57 Regulation)

The Commission does not suggest any substantial changes to the current Article 57 of the Regulation. Only technical and systematic changes to the provisions of the Regulation are proposed. However, some suggestions have been made regarding paragraphs (3) and (4) of Article 66 that regulates the costs incurred by the Central Authorities, as addressed below.

7.5.2 Recommendations

The main concern is that the Brussels IIbis does not expressly tackle the costs related to the cross-border placement of children among EU State Members. The only reference to costs incurred by the Central Authorities is in current Article 57. This provision states that the assistance that the Central Authorities provide in matters regarding cooperation in cases specific to parental responsibility shall be free of charge and that each Central Authority shall bear its own costs.

It is claimed that there might be situations in which some flexibility or a discretion to agree differently on the costs would be useful.¹⁰⁷ For example, Central Authorities could be allowed to require requesting other states to pay reasonable charges for services such as locating the child or delivering information or certificates. Thus, the suggestion that has been made is to add to the rule on costs that Central Authorities are free to agree differently on how to divide the costs.¹⁰⁸ Therefore, the default rule should be applied only when there is no other agreement.

Moreover, the representatives of the Central Authorities raised concerns that it is not always clear which Central Authority is in charge of and, accordingly, has to bear the costs of translations of the documents, if such are required (e.g. under the return procedures or the transfer of jurisdiction under Article 15). It was suggested to be included in the Regulation, that the receiving Central Authority should always in principle be responsible for the translations and should bear the costs incurred in connection with it. Indeed, the receiving Central Authority

¹⁰⁷ Kruger, *op. cit.*, p 37; also Carpaneto L., 'Cross-border placement of children in the European Union', Study for the Committee on Legal Affairs of the European Parliament, 2016 (available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556945/IPOL_STU\(2016\)556945_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556945/IPOL_STU(2016)556945_EN.pdf)) p 28-29.

¹⁰⁸ Kruger, *op. cit.*, p. 37-38.

will potentially make use of these documents and avoid unnecessary translations should the documents not be needed or the language of the documents is known to the employees of the authority. In this regard, this suggestion has not been reflected in the Proposal according to which both in Article 64(4) and in Article 65(2) the documents are to be translated into the language of the receiving Member State. However, Article 81(1)(c) of the Proposal at least partially rectifies this as the Member States are obliged to inform the Commission about the languages (other than official languages) in which the documents are accepted.

8. General and Final Provisions

Amongst these provisions there are several which concern the distribution of powers amongst EU legislative institutions, as well as new provisions on the translation of documents and adjustments in defining the relationship between the Regulation and the 1980 and 1996 Hague Conventions.

Amongst the final provisions, Article 78 of the Proposal reads as follows:

Article 64 78

Transitional provisions

1. ~~The provisions of~~ This Regulation shall apply only to legal proceedings instituted, to documents **authentic instruments** formally drawn up or registered as ~~authentic instruments~~ and to agreements approved or concluded ~~between the parties~~ **on or after its [the date of application of this Regulation]** in accordance with ~~Article 72.~~
2. ~~Regulation (EC) No 2201/2003 shall continue to apply to decisions given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements approved or concluded before [the date of application of this Regulation] which fall within the scope of that Regulation.~~
2. ~~Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.~~
3. ~~Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.~~
4. ~~Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.~~

Article 78 of the Proposal is most welcome as it replaces the unclearly drafted and highly problematic Article 64 of the Regulation relating to transitional provisions. Article 78 of the Proposal is obviously drafted along the lines of Article 66 of the Brussels Ibis Regulation. It clearly links the applicability of the revised Regulation to the moment of instituting legal proceedings, i.e., the moment of composing or registering authentic instruments or approving agreements between the parties. The Brussels Ibis Regulation continues to apply to decisions given in legal proceedings instituted before the date of application of the revised Regulation.

PART II: Matrimonial Matters

Recommendations to Improve Rules on Jurisdiction in Matrimonial Matters

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1. Introductory remarks

Part II of the Recommendation deals with matrimonial matters. Few important changes have been included in the Proposal in comparison with Part I (parental responsibility issues). The most relevant novelty is the new Article 6 of the Proposal, which integrates the content of Articles 6 and 7 of the Brussels IIbis Regulation into one single disposition. Terminological differences can also be found. For example, the Proposal refers to ‘authorities’ and ‘decisions’, while the Brussels IIbis Regulation refers to ‘courts’ and ‘judgments’. Nevertheless, we are of the opinion that the Proposal or a future version of the Regulation should take into account the proposed recommendations below.

2. Choice of court

The possibility for spouses to choose the competent court in cases of a marital breakdown is neither allowed in the Regulation Brussels II nor in the Brussels IIbis Regulation. The same holds true for the Proposal. Choice of court agreements were only foreseen in the 2006 Proposal, in which Article 3 allowed for a limited choice of court by the parties: spouses were allowed to choose any of the grounds of jurisdiction contained in Article 3 and two additional forums – the last common habitual residence of the spouses for a period of three years and, in the UK and Ireland, the UK or Irish nationality or domicile of the applicant – were included. However, the 2006 Proposal was rejected.

Despite the fact that, at the moment, the inclusion of choice of court agreements does not seem to be feasible given the necessary unanimity between the Member States to adopt and/or amend a family law Regulation (Article 81(3) TFEU), we are of the opinion that it is recommendable to allow the spouses to choose the competent court for their marital crisis.

First of all, choice of court agreements promote legal certainty among the spouses, since it is up to them to decide the Member States’ competent court for their matrimonial matters. Nonetheless, ‘the jurisdiction rules of the Brussels IIa Regulation currently do not provide for a possibility for spouses to choose the competent court by common agreement, preventing couples from predetermining the jurisdiction of potential divorce proceedings’.¹⁰⁹ From a practical point of view, a prior choice of court would be a way to ensure greater legal certainty for the implementation of agreements reached between the spouses, such as a separation of property or pre-nuptial arrangements. Moreover, given the fact that the forums contained in Article 3 of the Brussels IIbis Regulation are still alternatives, it seems that exclusive choice of court agreements could avoid the potential risk of *forum shopping*.

Another argument to support party autonomy is related to the coordination of related instruments. Divorce proceedings are connected to maintenance claims and the dissolution of the matrimonial property regime. Professionals working on family matters agree that a choice of court ‘would contribute to the goal of unification of proceedings and to achieve a global settlement of the financial consequences of a divorce (maintenance obligations and liquidation

¹⁰⁹ Impact Assessment, p. 28.

of the matrimonial property regime)'.¹¹⁰ The current scenario would lead to situations where different aspects of the same dispute would be heard by different courts, leading to a multiplication of expenses, possible conflicting judgments and no systematic and uniform mechanism to avoid this.¹¹¹ Party autonomy could avoid these situations by allowing the parties to choose the same competent court for related disputes (for example, the court of the common habitual residence or the common nationality of the spouses). A good example of the inclusion of choice of court agreements is Regulation 4/2009¹¹², whose Article 4 allows the parties – e.g. spouses – to choose the competent court. This is also the case in Regulation 2016/1103 on matrimonial property regimes. Both Regulations limit the possibility of a choice to specific courts. As choice of court agreements in family law matters are being increasingly offered to citizens in Europe by the European Union legislator, this is an argument to align Brussels Ibis with these recent Regulations.

Another important issue is coordination between jurisdiction and the applicable law. The Rome III Regulation permits the spouses to choose the applicable law for the separation or the divorce (Article 5) from a limited number of the States' laws. The same approach is taken in Regulation 2016/1103 on matrimonial property regimes (Article 22) and the Hague Protocol on maintenance obligations (Article 8). This allows spouses – but not in every case, since the Rome III Regulation is not applicable in all Member States – to make the competent court and the applicable law coincide. If a choice also includes a choice of the law of the forum, another practical issue is dealt with, namely that of the access to and the application of foreign law.¹¹³ The costs of proving one's case under the foreign law in question could be avoided (regardless of whether they are paid by the parties or assumed by the State).

Obviously, we are of the opinion that the inclusion of choice of court agreements has to be accompanied with sufficient substantive and formal guarantees. As for the substantive guarantees, we are of the opinion that the choice should be restricted to the courts of the Member States connected with the case. This could be the courts of the common habitual residence of the parties or the courts of the last common habitual residence of the parties provided that at least one of them resided there at the time the agreement was concluded. As to the formal requirements, the agreement should be, at least, written, dated and signed by the parties. Another guarantee deals with the moment at which the agreement can be concluded. It seems to us that choice of court agreements should be allowed not only when the marital crisis is manifest, but also before the marriage and during the marriage, since in these situations it is easier for the spouses to reach an agreement.

In this regard, Kruger and Samyn¹¹⁴ argue that the spouses should be able to choose any competent court of a Member State. However, given the fact that unlimited party autonomy

¹¹⁰ Council of Bars and Law Societies of Europe, *CCBE Position on the proposal for a recast of the Brussels IIa Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction*, 2016, p. 3.

¹¹¹ Borg-Barthet, J., 'Jurisdiction in matrimonial matters – Reflections for the review of the Brussels IIa Regulation', (2016) *European Parliament Committee on Legal Affairs (JURI)*, p. 18.

¹¹² Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009.

¹¹³ More in the Study by the Swiss Institute of Comparative Law: Foreign law and its perspectives for the future at the European level (JLS/2009/JCIV/PR/005/E4), Part III Recommendations, 2011.

¹¹⁴ Kruger and Samyn, *op. cit.*, pp. 163-164.

could be difficult to achieve, these authors also propose a restricted form of party autonomy. In particular, they propose a second option in the following terms:

“The spouses may agree that any of the following courts of a Member State is to have jurisdiction in a proceeding between them relating to matrimonial matters:

- a) any of the courts which have jurisdiction on the grounds listed in Article 3, or*
- b) the court of the Member State of the spouses’ last common habitual residence, if none of them still resides there, or*
- c) the court of the Member State of which at least one of the spouses is a national or, in the case of the United Kingdom and Ireland, has his or her ‘domicile’”*

For example, a Dutch/American expat couple, living in Bahrein, wants their marriage to be dissolved in the Netherlands rather than in Bahrein. The Dutch spouse does not want to leave Bahrein. In this situation, such a possibility to make a choice could make the Dutch court competent.

Our recommendation is supported by a large number of national reports. These reports find that the inclusion of choice of court agreements in the Regulation is appropriate and recommendable (the National Reporters of Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Greece, Latvia, Luxembourg, Slovakia, Slovenia and Spain).¹¹⁵ The arguments to do so, however, vary from one National Report to another.

Firstly, there is the legal certainty argument. The Austrian national reporter argues that choice of court agreements have the advantage that the parties will ‘know in advance where they are required to take legal action in the dispute’.¹¹⁶ In other words, choice of court agreements provide for ‘legal security’ (the Croatian National Reporter)¹¹⁷, or as the national report of France states: the ‘choice of forum clause is a good remedy against judicial insecurity because one spouse cannot take the other by surprise by seizing an unexpected forum’.¹¹⁸ Similarly, as is pointed out by the Irish respondent, a choice of forum would ‘give a degree of certainty to the jurisdictional problems’.¹¹⁹ The Czech Republic’s reporter also supported the introduction of a choice of forum in order to ‘allow spouses to manage their future disputes with a certain degree of predictability’.¹²⁰

Secondly, some national reporters have highlighted that choice of court agreements can be an effective tool to prevent the ‘rush to the courts’ trend (see below) (National Reporters of France, Italy, Luxembourg and Romania).¹²¹

¹¹⁵ National Report Austria, question 13; National Report Belgium, question 13; National Report Bulgaria, question 13; National Report Croatia, question 13; National Report the Czech Republic, question 13; National Report France, question 13; National Report Germany, question 13; National Report Greece, question 13; National Report Latvia, question 13; National Report Luxembourg, question 13; National Report Slovakia, question 13; National Report Slovenia question 13 and National Report Spain, question 13. Other National Reports do not provide specific information concerning the desirability of such agreements, e.g. National Reports of Cyprus, Estonia, Finland, Hungary, Ireland, Italy, Malta and Sweden.

¹¹⁶ National Report Austria, question 13.

¹¹⁷ National Report Croatia, question 13.

¹¹⁸ National Report France, question 13.

¹¹⁹ National Report Ireland, question 13.

¹²⁰ National Report the Czech Republic, question 13.

¹²¹ National Report France, question 13; National Report Italy, question 13; National Report Luxembourg, question

Thirdly, some National Reporters have argued that these kinds of agreements promote marital organization and make the spouses more conscious and responsible in their choices (National Reporters of Belgium, Ireland, and Slovenia).¹²²

Fourthly, several National Reporters pointed to arguments such as the possibility to concentrate related disputes in the courts of the same Member State as well as the convenience involved in aligning *forum* and *ius* in cooperation with the Rome III Regulation (National Reporters of Croatia, France, Greece, Germany, Latvia, Romania and Spain).¹²³ Connected to the latter, it has been outlined that a choice of forum for divorce matters ‘would be in line with all of other EU private international law regulations, where a choice of forum is accepted in a wide range of family-related and inheritance matters (National Reporter of Croatia).¹²⁴

Last but not least, attention has to be paid to the less-informed spouse (National Reporter of Austria) in order to avoid situations where ‘the party which is better advised, or legally more adept, tries to disadvantage the other by the choice of jurisdiction’,¹²⁵ for instance in cases of domestic violence (National Reporter of Slovenia).¹²⁶ This is the reason why, in other areas, such as insurance, consumer and labour matters, a choice of forum agreement is also very limited (National Reporter of Austria).¹²⁷

Despite these different arguments, the convenience of choice of court agreements can also be doubted. For instance, the National Reporter of Belgium highlighted that ‘it remains unclear whether the parties would actually make a choice of forum, if it were allowed. Article 55 Belgian PIL Code – in the meantime superseded by the Rome III Regulation – allowed spouses to make a choice of law in divorce matters. Research showed that only few spouses have used this possibility.¹²⁸

In the final conference of the project, the introduction of choice of court agreements was supported by most of the panellists, despite the fact that the Proposal did not include them.

3. Alternative/hierarchical list of jurisdictional grounds

One of the main controversial issues surrounding Article 3 of the Brussels IIbis Regulation is whether its alternative structure promotes *forum shopping*: it is up to the applicant to decide where to issue a divorce petition and, given the lack of unification in conflict of laws in all Member States, this implicitly results in a choice of law. It is true that the Rome III Regulation aims to reduce the ‘race to the court’ phenomenon,¹²⁹ but because this Regulation is not applicable in all Member States, the debate still persists.

The risk of *forum shopping* has only been highlighted as a real danger in a limited

13 and National Report Romania, question 13.

¹²² National Report Belgium, question 13; National Report Ireland, question 13 and National Report Slovenia, question 13.

¹²³ National Report Croatia, question 13; National Report France, question 13; National Report Greece, question 13; National Report Germany, question 13; National Report Latvia, question 13; National Report Romania question 13 and National Report Spain, question 13.

¹²⁴ National Report Croatia question 13 and National Report Greece, question 13.

¹²⁵ National Report Austria, question 13.

¹²⁶ National Report Slovenia, question 13.

¹²⁷ National Report Austria, question 13.

¹²⁸ National Report Belgium, question 13.

¹²⁹ Hausmann, R., ‘Article 3’, in: Corneloup, S. (dir.) *European Divorce Law* (LexisNexis, Paris, 2013), p. 239.

number of National Reports (Belgium, France, Romania and Spain).¹³⁰ Some of them seem to point out that the problem exists, but that it is more theoretical than practical (Austria, Bulgaria, Hungary, Italy, Slovenia and the Netherlands).¹³¹ According to the information provided in the other half of the National Reports, difficulties derived from *forum shopping* do not seem to be as evident (Cyprus, the Czech Republic, Finland, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia and Sweden).¹³² Finally, other National Reporters could not provide specific information regarding this issue (Estonia).¹³³

A good explanation of the problem is included in the Belgian Report: ‘A rush to court or forum shopping is inherent to a system providing alternative jurisdiction grounds. There are Belgian cases in which the applicant had been (re)registered in the Belgian population registry shortly before filing for divorce, cases of Belgian nationals married and habitually residing in Switzerland, cases of spouses that had their last marital residence in the UK etc. In all these cases (one of) the spouses clearly tried to evade stricter divorce laws (e.g. Italian divorce law) or disadvantageous alimony or matrimonial property rules (e.g. British ancillary relief or Swiss alimony rules). Also, one of the spouses regularly tries to take advantage of the lack of knowledge and/or understanding of (the details of) foreign law by filing for divorce in another country’.¹³⁴ Another illustrative explanation for this question is reported by the expert of France: ‘Obviously the alternative criteria of jurisdiction in Article 3.1 allow for forum shopping but the phenomenon is not new and is not due to the Brussels IIa Regulation. In the most frequent situations, the choice of alternative fora is limited to two fora and should not exceed four fora in very rare situations. Furthermore, the Brussels IIa Regulation provides an effective mechanism to prevent parallel proceedings. However, it is true that the prior tempore rule gives a great incentive to the spouses to be the first one to seize a forum and, in this respect, strongly contributes to the phenomenon of “rush to the court”’.¹³⁵

A possible solution to avoid *forum shopping* would be to convert the alternative list of Article 3 of the Brussels IIbis Regulation into a hierarchical one. In our opinion, the alternative jurisdictional grounds promote the *favor divortii* principle and mainly take the perspective of the applicant into account with the exception of the case of a joint application. The position of the respondent – possibly the ‘weaker spouse’ – is not considered. In this respect, Kruger and Samyn ‘admit that an order of priority may lead to more legal certainty for the respondent, enabling him or her to predict which court will be competent to hear the case. The order of priority must, however, not be too rigid. The first rule should still at least provide the alternative fora of the habitual residence of either spouse (for the plaintiff possibly with a time

¹³⁰ National Report Belgium, question 11; National Report France, question 11; National Report Romania, question 11 and National Report Spain, question 11.

¹³¹ National Report Austria, question 11; National Report Bulgaria, question 11; National Report Hungary, question 11; National Report Italy, question 11; National Report Slovenia, question 11 and National Report the Netherlands, question 11.

¹³² National Report Cyprus, question 11; National Report the Czech Republic, question 11; National Report Finland, question 11; National Report Greece, question 11; National Report Ireland, question 11; National Report Latvia, question 11; National Report Lithuania, question 11; National Report Luxembourg, question 11; National Report Malta, question 11; National Report Portugal, question 11; National Report Slovakia, question 11 and National Report Sweden, question 11.

¹³³ National Report Estonia, question 11.

¹³⁴ National Report Belgium, question 11.

¹³⁵ National Report France, question 11.

requirement). The subsidiary rule would then be that of jurisdiction for the court of the nationality (or domicile) of the parties.’¹³⁶

It is important to emphasise that, according to us, a hierarchical list has to be combined with the inclusion of party autonomy in the Brussels IIbis Regulation in order to obtain a fair balance between the possibility for the spouses to obtain the divorce, separation or marriage annulment and the equality of the parties. This proposal seems to follow the structure of the Regulation 2016/1103, where priority is given to choice of court agreements and, in the absence of such agreements, to a hierarchical and limited list of forums with a clear indication of the time at which the grounds contained in the forums should be considered.¹³⁷

Although the vast majority of the National Reporters are in favour of maintaining the alternative nature of Article 3, giving priority to the *favor divortii* principle (National Reporters of Croatia, Cyprus, the Czech Republic, Estonia, Finland, Ireland, Latvia, Lithuania, the Netherlands¹³⁸, Malta, Poland, Portugal, Romania, Slovakia and Sweden)¹³⁹, our recommendation is supported by a few National Reporters. The national reporters of Austria, France, Germany, Italy, Luxembourg, Slovenia, Spain and the United Kingdom are in favour of abolishing the current content of Article 3.1 of the Brussels IIa Regulation and turning it into a hierarchical list of jurisdictional grounds.¹⁴⁰

Despite this, the introduction of a hierarchical list was not considered appropriate by some of the panellists and attendees of the final conference of the project.

4. Personal scope of application

In the guideline for application it has been mentioned that the personal scope of application of the Regulation is controversial given the current wording of Articles 6 and 7. We have analysed the different possible doctrinal positions and conclude that the Regulation has to be applied as long as the personal circumstances of the spouses meet any of the forums contained in Article 3 of the Brussels IIbis Regulation. However, problems arise in those situations where the defendant is a national of a Member State of the European Union but no Member State has

¹³⁶ Kruger and Samyn, *op. cit.*, p. 143.

¹³⁷ In matters dealing with matrimonial property regimes, only in cases where proceedings for the dissolution of the marriage have already been commenced according to Article 3(1)(a), indent 5 and Articles 6, 5 and 7 of the Brussels IIbis Regulation (Article 5(2) Regulation 2016/1103 on matrimonial property regimes) and ‘other cases’ (Articles 6 and 7 of Regulation 2016/1103 on matrimonial property regimes).

¹³⁸ This idea has been introduced by the national reporter of the Netherlands in the following terms: The application of Dutch law as the ‘main choice of law rule is considered to be based on the so-called ‘*favor divortii*’, a divorce should be made possible if one of the spouses so desires. A hierarchy would probably mean that it will be more complicated to obtain a divorce, as spouses may need to bring proceedings before a court outside the Netherlands that is higher in the hierarchy and less willing to grant a divorce. This would block the *favor divortii*’, National Report the Netherlands, question 11.

¹³⁹ National Report Croatia, question 12; National Report Cyprus, question 12; National Report the Czech Republic, question 12; National Report Estonia, question 12; National Report Finland, question 12; National Report Ireland, question 12; National Report Latvia, question 12; National Report Lithuania, question 12; National Report the Netherlands, question 12; National Report Malta, question 12; National Report Poland, question 12; National Report Portugal, question 12; National Report Romania, question 12; National Report Slovakia, question 12 and National Report Sweden, question 12.

¹⁴⁰ National Report Austria, question 12; National Report France, question 12; National Report Germany, question 12; National Report Italy, question 12; National Report Luxembourg, question 12; National Report Slovenia, question 12; National Report Spain, question 12 and National Report the United Kingdom, question 12.

jurisdiction according to Article 3. Is it in that case possible to commence proceedings according to the domestic international jurisdiction rules?

Given the fact that the answer to this question is not clear-cut in legal doctrine, whereas clarity is needed in this respect, we are of the opinion that the Proposal should clearly state whether nationals of a Member State can start proceedings on the ground of domestic international jurisdiction rules.

Needless to say, this problem does not arise if the defendant has his/her habitual residence in a Member State, since it will always be possible to start proceedings according to Article 3(1)(a) third indent of the Brussels Ibis Regulation.

Taking this into account, we consider that the wording of Article 6 of the Proposal partly ends the controversy, since it merges Articles 6 and 7 of the Brussels Ibis Regulation into one single disposition. The question remains, however, whether any reference to domestic international jurisdiction rules should be maintained or whether it would be better to introduce a subsidiary jurisdiction rule and a *forum necessitatis*, as is the case in the latest Private International Law Regulations. This question will be analysed in the following recommendation.

5. Subsidiary jurisdiction and *forum necessitatis* rules

According to the current drafting of Article 3 of the Brussels Ibis Regulation – and taking into account that this Article will presumably not be modified in the short term – the Regulation does not provide for an available forum in the following situation: the respondent does not have his/her habitual residence in a Member State, the applicant is not habitually resident in the European Union for the period indicated in Article 3(1)(a) indents five and six and the parties do not share the same European Union Member State nationality. One could argue that these cases do not have a sufficient connection with the European Union and, consequently, that it is logical that no court has competence according to the Regulation. There are, however, some instances where such a situation could be reasonably avoided. For example, if the respondent and/or the applicant are nationals of different Member States.

For instance, if the respondent is a national of a Member State, he/she can only be sued according to one of the forums laid down by the Regulation. This could lead to a situation of a denial of justice for the applicant, if neither of the spouses has his/her habitual residence in a Member State and the spouses have the nationalities of different EU Member States. Moreover, in these circumstances, domestic international jurisdiction rules cannot be used, since the respondent is ‘protected’ by the Regulation’s personal scope of application of the Regulation.¹⁴¹ Another scenario is the following: the applicant is a national of a Member State of the European Union, but the respondent is not (again, given the other conditions described above). In these instances, given the lack of any competent court under the Regulation, it is possible to start proceedings by using the domestic international jurisdiction rules (e.g. the forum of the nationality of the applicant). These situations were not covered by the special ‘protection’ of the Regulation, assuming that the respondent was not specifically connected with the European

¹⁴¹ Rodríguez Rodrigo, J., ‘Reglamento 1347/2000: ámbito de aplicación personal (arts. 7 y 8)’ (2005) 4 Revista colombiana de derecho internacional, pp. 370-373.

Union to justify such protection. However, at the same time it has to be admitted that the respondent could be negatively surprised. He/she could be sued in a Member State of the European Union on the basis of an exorbitant forum in the national legislation of a Member State.

Assuming the difficulty of both scenarios and the interests at play, we are of the opinion that the inclusion of subsidiary jurisdiction and *forum necessitatis* rules could perfectly cover these situations. On the one hand, it avoids situations of a denial of justice. There will always be a competent court in a Member State under the jurisdiction rules of the Regulation. On the other hand, it precludes the unpredictability of the domestic international jurisdiction rules for the respondent. In line with other PIL Regulations, spouses should be provided with a complete and exhaustive number of forums in the Regulation through the inclusion of subsidiary jurisdiction and *forum necessitatis* rules. As Kruger and Samyn aptly state, in that case: ‘national private international law will no longer have a subsidiary role’.¹⁴²

According to the recent Private International Law Regulations, such as Regulation 4/2009, Regulation 650/2012¹⁴³ or Regulation 2016/1103, where no court of a Member State has jurisdiction according to the provisions of those Regulations, the subsidiary jurisdiction rule can be applicable provided that the conditions of the forum are met. It is true that the subsidiary rules contained in these Regulations are not equal – given the different nature of the areas covered by the Regulations. However, the way in which they function is comparable. These regulations include subsidiary jurisdiction where no choice of court agreement has been concluded, where there is no jurisdiction based on the appearance of the respondent and the general rule does not allow the parties to start proceedings in the courts of a Member State. In other words, when new Private International Law Regulations concerning family matters and succession contain a subsidiary jurisdiction rule, the introduction of a similar rule in the Proposal can be perfectly justified.

Even when this subsidiary rule would be included, this will not always result in a competent court in a Member State. Therefore, a *forum necessitatis* should be included in the Regulation. In this way, in exceptional cases the court seised could declare itself competent to hear the case under very strict circumstances: (1) no ground for jurisdiction is found in the Regulation, (2) proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected and (3) there is a sufficient connection with the Member State of the court seised. ‘Such a *forum necessitatis* would prevent the spouses from being confronted with a denial of justice’.¹⁴⁴ In the previous example of the Dutch/American expat couple in Bahrein, it will be up to the national courts to decide if their situation qualifies as an exceptional circumstance.

According to the information provided in the National Reports, this question has not been largely discussed (Bulgaria, Cyprus, Finland, Hungary, Luxembourg and Portugal).¹⁴⁵

¹⁴² Kruger and Samyn, *op. cit.*, p. 140.

¹⁴³ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107..

¹⁴⁴ Kruger and Samyn, *op. cit.*, p. 140.

¹⁴⁵ National Report Bulgaria, question 14; National Report Cyprus, question 14; National Report Finland, question 14; National Report Hungary, question 14; National Report Luxembourg, question 14 and National Report Portugal, question 14.

However, some of the National Reporters have indicated that it would be desirable to introduce a *forum necessitatis* in the Regulation (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Poland, Slovakia, Slovenia and Sweden).¹⁴⁶ We are of the opinion that a *forum necessitatis* should be included in a new Regulation as it is included in the latest Private International Law Regulations concerning family matters, maintenance and succession.

6. Same-sex marriage

As long as there is a discussion on the question whether same-sex marriage falls within the scope of the Regulation, some Member States will apply the Regulation to same-sex marriages while others will not. As a result, if a Member State court pronounces a divorce between two men or two women, problems might arise in the context of the recognition of this divorce in a Member State that does not allow same-sex marriage, and, accordingly, could also relate to the consequences of such divorce (e. g. property division, maintenance etc.). The difference between Brussels IIbis (autonomous interpretation) and Rome III and Regulation 2016/1103 (interpretation according to the national laws) makes the situation even more unclear and unpredictable. The incorporation of a *forum necessitatis* may in some cases not assist same-sex couples in finding a competent court to hear their divorce case. Therefore, we recommend that all Private International Law Regulations in the field of matrimonial matters should at least be aligned with regard to the interpretation of the concept of marriage. An alternative option would be to include in the Regulation a rule similar to Article 9 of Regulation 2016/1103 on matrimonial property regimes, which provides for an alternative jurisdiction rule. A competent court could then decline jurisdiction if it does not recognise the marriage and the jurisdiction to rule on the divorce case will be conferred on the courts of another Member State.

¹⁴⁶ National Report Austria, question 14; National Report Belgium, question 14; National Report Estonia, question 14; National Report France, question 14; National Report Germany, question 14; National Report Greece, question 14; National Report Italy, question 14; National Report Latvia, question 14; National Report Lithuania, question 14; National Report Poland, question 14; National Report Slovakia, question 14; National Report Slovenia, question 14 and National Report Sweden, question 14.

BIBLIOGRAPHY

TABLE OF CASES

Court of Justice of the European Union

C-195/08 PPU Inga Rinau [2008] ECR I-5271

C-403/09 PPU Jasna Deticek v Maurizio Sgueglia [2009] ECR I-12193

C-256/09 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-07353

C-256/09 Bianca Purrucker v Guillermo Vallés Pérez [2010] ECR I-07353, Opinion of AG Sharpston

C-211/10 PPU Povse v Alpago [2010] ECR I-6673

C-296/10 Purrucker II [2010] ECR I-11163

C-491/10 PPU Aguirre Zarraga v Pelz [2011] ECR I-14247

C-294/15 Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki [2016] ECLI:EU:C:2016:772

C-372/16 Soha Sahyouni v Raja Mamisch [2017] ECLI:EU:C:2017:988

TABLE OF LEGISLATION

EU legislation

Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L 338/1

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1

Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107

Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters [2013] OJ L 181/4

Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183/1

Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L 183/30

International and Regional Conventions

Hague Convention of 13 January 2000 on the International Protection of Adults

SECONDARY SOURCES

Books

de Boer TM and Ibili F, *Nederlands Internationaal personen- en familierecht, Wegwijzer voor de rechtspraak* (Wolters Kluwer 2012)

Lowe N and others, *The new Brussels II Regulation, A supplement to international movement of children* (Jordan Publishing 2005)

Magnus U and Mankowski P (eds.), *Brussels IIbis Regulation – Commentary* (Sellier European Law Publishers 2012)

Ni Shúilleabháin M, *Cross-border divorce law: Brussels II Bis* (OUP 2010)

Van Iterson D, *Ouderlijke verantwoordelijkheid en kindbescherming* (Maklu 2011)

Contributions to edited books

Carpaneto L, ‘On the Recast of the Brussels II bis Regulation regime on Parental Responsibility: few Proposals de jure condendo’ in Queirolo I and Heiderhoff B, *Party Autonomy in European Private (and) International Law – Tome I* (Aracne 2015)

Hausmann R, ‘Article 3’ in Corneloup S (dir), *European Divorce Law* (LexisNexis 2013)

Župan M, ‘Chapter 10 Cooperation of Central Authorities’ in Honorati C (ed), *Jurisdiction in matrimonial matters, parental responsibility and abduction proceedings. A Handbook on the Application of Brussels Iia Regulation in National Courts* (1st edn, Giappichelli and Peter Lang 2017)

Articles

de Boer TM, ‘De herschikking van de Verordening Brussel II-bis: een eerste indruk’ [2016] 68 FJR

Forcada Miranda FJ, ‘Revision with respect to the cross border placement’ [2015] NIPR

Kruger T and Samyn L, ‘Brussels II bis: successes and suggested improvements’ [2016] J Priv Int L

Lamont R, ‘Care proceedings with a European dimension under Brussels Iia: jurisdiction, mutual trust and the best interest of the child’ (2016) 28(1) CFLQ

Mellone M, ‘Provisional measures and the Brussels IIbis Regulation: an assessment of the status quo in view of future legislative amendments’ [2015] NIPR

Rodríguez Rodrigo J, ‘Reglamento 1347/2000: ámbito de aplicación personal (arts. 7 y 8)’ [2005] Revista colombiana de derecho internacional

Scott JM, ‘A question of trust? Recognition and enforcement of judgements’ [2015] NIPR

Weller M, ‘Die Reform der EuEheVO’ [2017] 3 IPRax

European Commission’s documents

Commission, Proposal on Jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children, COM(1999) 220 final

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 COM (2014) 225 final

Commission, Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final

Commission Staff Working Document Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) SWD(2016) 207 final with its Annex ‘Study on the assessment of Regulation (EC) No. 2201/2003 and the policy options for its amendment’

European Parliament’s documents

European Parliament’s Committee on Legal Affairs (Rapporteur Zwiefka T), Report on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (2017) A8-0388/2017 (available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0388+0+DOC+PDF+V0//EN>)

European Parliament’s Briefing: Main Recommendations from External Experts to the European Parliament on ‘Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)’ (available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571366/IPOL_BRI\(2016\)571366_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571366/IPOL_BRI(2016)571366_EN.pdf))

European Economic and Social Committee's documents

Opinion of the European Economic and Social Committee on the 'Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' [2017] OJ C 125/06

Explanatory reports, studies and opinions by experts and stakeholders

Article 11 working group, 'The method for processing and hearing incoming return cases under the 1980 Hague Child Abduction Convention in conjunction with Regulation (EC) No. 2201/2003' (available at: file:///C:/Users/user/Downloads/good_practice_guide_EU_en.pdf)

Borg-Barthet J, 'Jurisdiction in matrimonial matters – Reflections for the review of the Brussels Iia Regulation' (2016) ((Directorate General for Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs, Legal affairs) (available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571361/IPOL_STU\(2016\)57136_1_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571361/IPOL_STU(2016)57136_1_EN.pdf))

Borrás Rodriguez A, 'Explanatory report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters' (1998) OJ C 221/27

Carpaneto L, 'Cross-border placement of children in the European Union' (2016) (Directorate General for Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs) (available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556945/IPOL_STU\(2016\)55694_5_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556945/IPOL_STU(2016)55694_5_EN.pdf))

Christoph CP, Kruger T, Fridrich L, *et al.*, 'Recasting the Brussels Iia regulation, Workshop 8 November 2016, Compilation of briefings' (Directorate General for internal policies policy department C: Citizens' rights and constitutional affairs, Legal affairs) (available at: <http://www.europarl.europa.eu/cmsdata/111001/Full%20ppt%20Brussels%20Iia%20workshop.pdf>)

Corneloup S., *et al.*, 'Children on the move: a private international law perspective' (2017) (Directorate General for Internal Policies of the Union Policy Department for Citizens' Rights and Constitutional Affairs, Legal Affairs) (available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU\(2017\)58315_8_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU(2017)58315_8_EN.pdf))

Corneloup S, *et al.*, 'Private international law in a context of increasing international mobility: challenges and potential' (2017) (Directorate General for Internal Policies of the Union Policy

Department for Citizens' Rights and Constitutional Affairs, Legal Affairs) (available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU\(2017\)583157_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU(2017)583157_EN.pdf))

Council of Bars and Law Societies of Europe, CCBE Position on the proposal for a recast of the Brussels IIa Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (2016) (available at: http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/FAMILY_SUCCESSION_LAW/FSL_Position_papers/EN_FSL_20161202_CCBE_position_on_the_proposal_for_a_recast_of_the_Brussels_IIa_Regulation.pdf)

Lowe N, Statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Part II — Regional Report, Prel. Doc. No 8 B — update of November 2011 for the attention of the Special Commission of June 2011 (Hague Conference on Private International Law) (available at: <https://assets.hcch.net/upload/wop/abduct2011pd08be.pdf>)

Swiss Institute of Comparative Law, Study on foreign law and its perspectives for the future at European level (2011) (JLS/2009/JCIV/PR/005/E4)

Websites and blogs

<<http://www.europarl.europa.eu/atyourservice/en/20150201PVL00040/Child-abduction-mediator>>